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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 16, Vol. 12 dated August 7, 1964.

ORDERS	DATED	DISTRIBUTION	SUBJECT
318-64	7-30-64	U.S. Attys. & Marshals	Amendments to the Departmental organization regulations reassigning the responsibility for the enforcement of certain criminals provisions relating to elections and political activities from the Civil Rights Division to the Criminal Division, Title 28 - Judicial Administration, Chapter I - Dept. of Justice, Part 0 - Organization of the Dept. of Justice.
319-64	7-31-64	U.S. Attys. & Marshals	Delegating to the Administrative Assistant Attorney General authority to execute certificates required in connection with the payment of certain expenses of collecting evidence, Title 28 -- Judicial Administration, Chapter I -- Department of Justice, Part 0 -- Organization of the Dept. of Justice
320-64	8-13-64	U.S. Attys. & Marshals	Amendments to the Dept. of Justice Regulations (Order No. 293-63) relating to employee-management cooperation permitting exclusive recognition of employee organizations by all units of the Dept. except the Fed. Bur. of Investigation. Title 28 - Judicial Admin. Chapter I - Dept. of Justice Part 44 - employee-management cooperation in the Dept. of Justice

ORDERS	DATED	DISTRIBUTION	SUBJECT
321-64	8-17-64	U.S. Attys. & Marshals	Authorizing Michael J. Wyngaard to perform the functions & duties of U.S. Atty. for Western Dist. of Wisconsin during the vacancy in that office.
322-64	8-18-64	U.S. Attys. & Marshals	Authorizing Donald Page Moore to perform the functions & duties of U.S. Atty. for Southern Dist. of West Virginia during vacancy in that office.

MEMOS	DATED	DISTRIBUTION	SUBJECT
382	8-17-64	U.S. Attys. & Marshals	Change of title of Administrative Assistant Attorney General

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court Denies Defendants' Motion for Discovery Under Rule 16. United States v. Aluminum Company of America et al., D.J. File No. 60-9-161 (E.D. Pa.). On August 17, 1964, Judge Joseph S. Lord, III, filed an opinion refusing to give defendants discovery or inspection under Rule 16 of Federal Rules of Criminal Procedure of subpoenaed books, papers, documents, and objects obtained from a competitor of defendants, Southwire Company, where Southwire had objected to such disclosure other than disclosure of those of its books, documents, etc., which the Government intended to use at trial. Southwire had claimed that the documents included highly confidential information with respect to its financial affairs, its volume of business with various customers, the prices it charged, and the like.

The Court noted that there is no true privilege against the discovery of this material and that whatever "privilege" it has received is not an absolute one. The protection of this information must be balanced against the right of defendants to needed information to prepare their defense. Judge Lord found that defendants had not shown a need for disclosure at this time. He ordered that until defendants specifically showed the relevance of all documents sought, their discovery of Southwire's documents was to be limited to those which the Government intends to use at the trial.

In the opinion the Judge stated that he failed to see the relevance qua the defense of documents sought which might show (1) whether Southwire's prices differed from those of nondefendant competitors; (2) the existence of price competition in the sale of aluminum cable; and (3) whether Southwire's employees were present at the times and places of alleged meetings of competitors. He pointed out that the gist of the offense is a conspiracy - not proof of its success.

The case is presently scheduled for trial on September 14, 1964.

Staff: John E. Sarbaugh, John J. Hughes, Richard M. Walker, Stewart J. Miller, and Floyd C. Holmes (Antitrust Division)

Court Grants Preliminary Injunction In Section 7 - Clayton Act Case. United States v. Chrysler Corporation, et al. (D.N.J.) D.J. File No. 60-0-37-78. On July 30, 1964, a complaint was filed in the District Court for the District of New Jersey alleging that the proposed acquisition of Mack Trucks, Inc. by Chrysler Corporation, set for August 12, 1964, would violate Section 7 of the Clayton Act and Section I of the Sherman Act. Judge Reynier J. Wortendyke, Jr. entered a temporary restraining order pending a hearing on the Government's application for a preliminary injunction.

The complaint alleged that the acquisition of Mack, one of the leading independents in the manufacture and sale of heavy duty trucks, by Chrysler Corporation, the third largest manufacturer in the automotive field and the fourth largest manufacturer of trucks, might substantially lessen competition

in the truck industry and in various lines of commerce within the truck industry. The truck industry is highly concentrated with the four largest truck manufacturers, General Motors, Ford, International Harvester and Chrysler accounting for approximately 90% of domestic unit truck sales. The complaint alleged that the elimination of Mack would increase this already severe concentration. In 1963, according to the complaint, Chrysler accounted for 7.2% of domestic unit truck sales and Mack for approximately 1%. Mack, however, accounts for approximately 15% of the domestic sales of heavy and extra heavy duty trucks (those having a gross-vehicle-weight of greater than 26,000 pounds). Mack is also the leading producer of diesel-powered trucks in the United States. Chrysler, although it concentrates on the sale of light duty trucks, offers trucks in all weight categories and sells a significant number of heavy duty gasoline and diesel-powered trucks. The four largest truck manufacturers, according to the complaint, have obtained an increasing share of heavy duty truck sales in recent years. Their combined percentage truck sales over 26,000 pounds gross-vehicle weight has increased from 47% in 1950 to approximately 54% in 1963 and would amount to almost 70% with the acquisition of Mack.

Mack, a highly integrated concern, manufactures approximately 80% of the diesel engines used in its trucks, whereas, Chrysler purchases all of its truck diesel engine requirements. The complaint alleged that competition in the manufacture and sale of truck diesel engines may be substantially lessened by foreclosure of the diesel engine market represented by Chrysler.

A hearing on the Government's application for a preliminary injunction commenced August 7, 1964, and was concluded on August 10, 1964. The defendants contended that a preliminary injunction should not issue because the Government had not shown a case on the merits and the granting of an injunction would cause irreparable injury to stockholders of Mack since the merger agreement would be terminated by the parties if the preliminary injunction were granted. They also argued that divestiture would be an "easy remedy" should the Government ultimately prevail because Mack would be operated as an "autonomous" division of Chrysler. Defendants, for purposes of the preliminary injunction, accepted the Government's proposed lines of commerce, but maintained that the market shares (Mack 25% and Chrysler 1% in the diesel truck lines of commerce) were de minimis. Defendants also contended that the merger would promote competition in the truck industry and "promised" that there would be no vertical foreclosure since Chrysler intended to continue its purchase of diesel engines from outside suppliers.

Judge Wortendyke took the Government's application under advisement and on August 17, 1964, granted the Government's application for a preliminary injunction.

Staff: Walter D. Murphy, John M. O'Donnell, Daniel R. Hunter and Gordon A. Noe (Antitrust Division)

Court Refuses To Dismiss And Transfer Steel Indictment. United States v. United States Steel Corporation, et al. (S.D.N.Y.) D.J. File No. 60-138-145. On August 12, 1964 Judge Edward Weinfeld rendered opinions on two groups of motions made by defendants: (1) A consolidated motion by all defendants to dismiss the indictment on the ground that it fails to charge an offense with the definiteness, certainty and specificity required by the Fifth and Sixth Amendments to the Constitution and Rule 7(c) of the Federal Rules of Criminal Procedure; (2) a motion, joined in by all corporate and individual defendants, and a separate motion, made on personal grounds, by defendant Stephens, for an order, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, transferring the case to the Western District of Pennsylvania at Pittsburgh. The Court denied the motion to dismiss the indictment and the motions to transfer the case to Pittsburgh.

(1) In their motion to dismiss, the defendants centered their attack on the indictment upon paragraphs 9 and 10 (included under the heading "Offense Charged") urging that the allegations in those paragraphs merely charge that defendants engaged in a conspiracy to eliminate price competition in the sale of carbon steel sheets and omit to allege the factual terms of the alleged conspiracy. Defendants contended that the allegations in paragraph 11 (also included under the heading "Offense Charged"), that defendants and co-conspirators "from time to time agreed" upon various specified things for the purpose of effectuating the combination and conspiracy, do not set out terms of the conspiracy but only aver overt actions taken in furtherance of the conspiracy. The Court in its opinion upheld the Government's position that paragraph 11 must be read together with paragraphs 9 and 10 and the indictment as a whole, and, as so read, the indictment clearly charges a per se violation of Section 1 of the Sherman Act, setting forth the manner and means whereby the conspiracy was effectuated as well as the terms of the conspiracy. In this regard the Court stated that the "fact that the means and methods whereby the purpose of a conspiracy was to be carried out may also be descriptive of overt acts performed by the conspirators does not detract from their force as allegations of means and methods." The defendants urged in their argument that to constitute a valid indictment, it was essential that the allegations contained therein be recast in a different form. This the Court said "suggests a throwback to the rigidity of antiquated and archaic rules of old common law criminal pleading", and emphasized that an indictment must be viewed as an integrated document and must be read as a whole and not in truncated form.

(2) The motions to transfer were based on the contentions that a transfer of the case to Pittsburgh is required "in the interest of justice". Defendants contended that Pittsburgh accorded greater convenience to defendants and witnesses and that a trial in New York would result in an asserted onerous burden upon them because of disruption of corporate operations and records and interference with the activities of the individual defendants, key personnel and other employees located in Pittsburgh. The Court pointed to modern-day convenient air transportation between Pittsburgh and New York available to Pittsburgh defendants; to the fact that other defendants, located in cities closer to Pittsburgh than to New York, have convenient transportation, whether they travel to Pittsburgh or to New York; and mileage differences were of little consequence; and to the fact that defendants owned private airplanes which accorded them additional transportation.

The Court viewed allegations by defendants relating to an asserted burden of removing a vast amount of documents to New York for trial there as somewhat exaggerated considering the paucity of documents to be relied upon by the Government after months of grand jury investigation.

In denying the transfer motions the Court took into account that secret meetings and conspiratorial acts occurred in the Southern District of New York; that the Antitrust Division has no office in the Western District of Pennsylvania; and that it does maintain a field office in New York and some of the staff there are assigned to the case.

The separate motion of Defendant Stephens, made on grounds singular to him, was also denied. The Court's memorandum thereon was filed under seal.

Staff: Samuel Karp, John H. Earle, Marshall C. Gardner, Augustus A. Marchetti, Donald J. Williamson, Philip F. Cody, and S. Robert Mitchell. (Antitrust Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

WAGERING TAX

Circumstantial Evidence Permits Inference of Knowledge of the Wagering Tax Laws; Rebuttal Presumption of Such Knowledge Indulged. S. Frank Edwards and Albert Edwards v. United States (C.A. 5, July 10, 1964). D.J. File 160-18-234. The defendants, father and son, were convicted under 26 U.S.C. 7203 for wilful failure to register for and pay the gambling tax as required by 26 U.S.C. 4411, 4412. On appeal a panel of the Fifth Circuit reversed the convictions for lack of proof that the defendants had knowledge of the wagering tax laws, which is a prerequisite for conviction of a "wilful" violation of Section 7203. 321 F.2d 324. On a rehearing en banc the panel's decision was vacated and the convictions affirmed.

In analyzing the evidence of the defendants' knowledge of the wagering tax laws, the Court of Appeals recognized there was no direct proof that they knew of the duties imposed by the Federal gambling tax statutes. However, the Court looked to the decision in Ingram v. United States, 360 U.S. 672 (1959), and concluded that in Ingram evidence of concealment practiced in the operation of a wagering enterprise had sufficed to establish the bankers' knowledge of the wagering tax laws. In the present case numerous acts of concealment and subterfuge were practiced by the banker, S. Frank Edwards. When considered in conjunction with an earlier arrest on state lottery charges this concealment was considered sufficient to allow the jury to infer that the elder Edwards was aware of the tax. (To the same effect see the excellent discussion in United States v. Marquez, 332 F. 2d 162 (C.A. 2, 1964).)

The evidence against the son Albert Edwards disclosed that he was a writer for his father's numbers operation, from which the Court concluded that a jury could reasonably infer Albert knew of the law himself or that his father passed this knowledge on to him. However, the question whether this inference could be drawn beyond a reasonable doubt was said to be so close that the Court preferred to rest its decision on a holding that this circumstantial evidence could be supplemented by a rebuttable presumption that the defendants knew the law. In the Court's own words:

> Where the law is plain, definite, and well settled, and any want of knowledge of its requirements is a fact resting peculiarly within the knowledge of the defendants, when the Government has established its case in all other respects, the burden of adducing some evidence to rebut the presumption of such knowledge rests on the defendants. ***

In theory then, at least in the Fifth Circuit, if a defendant fails to develop any evidence to rebut the presumption that he knows of the wagering tax laws, a jury is entitled to infer that knowledge beyond a reasonable doubt. However, as a practical matter all United States Attorneys are urged to continue to introduce all available direct and circumstantial evidence tending to show a

defendant's knowledge, e.g. concealment, furtiveness, past arrests and gambling activities, and associations with others engaged in gambling activities.

Staff: United States Attorney Edward F. Boardman;
Assistant United States Attorney Thomas J. Hanlon, III
(M.D. Fla.).

SECURITIES LAWS

Manipulation of Market Price and Sale of Unregistered Stock; Stock Exchange as Means of Communication in Interstate Commerce. United States v. Gerardo A. Re, et al. (C.A. 2, July 24, 1964). D.J. File 113-51-125. The Court of Appeals for the Second Circuit has affirmed the convictions of Gerardo A. Re (father) and Gerard F. Re (son), specialists on the American Stock Exchange, for violations of the securities laws in connection with the manipulation of the market price and sale of unregistered stock of the Swan-Finch Oil Corporation. The conviction of defendant Charles A. Grande was also upheld, as was the conviction of Ely Batkin on one of the two counts under which he was found guilty.

On appeal, the defendants urged a number of grounds for the reversal of the convictions. An attack was made on the admission of records kept by Lowell Birrell's bookkeeper. (Birrell was named as a defendant in the case, but was a fugitive in Brazil at the time of trial.) The court rejected the contention that, since most of the information reflected the affairs of Birrell, the records were merely personal. It was held that these records came within the purview of the Business Records Act (18 U.S.C. 1732). Although Birrell's business was unlawful, the Act does not discriminate between lawful and unlawful businesses.

Also rejected by the Court of Appeals was the contention that the floor of the American Stock Exchange is not a means of interstate commerce within the purview of 15 U.S.C. 77e (a) (1).

Re, Jr. and Grande admitted that there was evidence tending to show that they may have done things to facilitate the transmission of stock to the buyers. They alleged, however, that their participation was connected not with the sale, 15 U.S.C. 77e (a) (1), but with the delivery--a different offense covered by subsection (2). It was pointed out by the court that the count in question also charged a violation of the aider and abettor statute (18 U.S.C. 2) and that, by facilitating the transmission of the stock so as to complete the transaction, these two defendants "associated themselves with the sale and thus could have been found to have aided and abetted Re, Sr."

The Res and Batkin were sentenced by the trial court to three years' imprisonment, two and one-half years of which was suspended, and each was fined $15,000.

Petition for certiorari has been filed.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Peter H. Morrison
(S.D. N.Y.).

TREASURY CHECKS

Theft and Forgery of Treasury Checks. An item in the December 13, 1963 issue of the Bulletin, Vol. 11, No. 24, at p. 611, summarized the efforts over the previous three years to reduce the incidence of thefts of Government checks. The Post Office Department has recently expressed its appreciation of the results obtained during the last few years in prosecutions of mail offenders. During fiscal 1964 there were a record 5,244 arrests for thefts from private mail receptacles and possession of stolen mail. Over the past 15 years the number of arrests for these offenses has almost tripled. However, the number of Government checks mailed and consequently the number of thefts continue to increase. During fiscal 1964, about 490 million Treasury checks were issued; it is estimated that during fiscal 1965 this figure will be 520 million. These checks are readily negotiated with a minimum of risk, and are a source of easy income for narcotics addicts and other thieves.

The Post Office Department is seriously concerned about this problem, and will cooperate with United States Attorneys in every way possible. Postal inspectors stand ready to furnish statistics and information as to local conditions with a view toward increasing the severity of sentences imposed on convicted offenders. See, e.g., United States Attorneys Bulletin, Vol. 10, No. 19, at p. 552 (September 21, 1962). United States Attorneys should continue to prosecute these cases vigorously, especially where second offenders are involved.

NARCOTICS

Purchasing Agent Instructions in Narcotics Prosecutions. Joseph E. Lewis v. United States (C.A. D.C., June 18, 1964). D.J. File 12-16-278. Defendant Lewis was convicted on the last six counts of a nine-count indictment relating to three separate transactions. Counts 4 and 7 charged Lewis with selling heroin not pursuant to a written order form, in violation of 26 U.S.C. 4705(a); counts 5 and 8 charged him with purchasing and selling heroin not in or from the original stamped package, in violation of 26 U.S.C. 4704(a); and counts 6 and 9 charged him with facilitating the concealment and sale of heroin, in violation of 21 U.S.C. 174.

The Government's evidence was such that the jury could have concluded that an undercover police officer had given the defendant certain sums of money so that Lewis could purchase narcotics for the undercover officer. The trial court instructed the jury on the issues of entrapment but refused to give a purchasing agent instruction, i.e. that the defendant could not be convicted if he merely acted on the buyer's behalf in procuring the drug from the seller and delivering it to the purchaser.

The Court of Appeals for the District of Columbia, after a careful analysis of the cases dealing with the purchasing agent theory, concluded that an instruction thereunder must be given under every count charging a sale of narcotics, as a defendant's status as an agent of the purchaser is incompatible with a role as a seller. Such an instruction would be required under the 26 U.S.C. 4704(a) counts, which charged both purchase and sale not in and from the original stamped package, and under the 26 U.S.C. 4705(a) counts, which charged sale not pursuant to a written order form. Failure to give this

instruction was, therefore, reversible error as to counts 4, 5, 7 and 8, and the case was remanded for a new trial on those counts. However, the Court pointed out that the purchasing agent theory is inapplicable to the offense of buying narcotics, and no such instruction would have been necessary under the Section 4704(a) count had it not charged sale as well as purchase. Moreover, the Court of Appeals, relying upon Bruno v. United States, 259 F. 2d 8 (1958) in the Ninth Circuit, found that the counts under 21 U.S.C. 174 required no purchasing agent instruction. Section 174 makes criminal conduct which in any manner facilitates the sale of illegally imported drugs. The ordinary meaning of facilitate is to make easy or less difficult and in that sense the procuring agent, a type of broker or middleman, inevitably facilitates the sale. Consequently, no purchasing agent instruction was necessary under the 21 U.S.C. 174 counts, and the convictions thereunder were affirmed.

This decision is notable not only because of its excellent collection of precedents dealing with the purchasing agent problem, but also because it points up the desirability of avoiding sale counts under the various narcotics statutes when the defendant may have been used as a purchasing agent. In such situations the defendant ordinarily may be charged with a violation of 21 U.S.C. 174, or with a purchase in violation of 26 U.S.C. 4704(a), but not with a violation of 26 U.S.C. 4705(a) or with sale, dispensation or distribution in violation of 26 U.S.C. 4704(a).

Staff: United States Attorney David C. Acheson;
Assistant United States Attorneys Max Frescoln,
Frank Q. Nebeker and Robert B. Norris (D. Columbia).

MAIL FRAUD

Existence of Widespread Publicity Does Not Require Postponement or Transfer of Case for Trial or Examination of Jurors With Reference to Their Knowledge of Case from Articles and Broadcasts Concerning It. Billie Sol Estes v. United States (C.A. 5, August 10, 1964). D.J. File 120-76-117. Appellant was convicted on four counts of mail fraud, 18 U.S.C. 1341, and one of conspiracy, 18 U.S.C. 371, and sentenced to a total of fifteen years' imprisonment. The offenses arose from "sales" and "leases" of non-existent storage tanks and related equipment to various farmers and businessmen by a company dominated by appellant. On appeal, the conviction was upheld over appellant's challenges to the impartiality of the jury and both the substance and method of the court's charges.

In a two-hundred page brief, appellant questioned, first of all, the sufficiency of the steps taken by the trial judge to guard against any adverse effect on the trial from widespread publicity in the El Paso area concerning appellant's activities. The district court had denied appellant's motions to postpone the trial or transfer the case to the San Antonio Division of the Western District of Texas. This ruling had been deferred until after the jurors were examined on their voir dire, and from this the Court of Appeals concluded that "the trial judge was of the view that nothing was shown in the voir dire examination which indicated a need for postponement or for transferring the case in order to afford the defendant a fair and impartial trial." In view of the care that was taken in selecting the jury (as indicated by almost three days of

examination and over three hundred pages of proceedings) and in the absence of any specific showing of prejudice by appellant, the Court refused to indulge in a presumption of bias and upheld this exercise of the trial court's discretion.

Appellant made motions to examine both the grand and petit juries in order to uncover bias and prejudice resulting from extensive publicity. All such motions were denied by the district court. With respect to the grand jury, the Court of Appeals held simply that the only ground for challenging an individual grand juror is his lack of legal qualifications. Challenges for bias and prejudice had been specifically authorized in a preliminary draft of Rule 6, F.R. Crim. P., but omitted in the final draft. And, since the court had admonished the petit jury some thirty times in the course of the trial not to read newspaper articles or listen to broadcasts concerning the trial, such an admonition preceding every recess during which the jurors were separated, the Fifth Circuit thought the requests to examine the individual jurors unjustified and held that the lower court correctly denied the motions. Moreover, the trial court's refusal to sequester the jury was held to be an exercise of sound discretion.

Appellant next questioned the propriety of the lower court's charge on presumed intent, that "The law provides a rebuttable presumption that every man intends the natural and probable consequences of his own acts." In the context of the charge as a whole, however, this instruction did not shift the burden of proof to appellant and was, therefore, unobjectionable said the Fifth Circuit. The trial court had been careful in its charge to keep the burden of proof as to every element of the offenses on the Government.

While the Court of Appeals indicated its disapproval of the lower court's submission of written responses to questions of the jury during their deliberations, it considered this "harmless error" to be disregarded under Rule 52(a). The better practice would have been to answer these questions in open court in the presence of appellant, but since the instructions given were correct and since appellant's counsel was present in the judge's chambers when they were composed, exercising his rights to object and press for revisions, no substantial harm was done to appellant's rights.

Likewise, the Court used Rule 52(a) to dispose of appellant's objection to the trial judge's "dynamite" charge, delivered when the jury returned without a verdict after almost two days of deliberation. This instruction reminded the jury of the expense of the long trial and of their liability, as taxpayers, for the Government's part of that cost. Nevertheless, "since the court's remarks were replete with admonitions against either coercion, compromise or surrender of individual convictions," the Court of Appeals held that they did not constitute reversible error.

Finally, the Court summarily dismissed appellant's objection to the district court's denial of his motion for directed verdict based on insufficiency of the evidence to sustain the counts upon which a verdict of guilty was returned.

Staff: United States Attorney Ernest Morgan;
Assistant United States Attorney Fred J. Morton;
(W.D. Texas).
Marshall Tamor Golding
Appellate Section
Criminal Division

BRIBERY

Bribery of Arresting Officers; Legality of Arrest Not Essential Prerequisite to Conviction for Bribery. Irene E. Vinyard v. United States (C.A. 8, August 12, 1964). D.J. File 51-42-104. Appellant was indicted for and convicted of violating 18 USC 201(b)(3), in that she offered, and gave, a bribe to two agents of the Government after they had arrested her for refilling of liquor bottles in violation of the Internal Revenue laws. The Court held, inter alia, that even if the initial arrest for refilling of liquor bottles was unlawful, the legality of that arrest was not an essential prerequisite to conviction for a violation of the bribery statute based on happenings occurring subsequent to such arrest.

At the time of arrest for refilling of the bottles, appellant contacted and employed an attorney to represent her for the purpose of defending her against the refilling charge. Appellant subsequently, in the absence of her attorney, offered a bribe to the arresting officers. The Court held that the receipt into evidence of the arresting officers' testimony as to the bribery offense was entirely proper, even though appellant was represented at the time by an attorney in connection with the first offense, for which she had been arrested. The Court noted that to decide otherwise "would be holding that the employment of counsel in the first offense gave appellant an insulated status against the commission of subsequent crime or immunized him from responsibility for his subsequent criminal acts." The Court distinguished United States v. Massiah, 377 U.S. 201, by noting that its ruling was limited to holding, as constitutionally improper, the receipt into evidence of statements surreptitiously elicited from a defendant after indictment and in the absence of his counsel, when such statements were intended to be used in the prosecution of the offense for which he had been indicted.

Staff: United States Attorney Richard D. FitzGibbon, Jr.; Assistant United States Attorney William C. Martin (E.D. Mo.).

ASSAULT UPON FEDERAL OFFICER

Knowledge of Official Capacity of Person Assaulted Not an Essential Element. United States v. John Joseph Lombardozzi, et al. (C.A. 2, August 4, 1964). All five defendants were convicted in the Eastern District of New York of an assault upon an FBI agent in violation of 18 U.S.C. 111 which prohibits assaults upon persons designated in 18 U.S.C. 1114 while engaged in or on account of the performance of official duties. On appeal defendants contended that proof of knowledge of the official capacity of the person assaulted is an essential element of the crime charged and that the trial judge erred in refusing to submit the issue of knowledge to the jury.

After referring to those cases which either by dicta or in their holdings have indicated that proof of knowledge or scienter was necessary, the court, accepting the reasoning of Bennett v. United States, 285 F. 2d 567 (C.A. 5, 1960), cert. denied, 366 U.S. 911 (1961), and McNabb v. United States, 123 F. 2d 848, 854 (C.A. 6), rev'd. on other grounds, 318 U.S. 332 (1942), as persuasive, held that proof of knowledge was not required. It observed that many statutes

creating crimes contain such requirements as "knowingly", "with knowledge", "intentionally", and "with intent", but that no such prerequisite had been written by Congress in Section 111. The court further observed that the meager legislative history suggested that in Section 111 Congress merely sought to provide a Federal forum for the trial of cases involving various offenses against Federal officers in the performance of official duties and concluded that the courts should not by judicial legislation change the statute by adding, in effect, the words "with knowledge that such person is a federal officer."

Staff: United States Attorney Joseph P. Hoey;
Assistant United States Attorney Raymond B. Grunewald
(E.D. N.Y.).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

National Parks: Suit by Owners of Private Land in Everglades National Park to Declare Unconstitutional Statute Enlarging Boundaries of Park to Include Such Land and Enjoin Operation of Park Dismissed by Three-Judge Court Convened Under 28 U.S.C. 2282. Eminent Domain: Statute Which Authorizes Acquisition by Purchase or Condemnation of Private Land Within National Park Unless Land is Used for Agricultural Purposes or Allowed to Remain in Natural State, then it may be Acquired Only With Consent of Owner, is not "an Unconstitutional Taking". Samuel C. Halpert, et al., v. Stewart L. Udall, etc., Civil No. 614-62-EC, U.S.D.C., S.D. Fla. D.J. File No. 90-1-1-1926.

By Act of July 2, 1958, 16 U.S.C. 410, the exterior boundaries of the Everglades National Park were enlarged to include a number of tracts of privately-owned land. The Act authorizes the Secretary of the Interior to acquire by purchase or condemnation such privately-owned lands as are necessary for park purposes, provided "that no parcel within the * * * area shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes * * * or is lying fallow or remains in its natural state."

The plaintiffs, who are the owners of lands within the boundaries of the park as enlarged, sought to enjoin the Secretary from "taking the position that the lands are within the Everglades National Park and can be used only for agricultural or other incidental purposes under pain of eminent domain if otherwise used." The plaintiffs requested and obtained the convening of a three-judge court under 28 U.S.C. 2282 on the ground that the existence of the statute and the failure of the Secretary to purchase or condemn their property constituted a taking of their property without due process in violation of the Fifth Amendment by impairing its market value and by restricting the use of their property. By amendment to their complaint the plaintiffs asserted that the defendant closed a public highway which had been in use for a number of years and had abutted their lands. They asserted further that persons using the road were required to pass a control and identification point (the park entrance installation) established by the defendant. The plaintiffs asserted that the road is in a state of disrepair and hazardous to use and that it had been barricaded so that they could no longer traverse the entire road extending from Miami on the Atlantic to Cape Sable on the Gulf.

After motions by the Government to dismiss the complaint and in opposition to the creation of a three-judge court were overruled, the case was tried and was argued before a three-judge court. The court considered the evidence with respect to the highway which extended through the park and abutted plaintiffs' property and held that since it was a state highway and since the state had conveyed to the United States all land owned by it within the park boundaries, the plaintiffs have no claim against the Secretary of the Interior for his failure to maintain and reopen the highway. That decision was based upon the court's conclusion that a property owner cannot challenge the closing of a road where injury to him is not materially different from that sustained by the public, and this is particularly true where there is another means of ingress and egress even though the other road is substantially longer.

Also, the court held there is no constitutional prohibition which prevents

land in private ownership from being within the exterior boundaries of a national park. The extent to which the United States may exercise jurisdiction over such privately-owned land depends upon whether there has been a cession of jurisdiction by the state to the United States and, if so, the extent of the cession.

Finally, the court held that it cannot be questioned that the United States may acquire lands for national park purposes and may do so by an exercise of the power of eminent domain. The granting of the power by Congress may be subject to restrictions or limitations. Congress, had it chosen to do so, could have provided that the privately-owned lands should not under any circumstances be acquired as part of the park and, had it done so, such a provision, of course, could be changed by subsequent legislation. The plaintiffs are not prevented by the 1958 Act from devoting their lands to any lawful purpose. If the lands are used for other than agricultural purposes or not allowed to remain fallow or in their natural state, the restriction against acquisition by the Government would terminate but no obligation on the part of the United States to acquire the property would arise. The court pointed out that it could not see how a valid grant of authority to acquire property for public use becomes invalid and in violation of the due process clause when there is a restriction or condition annexed to the grant of authority.

Staff: Herbert Pittle

Eminent Domain; Denial of Recovery for Damage to Property Resulting from Noise, Vibration, Sound Waves and Fumes Emanating from the Testing of Military Jet Aircraft Engines. Roosevelt H. Bellamy, et al. v. United States, Civil No. 7416, E.D. S. Car., July 13, 1964; D.J. File No. 90-1-23-924. - The plaintiffs are the owners of improved property located near Myrtle Beach Air Force Base, South Carolina. The property is not located within the approach zone to any of the runways at the airbase.

This action was brought to recover $10,000 as just compensation for the alleged taking of an interest in the plaintiffs' property resulting from the vibration, noise, sound waves and fumes emanating from jet engines being tested on so-called "trim tabs" near the plaintiffs' property. The plaintiffs also claimed that there were low and frequent flights of jet aircraft and helicopters over their property which caused serious interference with their use and enjoyment of the property. The areas where the jet engines were warmed up at maximum power output and tested are located about 1500-1700 feet south of the southwest corner of the plaintiffs' property. The noise from the jet engines being warmed up and tested was measured at 95 to 100 decibels of sound.

The court granted a motion for summary judgment filed by the Government on authority of Batten v. United States, 306 F. 2d 580 (C.A. 10, 1962), cert. den., 371 U.S. 955, reh. den., 372 U.S. 925, and quoted extensively from the opinion in that case. In its order of July 13, 1964, the court recited the facts stated above and held that the acts complained of, although causing substantial interference with the use and enjoyment of the plaintiffs' property, did not amount to a taking and were not compensable under the Tucker Act, 28 U.S.C. sec. 1346(a)(2).

The court also noted that upon oral argument the plaintiffs' attorney

stated that the plaintiffs could not sustain the allegation of low and frequent flights of jet aircraft and helicopters over the property.

Staff: Assistant United States Attorney Thomas P. Simpson, Charleston, South Carolina.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Federal Tax Liens; Lien of Judgment Creditor Held Choate Despite the Fact that the Debt Subject to the Lien was Disputed Both as to Existence and Amount. Corigliano v. Catla Construction Co., Inc. (S.D. N.Y., June 16, 1964). (CCH 64-2 U.S.T.C. ¶9657). Corigliano, a judgment creditor of Catla, sought to compel Melnick & Co., a debtor of Catla, to pay directly to him the amount of its indebtedness to Catla in partial satisfaction of Catla's debt to him. Toward this end, on August 29, 1962, Corigliano served upon Melnick & Co. a third-party subpoena in a supplementary proceeding pursuant to former Section 779 of the Civil Practice Act of New York. Accompanying the third party subpoena was an order restraining Melnick from paying its indebtedness to Catla. On September 20, 1962, the United States filed notices of tax liens against Catla in the amount of $13,898.98. In December, 1963, Catla recovered a judgment against Melnick & Co. in the amount of $1,250.00 plus interest and costs. The question which arose was whether the lien created by Corigliano when he instituted third-party proceedings against Melnick & Co. was "choate" so as to enjoy priority over the federal tax lien which was filed subsequently. Here, the property subject to the lien was indefinite, since the amount of the indebtedness of Melnick & Co. to Catla and its very existence were disputed until Catla recovered judgment.

However, the Court held that it is the lien and not the property upon which the lien attaches which must be choate and that a state-created lien is not inchoate merely because the amount or value of the liened property has not been finally determined. In this case, Corigliano is clearly identified as the lienor, and the amount of his lien is fixed by reason of his judgment against Catla. Hence, the Court found that Corigliano had a valid judgment creditor's lien entitled to priority over the subsequently filed federal tax lien.

An appeal is being considered on the basis that the property subject to Corigliano's lien was not established prior to the time of the perfection of the federal tax lien.

Staff: United States Attorney Robert M. Morgenthau; and Assistant United States Attorney John R. Horan (S.D. N.Y.).

Federal Tax Liens: Tax Liens Arising Before Institution of Interpleader Suit Deemed Secured and Accorded Priority Over Inchoate Liens of Other Creditors, But Tax Liens Arising After Suit Held to Share Pro Rata with Unsecured Creditors. George H. Jett Drilling Co. v. E. H. Tibbits, d/b/a Tibbits Drilling Co., et al. (W.D. La., May 22, 1964). (CCH 64-2 U.S.T.C. ¶9540). The taxpayer contracted to drill an oil well for Jett Drilling Company, but

encountered financial difficulties during the drilling and various of his creditors made demands upon Jett Drilling Company for amounts due him under the contract. On January 9, 1962, an interpleader action was filed by Jett Drilling Company and the defendants were enjoined from prosecuting any other suits pertaining to the interpleaded fund. Two federal tax liens securing the taxpayer's indebtedness had arisen at that time. The United States was named in the interpleader suit but was dismissed on motion and was allowed to intervene. Subsequent to the institution of this suit, additional federal taxes were assessed against the taxpayer and several other creditors took steps to perfect their respective liens.

The Court held that, of the several claims against the taxpayer in existence before suit was filed, only the liens of the Government, an attaching creditor, and an assignee were perfected and to be treated as secured. However, the latter two liens were held not to satisfy the federal test of choateness set forth in United States v. City of New Britain, 347 U.S. 81, so as to prime the tax liens, citing United States v. Security Trust & Savings Bank, 340 U.S. 47, United States v. Acri, 348 U.S. 211, and United States v. Liverpool & London Insurance Co., 348 U.S. 215, regarding the attachment lien, and United States v. R. F. Ball Construction, Inc., 355 U.S. 587, regarding the assignment. The Court further held that the taxes assessed after suit was filed were not entitled to any preference but would be treated as unsecured claims to share pro rata with all other unsecured creditors. The Court based this holding primarily on equitable grounds, feeling that since other creditors had been enjoined from perfecting their liens it would be inequitable to allow the Government to enjoy a preferred status through assertion of a lien perfected after institution of the suit. The Court awarded all secured creditors, including the United States, interest on their respective claims, relying on First National Bank v. Ewing, 103 F. 168, 190, cert. den., 179 U.S. 686.

No decision has been made by the Department with respect to an appeal from the holding that the tax liens arising after suit was filed are not secured but must share equally with inchoate and unsecured claims.

Staff: United States Attorney Edward L. Shaheen; Assistant United States Attorney Edward V. Boagni (W.D. La.); and Raymond L. McGuire (Tax Div.).

Interpleader Suit; Payment of Costs and Fees of Attorneys for Interpleading Plaintiffs Held Improper Until Amount and Priority of the Federal Tax Lien Is Determined. Pennsylvania Insurance Company, et al. v. Long Island Marine Supply Corporation. (S.D. N.Y., May 12, 1964). (CCH 64-2 U.S.T.C. ¶9505). The interpleading plaintiffs paid the proceeds of certain fire insurance policies on the taxpayer's property into Court naming various creditors of the taxpayer as defendants. The plaintiffs then moved that they be dismissed from the action and that they have the fees and disbursements of their attorneys paid from the interpleaded fund. The Government intervened to assert tax liens against the fund.

The Court treated the plaintiffs' motion as one for summary judgment and permitted the withdrawal of the interpleading plaintiffs. However, the Court denied the motion for the payment of attorneys' fees and disbursements, reasoning that, upon trial, it might be determined that the Government tax liens were superior to all, or some, of the claims of the defendants and, thus, superior to any claim of the plaintiffs for their costs, including attorneys' fees. The Court noted that an action of interpleader has two separate and consecutive steps: first, the determination of whether the plaintiff is entitled to the relief sought, including discharge; and second, the determination of the adverse claims as between the interpleaded defendants. The Court further noted that so long as payment of costs to the interpleader does not affect the federal tax lien a direction for such payment is within the discretion of the Court. However, the Court reasoned that until trial it could not be determined where the federal tax liens would stand in order of seniority, and the Court concluded that it might conceivably turn out that the federal tax liens were so ranked that any payment of attorneys' fees at this time would reduce by that amount the return of the Government and, in such circumstances, it would not be proper to order a payment of fees and disbursements.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Dawnald R. Henderson (S.D. N.Y.); and Clarence J. Grogan (Tax Div.).

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