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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 June 25, 1965 No. 13

APPOINTMENTS--UNITED STATES ATTORNEYS

As of June 18, 1965, the nomination of the following appointee as United States Attorney was pending before the Senate:

West Virginia, Southern--Milton J. Fergusen

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate.

Wisconsin, Eastern--James B. Brennan
New Mexico--John F. Quinn

In addition to those listed in previous Bulletins, the nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of June 18, 1965:

Georgia, Middle--Floyd M. Buford
Illinois, Eastern--Carl W. Feickert

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

TRANSPORTATION OF DOCUMENTS AS EXCESS BAGGAGE

United States Attorneys and Assistant United States Attorneys, traveling by air to courts of appeals to try cases, usually must transport bulky files and records. In most instances such records exceed the allowable baggage weight limit, and are transported at the very expensive excess baggage rate.

Attorneys making such trips are urged to inquire into the shipment of records and files by air-freight. The cost is approximately one-half that of excess baggage. For example, the maximum air-freight rate is 36 cents per pound, up to 50 lbs. (and greater saving for material weighing over 50 lbs.), as compared with 83 cents per pound as excess baggage.

There is no problem in reserving air freight space. All material transported by air freight goes on the same plane as personal luggage, except that it is in a section of the plane reserved for freight. Freight items are checked at the same counter as personal luggage.

MEMOS & ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 11, Vol. 13 dated May 28, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
278-S3	5/25/65	U.S. Attorneys	Form of Judgments in Social Security Cases.
410	5/19/65	U.S. Attorneys & Marshals	Federal Telecommunications System.
412	6/1/65	U.S. Attorneys & Marshals	Report of Outstanding Obligations.
413	6/8/65	U.S. Attorneys & Marshals	Standards of Ethical Conduct.
415	6/14/65	U.S. Attorneys	Amendment of Memo No. 374, Dated June 3, 1964, Delegating Authority to U. S. Attys. in Civil Div. Cases.

ORDERS	DATED	DISTRIBUTION	SUBJECT
339-65	5/26/65	U.S. Attorneys & Marshals	Relating to Redelegation by Assistant Atty. Gen. in Charge of Tax Div. of Certain Compromise and Closing Authority.
340-65	5/28/65	U.S. Attorneys & Marshals	Placing Assistant Atty. Gen. Edwin L. Weisl, Jr. in Charge of Lands Div.
341-65	5/28/65	U.S. Attorneys & Marshals	Placing Assistant Atty. Gen. Fred M. Vinson, Jr., in Charge of Criminal Div.
342-65	6/1/65	U.S. Attorneys & Marshals	Supplementing Departmental Regulations Relating to Equal Employment Opportunity With Respect to Government Contracts.
343-65	6/8/65	U.S. Attorneys & Marshals	Assigning to Asst. Atty. Gen. in Charge of Office of Legal Counsel Function of Providing Guidance & Assistance With Respect to Matters Relating to Standards of Ethical Conduct.
344-65	6/14/65	U.S. Attorneys & Marshals	Amending Regulations Relating to Recovery From Tortiously Liable Third Persons of Cost of Hospital & Medical Care & Treatment Furnished by U.S. (Order No. 289-62)

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Government Seeking Damages For Antitrust Violations. United States v. Grinnell Corporation, et al., (D. R.I.) D.J. File 60-339-1. On June 7, 1965, a complaint was filed in Providence, Rhode Island seeking actual damages sustained by the United States as a result of the antitrust violations of the Grinnell Corporation (Grinnell), American District Telegraph Company (ADT), Holmes Electric Protective Company (Holmes) and the Automatic Fire Alarm Company of Delaware (AFA).

On April 13, 1961, a civil antitrust enforcement action was filed under Sections 1 and 2 of the Sherman Act charging that these defendants, Grinnell, ADT, Holmes and AFA engaged in an unreasonable restraint of trade, combination and conspiracy to monopolize, an attempt to monopolize, and actual monopolization of interstate trade and commerce in Central Station Protection Service Industry. The enforcement action was tried before United States District Judge Charles E. Wyzanski, Jr., in Boston, Massachusetts during June 1964. On November 27, 1964, the Court decreed that these defendants had violated Section 1 of the Sherman Act by restraining and continuing to restrain interstate commerce in central station protection service, and had violated Section 2 of the Act by conspiring to monopolize, attempting to monopolize, and by monopolizing interstate trade and commerce in that market. (U.S. v. Grinnell Corp., et al., 236 F. Supp. 244 (D. Rhode Island 1964)).

The defendants provide property owners, including the United States Government, with protection from losses by fire, burglary and other hazards. Upon intrusion or fire in the protected premises, alarm signals are automatically transmitted to the central station over leased telephone lines where trained operators immediately notify the police or fire department, and at the same time dispatch guards to the premises. The United States Government subscribes to central station protection service for the protection of Federal property throughout the United States. As of December 31, 1963, there were in effect at least 400 central station protection service contracts which had been executed between the United States and these defendants.

The damage suit charges that these defendants, as a result of violations of Sections 1 and 2 of the Sherman Act, have fixed and maintained prices at high, artificial levels; have restrained, suppressed and eliminated price competition in the central station protection service industry; and that the United States, as a subscriber to central station protection service has been denied the benefits of free competition. By operation of defendants' unlawful conduct, including discriminatory pricing practices and the practice of retaining title to protection systems installed on premises owned or occupied by the United States, the Government has been compelled to pay substantially higher prices for central station protection service than would have been the case but for the violation. The complaint seeks damages equal to the amount by which the prices paid by the United States exceeded the prices which would have obtained under conditions of open competition. The complaint does not

name a precise figure for damages, pending a complete study of purchasing data and price patterns obtainable through discovery.

Staff: Noel E. Story and Hugh P. Morrison, Jr. (Antitrust Division)

Magazine Distributors Charged With Violating Section 7 of Clayton Act and Section 1 of Sherman Act. United States v. Curtis Circulation Company, Inc., et al. (D. N.J.) D.J. File 60-127-75. On June 9, 1965, a civil action charging violations of Section 7 of the Clayton Act and Section 1 of the Sherman Act was filed against the two largest national distributors of magazines, children's books and paperback books, Curtis Circulation Co., Inc., and Select Magazines, Inc., and their jointly owned subsidiary, National Magazine Service, Inc.

Curtis and Select have annual sales of magazines, children's books and paperback books amounting to $77,000,000 or about 35% of the national sales of those items sold on newstands. Curtis is a wholly owned subsidiary of Curtis Publishing Co. It distributes publications for its parent company and others. The stock of Select is owned by McCall Corp., Popular Science Publishing Co., Meredith Publishing Co., Reader's Digest Ass'n., and Time, Inc. Select distributes publications of its parents and others. There are eleven other national wholesalers.

In 1949 Curtis and Select created N.M.S. as a jointly owned subsidiary to mail their publications to those areas which could not economically support local wholesalers. In 1959 N.M.S. took on the additional function of acting as the local wholesaler in certain areas where Curtis and Select were dissatisfied with the local wholesalers.

The complaint alleges that the effect of the concurrent acquisition of the stock of N.M.S. by Curtis and Select may be to substantially lessen competition or to tend to create a monopoly in the distribution and sales of publications in the United States in violation of Section 7 of the Clayton Act. It further alleges that defendants have been engaged in a combination and conspiracy in violation of Section 1 of the Sherman Act consisting of a continuing agreement, understanding and concert of action to: eliminate competition between Curtis and Select, and between them and others; to utilize N.M.S. as an instrumentality to compel compliance with the space and display requirements of Curtis and Select with threats of termination, or actual termination, of the Curtis and Select franchises of wholesalers who refuse such compliance; to terminate, or threaten to terminate, the Curtis and Select franchises of any wholesaler who refused to sell his business to N.M.S.; to eliminate competition in the wholesale distribution and sale of publications in any area in which N.M.S. operates as a wholesaler; and to coerce wholesalers and dealers to give inferior space and display for publications of national distributors other than Curtis and Select.

The relief prayed for includes the dissolution of N.M.S., and injunctions against further agreements between Curtis and Select relating to the sale or distribution of publications, and against Curtis and Select compelling acceptance of space and display requirements which tend to deprive publications of

other national distributors of suitable space and display.

Staff: John J. Galgay, John D. Swartz, Bernard A. Friedman, Howard Breindel, Stanley Blecher, and Bertram M. Kantor (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

District Court Denial of Motion for Order Directing Issuance of Writ of Foreign Attachment in Admiralty Is Appealable; Corporation Not Doing Business in District in Which District Court Sits May "Be Found Within the District" for Purposes of In Personam Jurisdiction in Admiralty If Corporation Is Incorporated in State in Which Court Is Located; United States Has Not Waived Its Immunity to Garnishment by Reason of Suits in Admiralty Act or Public Vessels Act. Chilean Line, Inc. v. United States and Main Ship Repair Corp. (C.A. 2, No. 29275, April 27, 1965) D.J. File 61-51-4231. Libelant, in order to collect a debt owed it by Main Ship Repair Corp., sought to garnish a debt owed by the United States to Main Ship Repair Corp., which was a New York corporation not doing business in the Southern District of New York. The Clerk of the District Court for the Southern District of New York refused to issue process with a clause of foreign attachment against the United States, and the District Court denied libelant's motion for an order compelling the issuance of such process.

The Court of Appeals affirmed, holding that the District Court order was appealable, on the ground that the order was "too important and too independent of the cause itself to require that appellate review be deferred until the principal matter is adjudicated." The Court pointed out that otherwise the property sought to be levied on may be irretrievably lost by the time the merits are resolved at trial.

On the merits of the appeal, the Court of Appeals agreed with the District Court, on two grounds. First, it pointed out that in admiralty a writ of foreign attachment may only be used to obtain jurisdiction over a foreign corporation where it is not possible to obtain in personam jurisdiction. Here, the Court held, in personam jurisdiction could be obtained. Under Rule 2 of the Supreme Court Admiralty Rules, the test for in personam jurisdiction is whether the respondent can be "found" within the district. The Court held that respondent's incorporation within the state in which the district is located was sufficient to establish that respondent could be "found" within the district for purposes of jurisdiction and service of process.

As a second ground for agreeing with the denial of a writ of foreign attachment, the Court held that the United States is not subject to garnishment, despite the Suits in Admiralty Act and the Public Vessels Act. The Court reasoned that it was improbable that Congress wished the Government to become involved in disputes between third parties, without expressly so providing in either Act.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Louis E. Greco; Philip A. Berns (Civil Division)

Suits Against Cost-Plus Contract Operator of Government Vessel Prohibited by Exclusivity Provisions of Public Vessels and Suits in Admiralty Acts. Sarah Smith, Ad'x., et al. v. United States and Marine Transport Lines (C.A. 4, No. 9704, May 3, 1965) D.J. File 61-79-262. Merchant seamen on a Navy tanker operated as a public vessel for the Government by a cost-plus contractor moved for leave to bring Jones Act Suits with jury trials against the contractor in courts other than that where the United States and the contractor had together commenced admiralty proceedings to limit liability arising out of the loss of the USNS POTOMAC by fire and explosion at Morehead City, North Carolina. The district court denied the motions. The Fourth Circuit affirmed in a 2 to 1 decision, the majority holding that the seamen's exclusive remedy was against the United States under the Public Vessels and Suits in Admiralty Acts, which provide that the remedy is exclusive of any other action by reason of the same subject matter against the Government agent or employee whose act or omission gives rise to the claim. 46 U.S.C. 745. The Court held that the operating contractor is an agent within the meaning of the Suits in Admiralty Act, and therefore cannot be sued and must be exempted from liability. The decision upholds the paramount rights of the United States in the operation of its public vessels through private cost-plus contractors.

Staff: William E. Gwatkin, III (Civil Division)

ARMED FORCES

Closing of Air Force Base Held Not Subject to Injunction. Venturino v. McNamara, Secretary of Defense, et al. (C.A.D.C. No. 19099, May 12, 1965) D.J. File 145-15-84. Injunction was here sought against the closing by the Secretary of Defense of the Rome Air Materiel Area base (ROAMA). The moving parties were presidents of labor organizations and of a hardware company, and employees at ROAMA. The suit was nominally against individuals. The Government objected that the suit was actually one against the sovereign, without consent; that plaintiffs lacked standing to sue; and that the action of which complaint was made was one committed to the discretion of the defendants and not to judicial review. The District Court dismissed, finding lack of jurisdiction and that the complaint should be dismissed. The Court of Appeals for the District of Columbia Circuit affirmed, without opinion.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Ellen Lee Park and John A. Terry

CIVIL SERVICE

Refusal of Military Personnel to Appear at Discharged Air Force Employee's Request Does Not Invalidate Civil Service Hearing, Where Employee Did Not Inform Air Force of Such Refusal. Studemeyer v. Macy (C.A.D.C. No. 18770, April 12, 1965) D.J. File 35-16-226. Plaintiff, a discharged Air Force employee, challenged the Civil Service Commission's affirmance of his discharge on procedural grounds. The Court of Appeals agreed with the District Court's dismissal of

the complaint, stating: "the witnesses who the complaint says were unavailable at the Civil Service hearing were in fact present, and the appellant did not inform the Air Force that certain other military personnel refused to appear at his request."

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

IMMUNITY

United States Department of Justice May Not Be Sued; Superintendent of Government Hospital May Not Be Held Vicariously Liable for Negligence of Subordinates. Staph v. Cameron (C.A.D.C. No. 19009, April 2, 1965) D.J. File 157-16-1821. The Court of Appeals summarily affirmed the District Court's order dismissing a complaint brought against the United States Department of Justice and the Superintendent of St. Elizabeth's Hospital. The Court pointed out that the Department of Justice may not be sued eo nomine, and that the Superintendent could not be held vicariously liable for the negligence of his subordinates. The Court also pointed out that plaintiff may wish to sue the United States under the Tort Claims Act, and that the statute of limitations under such Act would expire in a month.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Frank Q. Nebeker (D.D.C.)

MORTGAGES

United States Not Subject to Limitations Period of State Statute for Suit for Deficiency Judgment. United States v. Flower Manor, Inc. (C.A. 3, No. 15159, April 30, 1965) D.J. File 130-62-2546. Having foreclosed a mortgage held by the Federal Housing Administration, the United States petitioned the district court to set a date for hearing to set a fair market value for the property for the purposes of establishing a deficiency judgment. The order setting the hearing date contained the phrase "in accordance with the Deficiency Judgment Act of Pennsylvania." The mortgagor contended that this phrase brought the case within the state statute, setting a limit of six months in which the mortgagee may sue for a deficiency. The Court of Appeals disagreed, saying that the phrase merely referred to the method that would be used in ascertaining the amount still due the United States.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Merna B. Marshall (E.D. Pa.)

DISTRICT COURT

ADMIRALTY

Government Ship Owner Not Liable for Wrongful Death Where Seaworthy Gear Is Caused to Fail by Stevedore's Negligence. Mascuilli v. United States (E.D. Pa., May 4, 1965) D.J. File 61-62-319. Libelant's decedent was a member of the

longshoreman gang engaged in loading tanks aboard a Navy vessel. In the course of the loading a shackle which was part of a heavy lift cargo gear parted causing cables, wires and other rigging to lash back, killing one man and injuring three others. At a pretrial the District Court inferred liability from the failure of the gear on the grounds of unseaworthiness. At a trial on damages the Court awarded $124,000. The Third Circuit reversed and remanded the case for a full trial.

After trial, where expert testimony was presented on a metallurgical analysis of the shackle, the proper design and construction of the cargo gear, and safety devices in the electrical cut-offs of the winches, the District Court concluded that the cargo gear was sound and proper and that the failure of the shackle was due to improper use by the longshoremen employees of an independent stevedore contractor in employing the winches in such a manner as to create excessive stresses. The Court exonerated the United States of liability.

Staff: Alan Raywid and Daniel E. Leach (Civil Division)

Dumb Barge Under Tow Which Collides With Government Lock and Dam Is Absolutely Liable for Damages and Statutory Penalties Under 33 U.S.C. 408, 411, and 412; Government Control and Responsibility Over Tug and Tow Limited to Period When Vessels Are in Lock. United Barge Company, Inc., et al. v. Logan Charter Service, The Tug City of Joliet and United States (D. Minn., April 19, 1965) D.J. File 61-39-17. The tug with six barges under tow was maneuvering to pass Lock and Dam No. 3 located on the upper Mississippi River at Red Wing, Minnesota. In approaching the lock, the tug and tow got out of control in the current and were swept into the dam where one of the barges became impaled on a pier abutment of the dam. The barge and the cargo owner made claim against the tug and the United States. The tug claimed against the United States on the grounds that the lock tenders failed to offer adequate assistance to the vessels in making their approach, and had given negligent and dangerous orders to the deckman on the tug. This claim was supported by rather broad language in a Corps of Engineers regulation which gave the lock tenders control over the lockages of vessels including their approaches to the lock. The Government claimed that its control was limited to when the vessels were in the lock, that the collision was due not to the negligence of lock tenders but to the careless navigation of the tug and her crew, and that the barge--even though innocent--was absolutely liable as the instrument of damage to the dam. The District Court found that the tug was solely at fault in carelessly maneuvering the barge and awarded the Government full recovery of its damages in the amount of $56,000. The Court also allowed $500 in statutory penalties against the innocent barge since it held that absolute liability was provided under 33 U.S.C. 408, 411 and 412. The Court interpreted the Corps of Engineers regulation, 33 C.F.R. 207.300 (a), and limited the authority and control of lock masters to the period when the vessels were actually in the lock.

Staff: Alan Raywid (Civil Division)

TORT CLAIMS ACT

Invitee to Air Force Non-appropriated Fund Bowling Alley Assumed Risk of Injury When Hit by Bowling Ball. Evelyn Smith v. United States (D. Nev., May 4, 1965) D.J. File 157-46-76. Plaintiff bowled, as an invitee, at the Nellis Air Force Base Bowling Alley. One of her companions, an airman age 19, bumped into a bowling ball on a rack and it fell on plaintiff's back. The Court found that the bowling ball rack, standing immediately in back of some of the spectator seats and being a few inches higher than the back of the seats, was a dangerous and hazardous condition. However, the United States was held not to be negligent in allowing the youth to bowl, and had no reason to anticipate that the accident would happen. Additionally, the Court held, plaintiff put herself in a position of danger since, although she moved once away from the rack when she saw Sanders move the balls around, she returned to a seat near the bowling rack immediately before the accident.

Staff: United States Attorney John W. Bonner (D. Nev.);
Alice K. Helm (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

IMMUNITY

Policy Regarding Grants of Immunity. The attention of all United States Attorneys is directed to Department of Justice Memo No. 402, dated March 11, 1965, which sets out the various Federal immunity statutes, and the Criminal Division's policy regarding those statutes.

Three recent cases make it imperative that a uniform procedure be established regarding immunization, not only of prospective defendants, but of any witness (see Malloy v. Hogan, 378 U.S. 1; Murphy v. New York Harbor Waterfront Commission, 378 U.S. 52; Frank v. United States, F.2d , 33 L.W. 2546). Accordingly you are requested to consult with the Criminal Division prior to taking any action which would result in immunity for any prospective witness.

Your attention is directed to Title 2, p. 88.1 of the United States Attorneys' Manual where instructions are set out for obtaining immunity for witnesses under the Narcotic Control Act of 1956. Those instructions will shortly be expanded and will, thereafter, serve as a guide toward obtaining authorization to seek to immunize any witness under a statute administered by the Criminal Division.

In short, these instructions will provide that requests to immunize witnesses and prospective witnesses must be in writing and must contain the following information:

1. Name of individual for whom immunity is requested.
2. Date and place of birth, if known.
3. FBI number or local police number, if known.
4. Whether any state or federal charges are pending against the prospective witness and the nature of those charges.
5. Whether the witness is currently incarcerated, under what circumstances and for what length of time.
6. A resume of the background investigation before the grand jury or trial court.
7. The witness' relative importance in the criminal activity in your area, and his part in the matter under investigation.

8. An estimate of what offenses, federal and state, may be excused by the grant of immunity.

9. Reasons for the request including a statement as to what testimony the witness may be expected to give and the manner in which this testimony will serve the public interest.

10. Whether the witness is expected to testify in the event immunity is granted, if known.

SEARCH AND SEIZURE

Motion to Suppress Denied; "Independent Source" of Evidence Established. United States v. Louis M. Ray (Crim. Nos. 16,883 and 17,026, W.D. La., April 21, 1965.) D.J. File 105-33-90. Defendant, charged in separate indictments with making false statements to the Government (18 U.S.C. 1001) and mail fraud (18 U.S.C. 1341) in connection with a scheme by which he defrauded the Small Business Administration of $450,000, moved, inter alia, for suppression of evidence and dismissal of both indictments on the ground that the evidence upon which the indictments were based was obtained as a result of an allegedly unlawful search and seizure conducted on defendant's business premises by Small Business Administration examiners.

Without ruling on the legality of the challenged search, the Court denied defendant's motions in both cases, on the ground that the Government had established an "independent source" of the evidence sought to be suppressed, free of any possible "taint" from that search.

The Court stated:

> The prohibition on the use of illegally obtained evidence extends only to facts which were actually discovered by the illegal search or as a result of "leads" uncovered by the illegal search. Facts or information developed independently of the unlawful act are not "poisoned." Silverthorne v. U.S., 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed. 319 (1920); U.S. v. Sheba Bracelets, Inc., 248 F. 2d 134 (2 C.C.A. 1957), cert. den. 355 U.S. 904, 78 S. Ct. 330, 2 L.Ed. 2d 259; McLindon v. U.S., 329 F. 2d 238 (D.C. Cir. 1964); U.S. v. Avila, 227 F. Supp. 3 (N.D. Cal., 1963); U.S. v. Rutheiser, 203 F. Supp. 891 (S.D. N.Y., 1962). . . . The burden is upon the Government to establish its independent source and thus "clear the taint" of an alleged illegal search. . . .

The "independent source" for each case was established in the following manner. In the false statement case the Small Business Administration examiner who supervised the challenged search testified that he had not seen any documents relating to the alleged loan which was the subject of the indictment. In addition, an affidavit of the General Counsel of the Small Business Administration was introduced which reflected that the individual who allegedly received the questioned loan had voluntarily furnished the Government with the evidence upon which the indictment was based, subsequent to the date of the

search. The individual had done so after an SBA subpoena directed to his bank caused the bank to deny him a loan, thus putting him on notice that his records were under scrutiny by the SBA.

In the mail fraud case, it was shown that the evidence was obtained by a Grand Jury in the District of Columbia by subpoena directed to the Clerk of the U.S. District Court for the Western District of Louisiana, then the lawful custodian of defendant's books and records pursuant to an order of that court placing defendant's corporation in receivership. Defendant contended that the subpoenas, issued subsequent to the challenged search, were so tainted by the "poisonous tree" as to invalidate the use of the evidence thereby obtained. In rejecting this contention, the Court held that since the evidence was obtained by the Grand Jury by means of a lawful subpoena directed to an officer of the Court, no possible Fourth Amendment violation could have occurred. (Citing Dier v. Banton, 262 U.S. 147 (1923).)

Staff: Assistant United States Attorney Dosite H. Perkins, Jr. (W.D. La.); Stuart Pollak and Stephen Wizner, (Criminal Division)

FRAUD

Securities Violations; Misuse of Subpoena Process. United States v. Steffes (D. Mont., May 21, 1965). D.J. File 113-44-11. Defendants were convicted on charges of fraud in the offer and sale of securities. Thereafter, they filed a motion for a new trial specifying as error a number of points, including the Government's use of the subpoena process. The Government had issued approximately fifty subpoenas duces tecum commanding witnesses to appear in the United States Attorney's office one week before the trial date. The district judge stated that, while apparently this is a common practice, "this use of the subpoena process is in my opinion improper and is disapproved." The Court noted, however, that by its order defendants were permitted to subpoena witnesses to appear at their counsel's office during the trial, and that it was the witnesses who were deprived of a right or privilege, not the defendants. The Court concluded that, although the use of the subpoenas was improper, the use would not justify granting the motion for a new trial.

As stated in the United States Attorneys Manual, Title 8, p. 116: "'Request subpoenas' directing a witness to appear before the United States Attorney or his Assistants are not permissible." It has long been the policy of the Department not to require the attendance of a witness at the office of the United States Attorney for interview by the use of a subpoena or any form or document resembling a subpoena. There is, of course, no objection to a letter requesting an interview, or a conference with a witness prior to his appearance in the grand jury room.

It should also be noted that a request for an individual to appear as a "witness" could result in a claim for witness fees.

Staff: United States Attorney Moody Brickett; Assistant United States Attorneys Robert T. O'Leary and Richmond F. Allan (D. Mont.).

BANK ROBBERY

Conviction of Stealing Money From Bank and of Receiving Money Knowing It to Have Been Stolen From Bank, and "Consolidated" Sentence on Both Counts Grounds for Reversal of Conviction. United States v. Percy Harris (C.A. 4, May 20, 1965). D.J. File 29-100-2993. Harris was convicted by a jury in the Western District of North Carolina for stealing $2,000 from a Charlotte, North Carolina bank, and of receiving the $2,000 knowing it to have been stolen from the bank. The trial judge sentenced Harris to a total of three years' imprisonment for both counts. He did not assess a separate sentence for each count.

The U.S. Supreme Court held in United States v. Heflin, 358 U.S. 415 (1959), that a person may not be convicted of both stealing money from a bank and of receiving money knowing it to have been stolen from a bank. It has also reversed a two-count conviction for stealing Government property and for possession of the stolen Government property despite the fact that separate sentences were assessed for each count. Milanovich v. United States, 365 U.S. 551 (1961). Because of this precedent, the Fourth Circuit reversed Harris' conviction in this case.

When presenting this type of case to a jury, the Government should be careful to request that the judge instruct the jury that defendant can be found guilty of either stealing the money from the bank or of receiving the money knowing it to have been stolen from the bank, but not of both. If defendant is convicted of both counts, even if a separate sentence is assessed for each count, the appellate court will be required to reverse the conviction and order a new trial.

Staff: United States Attorney William Medford; Assistant United States Attorney Joseph Cruciani (W.D. N.C.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

EXPATRIATION

Voting in Japanese Election Held Voluntary and Expatriatory. Minoru Tanaka v. Immigration and Naturalization Service (C.A. 2, No. 27, 721, May 25, 1965). Petitioner acquired United States nationality by birth in New York in 1923. Three years later he was taken to Japan and resided there for 30 years. In 1954 in Japan he was refused a United States passport on the ground that he had expatriated by voting in Japanese elections and by service in the Japanese Army. He entered the United States in 1957 as an alien non-immigrant newspaper representative. When he failed to depart at the end of his temporary stay, deportation proceedings were instituted against him. At his deportation hearing petitioner claimed United States citizenship and denied that he had expatriated. The Board of Immigration Appeals found that petitioner, by voting in a Japanese election in 1950, had lost his United States nationality under Section 401(e) of the Nationality Act of 1940, 54 Stat. 1169, and that he was deportable for having overstayed his authorized admission as an alien non-immigrant.

In 1960 petitioner brought a declaratory judgment action to review the order for his deportation in the Southern District of New York. Two years later the District Court transferred the action to the Second Circuit for judicial review of the deportation order under Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a. Petitioner requested the Second Circuit to transfer his case back to the District Court under the provisions of Section 106 for trial of the issue as to whether his voting in Japanese elections was a voluntary act as found by the Board of Immigration Appeals. His request was denied by the Court on the ground that no genuine issue of fact remained to be tried by the District Court. The Court saw the only issue before it to be whether the circumstances surrounding petitioner's act of voting, as related by him, constituted duress and rendered it involuntary within the test laid down by the Supreme Court in Nishikawa v. Dulles, 356 U.S. 129. The Court construed Nishikawa as requiring petitioner Tanaka, his expatriatory act having been proved, to come forward and adequately inject the issue of involuntariness. The Court found inadequate Tanaka's explanation of his own vague and groundless fears of what his neighbors would have thought if he did not vote, especially where there was no basis for believing they might have applied any coercive measures as a result of his not voting. The Court affirmed the finding of expatriation and deportability.

Circuit Judge Kaufman dissented for several reasons. He construed Nishikawa as requiring the Government to prove by clear, convincing and unequivocal evidence that Tanaka's act of voting was voluntary and after analysis of the evidence found that the Government had not borne this heavy burden of proof. It was his belief that as a minimal requirement the Court should have transferred the case to the District Court for a de novo hearing on the factual issue of whether Tanaka voted voluntarily. Finaly he doubted that

Section 401(e) should be read to cover the case of a dual national like Tanaka who voted in an election in the country of his second nationality.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.)
Francis J. Lyons, Esq., and James G. Greilscheimer, Esq.,
of Counsel

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress Conviction. John T. Gojack v. United States, 2 U.S.C. 192. (C.A.D.C., May 27, 1965.) D.J. File 146-7-265-175. Appellant was convicted for unlawful refusal to answer questions propounded to him on May 26, 1965 but his prior conviction on the same charge was reversed by the Supreme Court for failure of the subcommittee's authority at the time the questions were asked. Russell v. United States, 369 U.S. 749.

Appellant argued that the subcommittee had no proper legislative purpose and that he had not been adequately informed by the subcommittee of the legislative pertinency of its questions. The court held that these arguments had been foreclosed by the Supreme Court decision in Barenblatt v. United States, 360 U.S. 109 (1959). Appellant further contended that the new indictment was insufficient in that it did not specifically recite the subcommittee's authority to conduct the investigation and that there was no adequate proof at trial of the subcommittee's authority. The Government argued that the proof had been sufficient and, in regard to the sufficiency of the indictment, that not only was the subcommittee's authority well-pleaded but that it was the rule in the District of Columbia Circuit that it was unnecessary to plead the specific chai of authority of the subcommittee. The court stated it could find no merit in appellant's contentions, without indicating on what basis it was upholding the indictment.

Staff: The case was argued by Robert L. Keuch. With him on the brief was Kevin T. Maroney (Internal Security)

Communist Political Propaganda Received in Mail From Abroad. Lamont, d/b/a Basic Pamphlets v. Postmaster General, and Fixa v. Heilberg, (U.S. Supreme Court, No. 491 and No. 848, October Term, 1964) D.J. Files 146-1-51-2892 and 145-5-2580. On May 24, 1965 the Supreme Court handed down its decision (8-0) holding unconstitutional 39 U.S.C. 4008 as an abridgment of First Amendment rights. These cases were instituted to test the constitutionality of a statute enacted in 1962 to establish certain postal procedures with regard to unsealed mail from abroad addressed to persons within the United States. The statute (Section 305 of the Postal Service and Public Employees Salary Act of 1962, 76 Stat. 840, 39 U.S.C. 4008) requires the Postmaster General to detain and to deliver "only upon the addressee's request" any mail having all of five characteristics: (1) unsealed; (2) originating, printed, or otherwise prepared in a foreign country; (3) determined by the Secretary of the Treasury to be "Communist political propaganda"; (4) not furnished pursuant to subscription; (5) not otherwise known to be desired by the addressee. The statute defined "Communist political propaganda" in subsection (b) as matter issued by or on behalf of any country with respect to which tariff concessions have been suspended or have been withdrawn or from which foreign assistance is withheld and which meets the definition of "Communist political propaganda" defined in Section 1(j) of the Foreign Agents

Registration Act of 1938. Subsection (c) of the statute exempts any mail addressed to agencies of the United States Government and educational institutions and mail sent pursuant to a reciprocal cultural international agreement. The statute is administered by the Post Office Department and the Customs Bureau of the Treasury Department. To implement the statute the Post Office maintains screening points through which is routed all unsealed mail from designated foreign countries, at which points such mail is examined by Customs authorities for determination as to whether it is "Communist political propaganda" subject to the statute, and the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days. Prior to March 1, 1965 the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future; after that date the Government discontinued maintaining a record of the persons desiring such propaganda and, under a new practice, sends a notice, to be returned by the addressee for each individual piece of mail desired, and those who do not return the card will be assumed not to desire the identified publication or any similar one arriving subsequently.

Upon receiving from the Post Office a notice that certain mail was being detained under the statute, both Lamont, in New York, and Heilberg, in California, brought suit for a judgment declaring the statute unconstitutional and for an order enjoining the enforcement of the statute on the ground that it violated First Amendment rights of free speech and association and Fifth Amendment rights of due process. Thereupon, in each instance the Post Office Department notified the petitioner that the filing of his complaint was considered an expression of his desire to receive such propaganda and in the future he would receive all such mail. The Government then moved in each case to dismiss the action on grounds of mootness. Since the constitutionality of a federal statute was involved, a three-judge district court was convened in each case.

In Lamont, the three-judge district court (S.D.N.Y.) dismissed the complaint as moot, 229 F. Supp. 913. As to Lamont's argument that the placement of his name on the list of those desiring to receive "Communist political propaganda" violated his constitutional rights, the District Court thought that any legally significant harm to Lamont was merely a speculative possibility and did not present a controversy ripe for adjudication. Lamont appealed from the dismissal and the Supreme Court noted probable jurisdiction.

In Heilberg, the three-judge district court (S.D. Calif.) declined to hold that Heilberg's action was moot, but reached the merits and unanimously held that the statute was unconstitutional under the First Amendment (236 F. Supp. 405). The Government appealed and the Supreme Court noted probable jurisdiction.

The Supreme Court held that there was no "colorable question of mootness" in these cases since the new procedure required the postal authorities to send a separate notice for each item of mail and the addressee to make a separate request for each item and the Government concedes the changed procedure precludes

any claim of mootness and leaves for consideration of the Court the question of the constitutionality of the statute. The Supreme Court further held that the statute as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. The Court quoted from Mr. Justice Holmes in Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437, (dissenting):

> "The United States may give up the Post Office when it sees fit, but while it carried it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . ."

The Court felt that the affirmative obligation imposed upon the addressee is almost certain to have a deterrent effect, especially as to those who have sensitive positions, and whose livelihood might depend on a security clearance, that public officials, like school teachers, might think they might invite disaster if they read what the Government says contains the seeds of treason; and that any addressee is likely to feel some inhibition in sending for literature condemned as "Communist political propaganda". The Court concluded that "this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that was contemplated by the First Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 270".

Staff: The cases were argued by Solicitor General Cox. With him on the briefs were Assistant Attorney General J. Walter Yeagley, Assistant to the Solicitor General, Nathan Lewin, Kevin T. Maroney, and Lee B. Anderson (Internal Security).

Exportation of Munitions. U.S. v. Randall Lee Etheridge, et al. (S.D. Fla.) On May 26, 1965, the grand jury for the Southern District of Florida returned a three-count indictment against four United States citizens and Rudolpho Baboun, the Haitian Consul in Miami, Florida. The indictment contained two substantive counts and a conspiracy count charging violations of 22 U.S.C. 1934 (Section 414, Mutual Security Act of 1954, as amended) and the Munitions Control Regulations issued thereunder (22 C.F.R. 121 et seq.) in connection with the exportation of T-28 surplus military aircraft to the Republic of Haiti in the fall of 1964 without first having obtained the required license from the State Department.

The conspiracy count charged that the planes would be specially equipped with extra fuel tanks in order that the flights from the United States to Haiti could be made nonstop thereby obviating any necessary refueling stops where detection might take place. It was also alleged as part of the conspiracy that for the purpose of avoiding both visual and radar detection the airplanes would be flown out of the United States at very low altitudes and at times when the airport tower was closed. The conspiracy further charged that upon delivery of each airplane to Haiti the sum of $10,000 would be paid by the Haitian Consul

in Miami, Florida. Two aircraft were actually delivered to Haiti and a third airplane was seized by the Bureau of Customs.

Staff: United States Attorney William A. Meadows, Jr. and Assistant United States Attorney Lloyd G. Bates, Jr. (S.D. Fla.); Joseph T. Eddins (Internal Security Division)

Labor Management Reporting and Disclosure Act; Provision of 29 U.S.C. 504 Relating to Members of Communist Party Held Unconstitutional. United States v. Archie Brown (June 7, 1965, N.D. Calif.) D.J. File 146-7-4166. On June 19, 1964, the Ninth Circuit reversed the conviction of Brown on an indictment charging him with a violation of Section 504 which defined as an offense the holding simultaneously of union office and membership in the Communist Party (12 Bull. 372). A majority of the Ninth Circuit said that the section was invalid as a direct restraint on First Amendment activity, and that it denied due process because it did not require a showing of an actual threat to interstate commerce as part of the offense and imputed guilt merely on the basis of association without proof of a specific intent.

On certiorari the Supreme Court affirmed, 5-4. The majority opinion by Chief Justice Warren did not consider the grounds on which the Ninth Circuit had decided the case, but held Section 504 unconstitutional as a bill of attainder, because it imposed "punishment" - exclusion from union office - legislatively on an identifiable group, the members of the Communist Party.

The decision seems to represent an extension of the concept of "punishment" as it had previously been understood. The majority opinion held that "punishment" may include the deterrence and prevention of crime and that the exclusion of Communists from union office to avoid the possibility of political strikes was punishment imposed legislatively and in violation of the doctrine of the separation of powers. The dissenting opinion by Justice White, in which Justices Clark, Harlan and Stewart concurred, pointed out that the decision puts in doubt the validity of numerous "conflict of interest" statutes, such as the provision of the Banking Act upheld in Board of Governors v. Agnew, 329 U.S. 441.

Staff: The Solicitor General argued the case. With him on the brief were Nathan Lewin, Assistant to the Solicitor General and J. Walter Yeagley, Assistant Attorney General, Kevin T. Maroney and George B. Searls (Internal Security Division).

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LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Eminent Domain; Federal Versus State Law; Tenants' Right to Recover Separate Compensation for Trade Fixtures. United States v. Certain Property (C.A. 2, April 2, 1965) D.J. File 33-33-907. The United States condemned the fee to land and improvements in Manhattan. The tenants made separate claims for the "sound value" of their trade fixtures. On an earlier appeal the district court's dismissal of their claims on grounds not here relevant was reversed. The district court awarded the tenants about $100,000, approximately one-half the amount claimed.

On appeal and cross-appeal, the Court of Appeals affirmed. With respect to the Government's appeal the Court held: (1) In the absence of Congressional intent to the contrary, it was free to choose state law to determine what was taken. (2) It selected state law because it was more important for the New York businessman to have the same law apply to all condemnation (federal, state or city) than to have the same law apply to all federal condemnation throughout the country. (3) The tenants were entitled to be separately compensated for their "trade fixtures" which were in the nebulous category of being neither personalty nor realty under New York law. (4) This was true even if, in fact, they added nothing to the value of the building or land. (5) That this resulted in the United States having to pay double compensation and more than the fair market value of the whole was of no moment. (6) The unit rule was inapplicable to this situation. (7) That "sound value" of the trade fixtures (reproduction cost less observed depreciation) was a proper measure of compensation for the tenants' interest. In short, the Court of Appeals ignored or overruled most of the established principles of federal eminent domain law. For this reason, application for certiorari is under consideration now.

Staff: Roger P. Marquis and Edmund B. Clark (Lands Division).

Public Lands; Federal Power Commission License; Reasonableness of Conditions Upon Issuance of License; Validity of Reasonable Conditions on Existing License Upon Issuance of New License. Idaho Power Company v. Federal Power Commission. No. 19637, C.A. 9, June 4, 1965 D.J. File 90-1-2-756. Federal Power Commission issued Idaho Power Company a license in 1954 to construct and operate a hydroelectric project of three power developments on the Snake River. Subsequently several amendments to the license were granted to permit construction and operation of transmission lines within the project. Neither the original license nor the amendments contained a condition that Idaho Power should wheel Government-produced power.

Idaho Power sought an amendment in 1964 to permit two additional lines which would, in part, traverse the public domain. At the request of the Departments of Interior and Agriculture, the Commission issued the amendment, conditioned upon subjecting the entire system to wheeling Government-produced power over lines with excess capacity and to create such excess capacity as the Government

should request, all at Government expense. Idaho Power sought review in the Court of Appeals.

The Court of Appeals affirmed on the grounds that (1) wheeling conditions are valid if reasonable, even when applied to previously licensed portions of the system and (2) wheeling condition was reasonable here as it insured full utilization of existing lines, particularly those over the public domain, before authorizing additional ones. The Court emphasized the Commission's role as "guardian of the public domain."

Staff: Edmund B. Clark (Lands Division).

Zoining; Maryland Law; Changes in Neighborhood Insufficient to Permit Change of Zoning. MacDonald v. Board of County Commissioners. (Court of Appeals of Maryland, May 5, 1965) D.J. File No. 90-1-0-729. A real estate developer obtained from the zoning board of Prince George's County, Maryland, a zoning change from single family residential to high-rise for a tract of land on the Potomac, adjacent to Fort Washington and opposite Mount Vernon. The Secretary of the Interior, by letter to the zoning board, had objected to the rezoning. The circuit court affirmed.

The Court of Appeals reversed on the grounds that (1) Maryland law requires an applicant for a zoning change to show a mistake in the original plan or a change in the character of the neighborhood to justify the rezoning, (2) no mistake had been shown and (3) all the changes shown (new roads and bridges, a golf course, more people, new water and sanitation facilities) were no more directed to high-rise development than single family residence.

Staff: Edmund B. Clark (Lands Division).

Appeals and Procedure: Vacation and Re-entry of Judgment After Time for Appeal Has Expired Does Not Extend Time for Appeal; Rules 73(a) and 77(d), F.R.Civ.P. Lord v. Helmandollar. (C.A. D.C., Nos. 18625 and 18680, June 10, 1965) D.J. File 90-1-18-602. This action was to review interior's invalidation of claimants' locations of placer mining claims on public lands in Arizona on the ground that no valid discovery of valuable minerals had been made. Summary judgment was entered for the Secretary and the office of claimants Washington counsel was notified. After the time for appeal had expired (more than four months after entry of judgment), claimants filed a motion to vacate and to re-enter the judgment to permit an appeal because their Arizona counsel had not seasonably learned of the judgment. The motion was granted. Out of caution, the Government cross-appealed. It contended that the judgment on the merits was correct but that appellate jurisdiction was lacking, the district court being powerless to so extend the time for appeal.

The Court of Appeals dismissed claimants' appeal for lack of jurisdiction and therefore the Government's for mootness. It reasoned that the possible 90-day period for filing an appeal under Rules 73(a) and 77(d), as amended, F.R.Civ.P., had expired and that the purpose of the amended rules was to restrict the potential power of a district court, under Hill v. Hawes, 320 U.S. 520 (1944), "to revive a right of appeal at any time by simply vacating and

re-entering its original judgment." It distinguished recent Supreme Court decisions, which directed appellate review on the merits, where the losing party relied on a misleading act of the district court or adversary at a time when a timely appeal could have been filed.

Staff: Raymond N. Zagone (Lands Division).

Indians; Allotments of Public Lands to Indians Not Residing on Reservations (25 U.S.C. 334); Denial of Patent to Allotment Selection After Issuance of Certificate of Eligibility. Amos A. Hopkins (Dukes) v. Udall. (Civil No. 64-1648-TC, S.D. Cal.) D.J. File No. 90-2-11-6794. 25 U.S.C. 334 provides generally that where any Indian, not residing upon a reservation or for whose tribe no reservation has been provided, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he shall be entitled, upon application to the local Land Office, to have the same allotted to him or his children, in quantities and manner as provided in other sections of Title 25 relating to allotments.

Plaintiff obtained a certificate of eligibility from the Superintendent in the appropriate area and applied to the local Land Office for an allotment of 160 acres of vacant public domain grazing lands in Colorado. The Bureau of Land Management denied the application for a patent on the ground that the land selected was not suitable for an Indian homestead because it was not an economic farming or grazing unit. Upon appeal to the Secretary, the decision rejecting the application was affirmed and petitions for classification were denied.

Thereafter, plaintiff instituted this action, which is one of a number of similar ones brought in the United States District Court for the Southern District of California and in the Western District of Oklahoma, to mandamus the Secretary, to issue a patent and for damages by reason of plaintiff's failure to have obtained the patent applied for. The claim for damages was also based upon allegations that the Secretary or his subordinate officers had distributed and circulated papers and publications which damaged plaintiff's reputation as the organizer of the Tribal Indian Land Rights Association, Inc. and violation of the Civil Rights Acts.

A motion to dismiss was filed on behalf of the Secretary on the grounds (1) that the complaint failed to state a claim upon which relief can be granted; (2) that the Court is without jurisdiction to control and administer public lands; (3) that the United States is the real party in interest; and (4) that the Court is without jurisdiction since no valid grounds for federal jurisdiction exist.

On March 18, 1965, defendant's motion to dismiss was granted and no appeal has been taken. Presumably, the Court accepted as correct the grounds in support of defendant's motion to dismiss. Since the complaint failed to allege that plaintiff had made "settlement" upon the lands selected, as required by the statute, clearly plaintiff was not entitled to a patent. In addition, the Taylor Grazing Act, 43 U.S.C. 315, conferred upon the Secretary the authority

in his discretion to examine and classify any lands withdrawn by Executive Order No. 6964, and the refusal of the Secretary to allot the lands selected on the basis of the factual determination that the lands were unsuitable is conclusive in the absence of fraud, since it is based upon substantial evidence.

Staff: Assistant United States Attorney Richard Dauber (S.D. Calif.) and Herbert Pittle (Lands Division).

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TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CRIMINAL TAX MATTERS
Appellate Decisions

Supreme Court Upholds Sufficiency of Complaint to Toll Statute of Limitations for Offense of Tax Evasion. Max Jaben v. United States (Supreme Court, May 17, 1965.) On April 15, 1963, the day before the expiration of the six year period of limitations for the offense of wilful attempted tax evasion, the Government filed a complaint (following the model Form contained in the Manual, Trial of Criminal Income Tax Cases, Form 1, p. 137) against defendant Jaben in order to toll the statute of limitations for nine months. (See Section 6531, Internal Revenue Code of 1954). The Commissioner determined that the complaint showed probable cause for believing that defendant had committed the offense charged, and issued a summons ordering him to appear at a preliminary hearing at a later date. The preliminary hearing was never held since the grand jury, prior to the date of the hearing, returned an indictment against defendant for the 1956 attempted evasion which the complaint had charged. Defendant, by pre-trial motion, moved to dismiss the indictment on the ground that the complaint failed to toll the statute of limitations since it did not disclose probable cause for believing that he had committed the offense. Following the rejection of this claim by the trial court, defendant pleaded nolo contendere to the count in question, and appealed from the ensuing judgment of conviction on the sole basis of the alleged inadequacy of the complaint. The Eighth Circuit upheld the sufficiency of the complaint and affirmed the judgment of conviction. (See Jaben v. United States, 333 F. 2d 535, reported in United States Attorneys Bulletin, Vol. 12, No. 14). Since a virtually identical complaint had previously been ruled invalid by the Ninth Circuit in United States v. Greenberg, 320 F. 2d 467, the Supreme Court granted certiorari to resolve the conflict. In affirming the conviction, the Supreme Court held that the allegations of the complaint (which is set forth verbatim in the opinion) provided the Commissioner with a sufficient basis on which to make a judgment of probable cause. While the Supreme Court has now definitively upheld the legal sufficiency of such a complaint, United States Attorneys are requested to continue the prior policy of securing approval from the Tax Division's Criminal Section before invoking the complaint procedure.

Staff: Nathan Lewin, Assistant to the Solicitor General; Joseph M. Howard, Norman Sepenuk (Tax Division)

CIVIL TAX MATTERS
Appellate Decisions

Search and Seizure; Records Illegally Obtained by Revenue Agent and Returned by Court Order May Be Obtained Again by Internal Revenue Service Summons. McGarry's Inc. v. Rose (C.A. 1, May 3, 1965), 65-1 USTC ¶9391. A Special Agent, Internal Revenue Service, went to an accountant's office with an Internal Revenue summons requiring the production of certain records and work papers relevant to the determination of income taxes owed by clients

named in the summons. Without serving the summons, he prevailed upon the accountant to turn over the documents. Thereafter, the accountant applied to the district court for suppression and return. The court concluded (223 F. Supp. 684) that the accountant had yielded to the threat that he himself would be investigated if he did not make immediate delivery, and ordered suppression and return, but stated that the Service nevertheless was free to obtain the same documents by future lawful process, provided no information gained by the taking was utilized. A new summons was accordingly served, and the court ordered compliance. On appeal, the First Circuit affirmed, as against the contention that the documents had become tainted and forever out of reach. The Court relied on Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392; Nardone v. United States, 308 U.S. 338, 341; Wong Sun v. United States, 371 U.S. 471, 482; and Wagman v. Arnold, 257 F. 2d 272, 276 (C.A. 2). The contrary decision in Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio) appears erroneous and will probably be appealed by the Government. It is anticipated that McGarry will file a petition for certiorari in the present case.

Staff: John M. Brant and Joseph M. Howard (Tax Division); Assistant United States Attorney Murray H. Falk (D. Mass.)

Suit to Enjoin District Director from Using Evidence Allegedly Obtained by Illegal Search and Seizure by State Officers in Asserting or Proving Tax Deficiencies; District Courts Without Jurisdiction to Entertain Such Action. Leo Zamaroni v. Jay G. Philpott, District Director (C.A. 7, No. 14952; May 21, 1965.) Taxpayer filed an action to enjoin the District Director from using evidence, which had allegedly been illegally seized by state officers, to assert or prove any wagering tax deficiencies against him. The district court dismissed the complaint for lack of jurisdiction. All seized material, except that which was deemed contraband, was returned to taxpayer after the dismissal, and the only issue on appeal was suppression of the evidence.

In affirming the dismissal, the Seventh Circuit held it to be unnecessary to consider the impact, upon civil court proceedings, of the exclusionary rule of Elkins v. United States, 364 U.S. 206, which was formulated in the exercise of the Supreme Court's supervisory power over criminal proceedings in Federal courts. The Court held that the underlying policy manifested by the provisions of Section 7421(b) of the 1954 Code, and 28 U.S.C. 2201, would indicate that judicial intervention in the investigation and administrative determination of tax deficiencies is improper. The Court quoted approvingly from Campbell v. Guetersloh, 287 F. 2d 878, 881 (C.A. 5):

> All questions touching on the weakness of the Director's case and the difficulty of proof will be before the courts for their review once the administrative function is completed. That is when the court may first come upon the scene; not before the investigation has been completed.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

District Court Decisions

Exemptions Under State Law; State Liquor License, Although Exempt Under State Law, Held Subject to Sale by Foreclosure of Federal Tax Liens; Injunction Granted Against Owner of Liquor License from Further Operating Thereunder so as to Preclude His Incurring Further Tax Liabilities. United States v. Emerson W. Smith, et al. (S.D. Cal., January 4, 1965). (CCH 65-1 U.S.T.C. ¶9238). This suit was instituted to foreclose federal tax liens against an alcoholic beverage license issued by the Alcohol Beverage and Control Board of the State of California to taxpayer and used by him in the operation of a lounge. The Court found that not only had taxpayer failed to pay prior withholding and FICA taxes but that he was continuing to incur additional unpaid tax liabilities by virtue of the operation of his lounge. The Court also determined that the only property of value owned by taxpayer was the liquor license and several cases of alcoholic beverages and concluded that, under state law, taxpayer was the owner of the alcoholic beverage license but that Section 688 of the California Code of Civil Procedure provided that such license was exempt from execution and levy. Despite the California prohibition, however, the Court ruled that the state exemption law was inoperative as to a federal tax levy or as to the foreclosure of a federal tax lien, citing Bess v. United States, 357 U.S. 51, and United States v. Heffron, 158 F. 2d 657 (C.A. 9). Furthermore, the Court ruled that, in view of taxpayer's inability to pay the federal taxes which he was continually incurring, an injunction would be issued precluding him from further operation of the lounge, and the Court ordered the liquor license to be delivered to the Internal Revenue Service.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorneys Lloyal E. Keir and Charles H. Magnussen (S.D. Cal.).

Injunctions; Although Injunctive Relief Against Assessment and Collection of Income, Estate or Gift Taxes Lies When Deficiency Notice Has Not Been Sent to Taxpayer, Such Relief Does Not Extend to Withholding and Social Security Taxes. Thomas P. Bolme, et al. v. Raphael I. Nixon, et al. (E.D. Mich., April 1, 1965). (CCH 65-1 U.S.T.C. ¶9365). Taxpayers sought, by this suit, to enjoin the District Director of Internal Revenue from collecting or enforcing assessments of penalties made against them as officers and directors of a Michigan corporation, pursuant to Section 6672 of the Internal Revenue Code of 1954, for failure to withhold and pay over certain payroll taxes.

An involuntary petition in bankruptcy had been filed against the corporation in December of 1960, and on July 15, 1964, the District Director made the assessments in question. The complaint alleged that the assessment was illegal and void on grounds that the Internal Revenue Service did not, prior to assessing the liability, send to plaintiffs a notice of deficiency pursuant to Sections 6212 and 6213 of the Internal Revenue Code of 1954.

In granting the Government's motion to dismiss and denying taxpayers' motion for a preliminary injunction, the Court considered the decisions in Botta v. Scanlon, 314 F. 2d 392 (C.A. 2); Lipsig v. United States, 187 F. Supp. 826 (D.C. N.Y.); and Enochs v. Green, 270 F. 2d 558 (C.A. 5), and held that, although Section 6213(a) of the Internal Revenue Code authorizes injunctive relief against the assessment and collection of income, estate or gift taxes

when a deficiency notice has not been sent to taxpayer, this relief does not extend to withholding and social security taxes. The deficiency notice, of course, entitles taxpayer to petition the Tax Court of the United States for a redetermination of the tax deficiency and that Court has jurisdiction to redetermine income, estate and gift taxes only and not withholding and social security taxes. It is with respect to the former type of taxes that a deficiency notice is required to be sent to a taxpayer, and, where such a notice is not sent, injunctive relief is available to prevent the assessment and collection of the tax without complying with the statutory requirements. Since no deficiency notice is required and no petition may be filed in the Tax Court with respect to payroll taxes, injunctive relief is not available, and assessments of such taxes cannot be enjoined.

Staff: United States Attorney Lawrence Gubow (E.D. Mich.); and John W. Johnson (Tax Div.).

State Court Decision

Probate; Executrix Surcharged for Disbursement of Assets of Taxpayer's Estate to Claimant Not Entitled to Priority Over Tax Claim Made When no Tax Claim Had Been Filed But With Knowledge of Possible Tax Claim. Matter of Albert Clemente. (Surrogate's Court, N.Y., April 20, 1965). Taxpayer died on November 18, 1953, and his wife qualified as executrix of his estate on January 28, 1954. Taxpayer and his wife had filed joint income tax returns for the years 1950 and 1951 and, at a hearing on the Government's objections to the final account of the executrix, she testified that she knew that an investigation of a possible liability for income taxes was pending at the time of taxpayer's death. On March 29, 1954, the executrix made a payment to a claimant against the estate and at that time no claim for taxes had been filed. However, the investigation resulted in a deficiency notice being issued and a petition being filed in the Tax Court of the United States. Subsequently, on February 8, 1957, a stipulated decision was entered in the Tax Court determining tax deficiencies and penalties due from the decedent-taxpayer and an assessment was made on March 28, 1957.

In holding that the executrix was personally liable for the unauthorized payment to the claimant whose claim was not entitled to priority over the tax claim, the Court noted that Section 208 of the Surrogate's Court Act provides that an executor shall not be chargeable by the holder of an unpresented claim for disbursement of the estate assets made in the absence of timely presentation of the claim, but concluded that the exception to this rule, to the effect that this provision shall not apply in respect to any claim of which the fiduciary had personal knowledge at the time of the disbursement, applied to the circumstances presented. Because the executrix testified that she knew of the tax investigation at the time of taxpayer's death and the claim in question was thereafter paid, the Court concluded that she had actual knowledge of the pending tax claim of the United States and that she was, therefore, personally liable for the unauthorized payment plus interest.

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

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