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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 14 February 4, 1966 No. 3

IMPORTANT NOTICE

Effective immediately deeds issued because the Federal Housing Administration is the successful bidder at foreclosure sales conducted at its instance (apartments, single family dwellings, etc.) should be made out to "Secretary of Housing and Urban Development, of Washington, D. C., his successors and assigns" as grantee.

APPOINTMENTS - UNITED STATES ATTORNEYS

The nominations of the following United States Attorneys have been submitted to the Senate for confirmation:

California, Northern - Cecil Poole (reappointment)
Tennessee, Middle - Gilbert S. Merritt, Jr.

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ADMINISTRATIVE DIVISION

Acting Assistant Attorney General for Administration John W. Adler

WITNESSES FOR INDIGENT PERSONS

The Department has received a number of inquiries relating to administrative and fiscal procedures under the Criminal Justice Act and in connection with habeas corpus matters, particularly as regards witnesses for indigent defendants and petitioners. The following summary is furnished for quick reference:

A. Criminal Cases - Criminal Justice Act

In volume 5, page 723, United States Attorneys Bulletin for December 6, 1957, all offices were reminded that Rule 17(b), F.R.Cr.P., sets out in detail the requirements which must be satisfied before a subpoena will be issued upon the motion or request of an indigent defendant. The Criminal Justice Act does not change these requirements.

Attorneys for indigent defendants should be advised that Rule 17(b) requires the filing of a motion or request for the issuance of subpoenas, and that the motion shall be supported by an affidavit of indigency. Supoenas must be based on a court order allowing the witnesses to be produced at Government expense.

United States Attorneys should certify as to the attendance of witnesses of indigent defendants in the same manner as in the case of Government witnesses. See the instructions on pages 123 and 124, Title 8, U. S. Attorneys' Manual. Prior to certification, the U. S. Attorney should determine that the subpoena was issued in accordance with Rule 17(b) and that all the requirements of the Rule have been met.

Requests for the issuance of subpoenas duces tecum by court-appointed attorneys should be fully justified since the production of records under seal, in lieu of production by the witness personally, is permissible under Rule 44, F.R.C.P., and Rule 27, F.R.Cr.P.

U. S. Attorneys are requested to guide court-appointed attorneys as to allowances payable by the Government to witnesses for indigent defendants. Such allowances must not exceed those authorized for Government witnesses. If the court allows the indigent to produce an expert witness, the U. S. Attorney should forward a Form 25B in the same manner as he does for Government witnesses, indicating that the fees were negotiated and were approved by the court.

U. S. Marshals receiving subpoenas for service from a court-appointed attorney should insure that the subpoenas were issued pursuant to an order of court. If so, they shall be handled in the same manner as subpoenas for Government witnesses, including the payment of witness fees and expenses from the witness appropriation.

When subpoenas for an indigent defendant's witnesses are forwarded to another district for service, the forwarding marshal should show on Form USM-9 (see Memo No. 442), immediately below the word "Subpoena", the following: "For indigent defendant per Rule 17(b), F.R.Cr.P."

B. Civil - Habeas Corpus

The above instructions also apply to indigent petitioners in the State or Federal institutions filing writs of habeas corpus in Federal courts. See 39 Comp. Gen. 133, in which it is stated that authority for charging the U. S. with witness's fees and expenses in habeas corpus proceedings rests in Rule 17(b). See U. S. Attorneys Manual, Title 8, pages 141 and 142; and U. S. Marshals Manual, pages 503.37 and 503.38.

Section 1825, Title 28, U. S. Code, was amended by P.L. 89-162 to provide that in proceedings in forma pauperis (for a writ of habeas corpus or in proceedings under Section 2255 of this Title) the Marshal shall pay all fees of witnesses for the party authorized to proceed in forma pauperis, on the certificate of the district judge. Since United States Attorneys may not have first-hand knowledge of the attendance of these witnesses, it would seem proper for the court to look to his Clerk of the Court for the preparation of attendance certificates.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 2, Vol. 14 dated January 21, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
243-S2	1-17-66	U.S. Attorneys	Early Production of Witnesses' Statements Pursuant to 18 U.S.C. 3500 and Giving of Lists of Witnesses
428-S1	1-20-66	U.S. Attorneys & Marshals	Travel on Official Duty Time

ORDERS	DATED	DISTRIBUTION	SUBJECT
352-66	1-13-66	Washington, D.C., U.S. Attorney & Marshal Only	Relating to Confinement of Persons Committed to Correctional Institutions of District of Columbia

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Commercial Bank Merger in Credit Card Field Challenged as Violation of Section 7 of Clayton Act. United States v. First National City Bank, et al., (S.D. N.Y.) D.J. File 60-0-37-894. On December 30, 1965, a complaint was filed charging violation of Section 7 of the Clayton Act by the following defendants:

First National City Bank,
FNCB Services Corporation, a subsidiary of First National City Bank
Carte Blanche Corporation, a subsidiary of FNCB Services Corporation
Hilton Credit Corporation, operator of the Carte Blanche general purpose credit card
Hilton Hotels Corporation, majority stockholder of Hilton Credit Corporation.

The complaint alleged that First National City Bank, Hilton Hotels Corporation and Hilton Credit Corporation proposed to consummate a plan of acquisition and merger on December 31, 1965, whereby Carte Blanche Corporation would acquire all of the outstanding shares of, and merge with, Hilton Credit Corporation. Under the plan, shareholders of Hilton Credit Corporation, including Hilton Hotels Corporation, would receive approximately $12 million and a 50 per cent economic interest in Carte Blanche Corporation. FNCB Services Corporation would retain voting control and a 50 per cent economic interest in Carte Blanche Corporation.

The complaint prayed for the issuance of a temporary restraining order and preliminary injunction to enjoin the parties from taking any action to consummate the proposed acquisition pending adjudication of the matter on the merits.

The Hilton Credit Corporation Carte Blanche credit card plan is the third largest general purpose credit card plan operating on a national and international scale. In 1964 it had approximately 400,000 card holders, 100,000 participating business establishments and billings of $90,000,000.

The complaint defines a general purpose credit card as a credential which provides the holder with the right to purchase goods or services on credit at a wide variety of business establishments.

General purpose credit card companies issue such credit cards, purchase for collection the accounts receivable arising from the use thereof, and collect payment from card holders.

Only three general purpose credit card companies operate on a national and international scale. They are American Express Company, Diners Club, Inc., and Hilton Credit Corporation.

A number of other companies including commercial banks operate general purpose credit card plans on a local basis.

First National City Bank is the second largest commercial bank in the United States and the largest in New York State.

The complaint alleges that First National City Bank is one of the most likely potential entrants into the general purpose credit card field on a national and international scale and that such entry will probably occur by internal expansion if the acquisition complained of is enjoined.

The complaint alleges the following anticompetitive effects of the acquisition:

(a) Potential competition between First National City Bank and FNCB Services Corporation, on the one hand, and Hilton Credit Corporation, on the other hand, in general purpose credit cards on a national and international scale will be eliminated.

(b) Actual potential competition generally in general credit cards on a national and international scale will be substantially lessened.

(c) Actual competition in commercial banking in the New York City area will be substantially lessened.

On December 30, 1965, after hearing argument from the Government and the defendants, Judge William B. Herlands issued a temporary restraining order enjoining the defendants from taking "any further action to consummate the acquisition and merger." However, by operation of Delaware law and without any further action by defendants, the acquisition and merger became effective on December 31, 1965.

On January 4, 1966, Judge Charles M. Metzner approved a stipulation entered into the parties requiring the defendants to maintain the business of Carte Blanche Corporation in a condition which will permit its disposition as a going business; to refrain from commingling the assets or properties of Carte Blanche Corporation with those of First National City Bank, FNCB Services Corporation or any corporation owned or controlled by either of such defendants; to refrain from taking any action which would detract from the value of the business of Carte Blanche Corporation or of the assets or properties of Carte Blanche Corporation, including the Carte Blanche general purpose credit card trade name; and to refrain from taking any action to transfer or encumber the stocks issued in connection with the acquisition and merger. Defendant Hilton Hotels Corporation agreed to place the monies it will receive pursuant to the merger in escrow so as to enable it to purchase the business of Carte Blanche Corporation should a final decision in the matter require it. First National City Bank is enjoined from conditioning the use of its banking services upon the use of Carte Blanche Corporation general purpose credit card services and Carte Blanche Corporation is similarly enjoined from conditioning the use of its general purpose credit card services upon use of First National City Bank banking services.

The stipulation was agreed to by the Antitrust Division after a hearing before Judge Ryan in which Judge Ryan stated that a hearing on the preliminary injunction could not be held for two weeks and that he might have to amend Judge Herlands' temporary restraining order along the lines of the stipulation unless the Government agreed to the stipulation.

Staff: Gerald R. Dicker, Bertram M. Kantor and Robert D. Canty (Antitrust Division)

Concrete Pipe Companies Indicted for Price Fixing. United States v. International Pipe and Ceramics Corporation, et al., (D. N.J.). United States v. International Pipe and Ceramics Corporation, et al., (D. N.J.) D.J. Files 60-16-66 and 60-16-68. On January 11, 1966, a grand jury for the District of New Jersey at Newark returned two indictments charging five corporations and three individuals with a violation of Section 1 of the Sherman Act. The defendants in the first indictment are:

International Pipe and Ceramics Corporation and its predecessor, Lock Joint Pipe Company, East Orange, New Jersey; Allan M. Hirsh, Jr., chairman of the board of directors and chief executive officer of International Pipe and Ceramics Corporation and formerly president of Lock Joint Pipe Company; Paul Maloney, formerly sales manager for both companies; and Martin Marietta Corporation, New York, New York and Grover M. Hermann, former chairman of its board of directors.

In the first indictment the defendants are accused of entering into a conspiracy to fix prices, to allocate and divide orders, and to submit collusive price quotations for certain types of low pressure and non-pressure concrete pipe in the states lying east of the Rocky Mountains, except Texas, Louisiana, and Mississippi. Concrete pipe sales during 1958-1962, the period of the conspiracy, were $23,000,000. Most of the concrete pipe was used in connection with the construction of irrigation and sewer systems.

Named as defendants in the second indictment are:

International Pipe and Ceramics Corporation and its predecessor, Lock Joint Pipe Company, East Orange, New Jersey;

Kerr Concrete Pipe Company, Paterson, New Jersey;

Martin Marietta Corporation, New York, New York; and

North Jersey Concrete Pipe Co., Inc., Irvington, New Jersey.

The second indictment charges that defendants conspired to fix prices, to allocate and divide orders, and to submit collusive price quotations for another type of non-pressure concrete pipe in northern New Jersey. In 1961 the defendants had total sales of approximately $7,000,000. The concrete pipe involved in the conspiracy, which began in 1960 and continued until 1962, was used in connection with the construction of highways and sewer systems.

The defendants in both indictments were charged with taking part in periodic meetings at which they decided which companies would submit the low quotations on various projects according to agreed-upon percentages of the total available business.

Staff: Samuel London, John H. Clark and Howard Breindel
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

SUPREME COURT

PATENTS

Supreme Court Holds That "Copending Patent" Is Relevant Reference in Determining Patentability of Invention. Hazeltine Research, Inc., et al. v. Edward J. Brenner, Commissioner of Patents (Sup. Ct., December 8, 1965). D.J. File 27-6129. The Supreme Court affirmed unanimously the decision of the Court of Appeals for the District of Columbia Circuit which had held an application for patent, pending in the Patent Office, to be a part of the "prior art", as that term is used in Section 103 of the Patent Act of 1952. The Court (per Black, J.) rejected petitioners' argument that the phrase "prior art" included only inventions or discoveries which were publicly known at the time an invention was made, holding that there was "no reason to depart from the plain holding and reasoning" of Alexander Milburn Co. v. Davis-Bournonville Co., 270 U.S. 390. In that case, the Court had held a patent invalid because at the time it was applied for there was already pending an application which completely disclosed the subject matter of the patent sought. The Court saw no distinction between the Milburn situation and the instant case where the "copending" patent partially, rather than completely, disclosed the subject matter of petitioners' application. The Court's decision settles the controversy which had arisen, since Milburn, concerning whether a "copending patent" is an available reference in determining patentability of an invention.

Staff: J. William Doolittle and Lawrence R. Schneider (Civil Division)

COURTS OF APPEALS

ADMIRALTY -- LONGSHOREMEN'S AND HARBOR WORKERS COMPENSATION ACT

Injury Occurring Between Dock and Ship Held to Have Occurred Upon Navigable Waters. O'Keeffe v. Atlantic Stevedoring Co. (C.A. 5, No. 21770, December 8, 1965). D.J. File 83-20-6. The Court of Appeals, reversing the district court, sustained an award of benefits by the Deputy Commissioner of the Bureau of Employees' Compensation, Department of Labor, under the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. 901, to the widow of a longshoreman who fell into the water between the dock and the vessel into which he was helping to load rolls of paper. The longshoreman in falling struck his head on either the dock or the side of the ship (the evidence was inconclusive as to which) and drowned in the water between the two.

The Court of Appeals, stating that "he was off the dock and upon navigable waters when injured," ruled that the Deputy Commissioner's award of benefits "seems not only reasonable, it appears to be conclusive."

Staff: Leavenworth Colby (Civil Division)

ALIEN PROPERTY

Government Not Estopped to Assert Sixty Day Limitation Period for Filing of Complaints Prescribed by Trading With Enemy Act. Masae Kondo v. Katzenbach, Masaru Okamoto v. Katzenbach, and Ayako Honda v. Katzenbach (C.A.D.C., Nos. 19282, 19283, 19284, January 13, 1966). D.J. Files 9-21-2935, 9-21-2936, and 9-21-2937. These actions were brought by several thousand Americans of Japanese ancestry to set aside the dismissal by the Attorney General of their debt claims based upon yen deposits in American branches of the Yokohama Specie Bank, Ltd. The property in the United States of this Japanese Bank had been vested as Japanese enemy property under the Trading with the Enemy Act, 50 U.S.C. App. 1.

In 1946 Congress enacted Section 34 of the Trading with the Enemy Act authorizing the Alien Property Custodian (predecessor to the Attorney General in these matters) to pay from the proceeds of vested property the debts of former owners of the vested property that were due and owing on the vesting date.

Acting under Section 34(b) of the Act, the Alien Property Custodian set November 18, 1949, as the final date for filing debt claims against the funds of the Yokohama Specie Bank, and appellants did file such claims. In 1958 the Custodian mailed appellants, among other claimants, a letter telling them that their claims would be allowed at the post-war rate of exchange of yen for dollars which amounted to approximately 2 per cent of the pre-war rate. The letters instructed claimants to send in their original certificates of deposit or equivalent proof and that if proper proof were submitted allowance of the claims at the post-war rate would be recommended. Appellants were further advised that claims not timely submitted would be dismissed as abandoned. Appellants did not comply with the requirements of this letter.

In 1961 the Custodian sent to all claimants, including appellants, a Final Schedule of all Yokohama Bank claims allowed and the proposed payment in each case. A Notice was included advising that "[i]f your claim is not shown on the Schedule, it is for the reason that the claim has been dismissed and disallowed by this Office"; that any claimant considering himself aggrieved "may, within sixty (60) days" file for judicial review; and that "[i]f no such complaint for review is filed within the sixty-day period, payments to claimants will be made" in accordance with the Schedule. Appellants did not file for judicial review within 60 days of the letter, as required by § 34(f) of the Act.

The Government's motion to dismiss appellants' complaints brought in 1964, seeking review of the dismissal of the claims, was granted by the district court, and the Court of Appeals (per Judge Tamm, Judge Wright dissenting) affirmed. The majority rejected appellants' contention that the Government was estopped to invoke the statutory limitation period, because it created the impression in the 1958 letter that appellants would be acquiescing in the lower award by submitting proof of their claims and that after 1961 appellants had fairly assumed that their claims would be treated in the same manner as those of claimants in another case Arantani v. Kennedy, 317 F. 2d 161, 323 F. 2d 427, cert.

granted, 375 U.S. 877, remanded to district court, 376 U.S. 936, settlement approved, 228 F. Supp. 706.

The Court stated that "estoppel cannot be used against the Federal Government," and that in any event the relevant correspondence had carefully apprised appellants of their rights, and the record would not support a holding of estoppel.

Staff: David L. Rose, Armand B. DuBois (Civil Division)

Remainder Interest in Testamentary Trust Becomes "Vested in Possession," for Purposes of Divestment Statute, Upon Death of Last Life Tenant, Even Though Actual Distribution of Property Was Delayed by Litigation. The Northern Trust Company v. Biddle, (Appellate Court of Illinois, No. 49921, December 9, 1965.) D.J. File F-63-11101. Public Law 87-846 provides that alien property vested by the Attorney General under the Trading with the Enemy Act shall be divested if it has not become "vested in possession in" or "payable or deliverable to" the Attorney General prior to December 31, 1961. The Attorney General in this case had a vested remainder in the testamentary trust of Louisa Bigelow. The last life tenant in the trust died in 1951, at which time the remainder became distributable. However, more than ten years of litigation ensued, in which substantial issues were contested relating to the validity of the Attorney General's vesting orders and whether the remaindermen who were vested had a valid interest in the trust. On December 31, 1961, the Attorney General, having prevailed in the lower courts, was defending an appeal in the Illinois Supreme Court, and distribution of the trust had been stayed pending outcome of the appeal (which the Attorney General won).

The remaindermen argued that the property had not become vested in possession in, or payable or deliverable to, the Attorney General by December 31, 1961, because at that date the Attorney General was not in a position to obtain actual possession of the property because of pending litigation in which substantial issues relating to his rights were involved.

The Appellate Court held that the term "vested in possession" refers to the date on which the right to possession accrues, rather than the date on which actual possession becomes practicable. The right to possession of the remainder interest accrued upon the death of the last life tenant in 1951, although actual possession did not become practicable until after December 31, 1961. Accordingly, the Court held that the divesting statute did not affect the Attorney General's interest.

The remainder interest involved in this case is worth more than $900,000. An appeal to the Illinois Supreme Court is expected.

Staff: Robert V. Zener (Civil Division)

CAPEHART HOUSING ACT

Capehart Housing Corporations Whose Stock Is Wholly Owned by Government Are Not Alter Egos or Agents for Purposes of Service and Jurisdiction of Persons Who Originally Owned Stock. Great American Insurance Co. v. Louis Lesser Enterprises, Inc., et al (C.A. 8, Nos. 18,048 and 18,049, December 16, 1965).

D.J. Files 145-4-1411 and 145-4-1409. The assignee of a sub-contractor on a Capehart Housing project at Fort Leonard Wood, Missouri sued the two involved Capehart Housing Corporations, "C-9" and "C-10," which had been authorized to do business in Missouri, in an attempt to obtain, on an alter ego theory personal jurisdiction over the prime contractors (California corporations) which had not been authorized to do business in Missouri. At the time of the service of process, the stock of the Capehart corporations, was wholly owned by the Department of the Army and the officers of the corporations were Department of the Army personnel.

The Eighth Circuit ruled that, at least from the time the corporate stock was transferred from the prime contractors to the Department of the Army, C-9 and C-10 were instrumentalities of the Federal Government and were neither alter egos nor agents of the private contractors for purposes of service and jurisdiction.

Staff: Harvey L. Zuckman (Civil Division)

EMPLOYEE DISCHARGE

Discharge of NASA Employee for Falsifying Official Time and Attendance Reports and Fraudulently Obtaining Overtime Compensation Sustained. Agatha Mendelson v. Macy, (C.A.D.C., No. 19310, January 13, 1966). D.J. File 35-16-254. The Court of Appeals affirmed a decision of the Civil Service Commission affirming a dismissal of the appellant, a secretary employed by NASA, for having falsified official time and attendance reports and fraudulently obtaining overtime compensation. Appellant did not deny that she claimed overtime in excess of the hours she was actually in her office on the days for which the overtime was claimed, but contended that she had simply overstated her time in order to recoup overtime which she had worked on weekdays, but for which she had made no claim.

The Court of Appeals held that the Commission's finding of fraud, based on evidence revealing a consistent pattern of excessive claims for weekend work, was neither arbitrary nor unreasonable, and stated that there was a rational basis in the evidence for the Commission's finding that the overtime claims were deliberately falsified. It also rejected appellant's contention that the Commission acted arbitrarily in sustaining her discharge, rather than applying some lesser sanction.

Staff: Former United States Attorney David C. Acheson, Assistant United States Attorneys Frank Q. Nebeker, Arnold T. Aikens and Allan M. Palmer (Dist. Col.)

FEDERAL HOUSING AUTHORITY LOANS

United States Held Entitled to Recover From Bank Which Made Federal Housing Authority Loan Upon Non-genuine Signature of Payee. United States v. First National City Bank of New York (C.A. 2, No. 29429, November 24, 1965). D.J. File 77-51-2650. This suit was brought by the United States to recover a sum paid the bank by FHA when certain payees defaulted on a FHA loan made by the bank. The bank made the loan to one Victoria North, which was an alias of the

borrower, Mary Morgan. The applicable regulation, 24 C.F.R. 201.2(a), provides that in order for a FHA loan issued by a bank to be eligible for insurance "the signature of all parties to the note must be genuine." The Court of Appeals, with Judge Moore dissenting, ruled that the requirement that signatures be "genuine" was not satisfied by the fact that the signature was made by a person not fictitious.

The Court reasoned that the requirement of genuineness of signature, in context "manifests that the use of a false name would impair if not preclude adequate checking of the answers to the questions in the Credit Application and make it difficult if not impossible for the insured effectively to carry out its disbursement duties under [24 C.F.R. 201.5 (c)]."

Staff: United States Attorney, Robert M. Morgenthau; Assistant United States Attorneys Arthur M. Handler and Stephen Charnas (S.D. N.Y.)

FEDERAL TORT CLAIMS ACT

Government's Negligence Was Not Proximate Cause of Crash of Decedent's Light Aircraft in Vicinity of Air Force Base. Wenniger v. United States (No. 15,233, C.A. 3, November 24, 1965). D.J. No. 157-15-35. This Tort Claims Act suit was instituted by the administrators of the estate of William Miller who was killed when his light aircraft crashed in the vicinity of the Dover Air Force Base, as a result of an inflight failure. The district court found that decedent's airplane in all probability crashed because it encountered extreme wing tip vortex turbulence generated by an Air Force C-124, flying in connection with Dover Air Base operations across a civilian airway, and that the Civil Aeronautics Administration (now the FAA) and the Air Base commander were negligent in not warning civilian airmen, including decedent, of the unusual flying hazards which existed in the airway due to Air Force practice flights. The trial court found, however, that plaintiffs failed to establish that the negligence of the CAA or the commander was a proximate cause of the accident, and, even if it was, decedent's own negligence was also a proximate cause of the accident, thus barring any recovery. See 234 F. Supp. 499. On plaintiff's appeal, the Third Circuit affirmed, stating that the lower court had committed "no substantial error."

Staff: Lawrence R. Schneider (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Held Not Negligent in Construction and Maintenance of Post Office Steps on Which Plaintiff Fell. Vivian P. Boe v. United States (C.A. 8, No. 18005, November 9, 1965). D.J. File 157-56-27. In this Tort Claims Act action, the district court found that there was insufficient evidence to establish negligence by the Government in the maintenance of the steps of a Post Office in New Bedford, North Dakota, or in failing to make adequate provisions to prevent rain, snow or sleet from collecting on the steps. The Court of Appeals affirmed on the basis of the district court's opinion (which is reported

at 234 F. Supp. 942), stating that the district court's finding of non-negligence was not clearly erroneous.

Staff: United States Attorney John O. Garaas; Assistant United States Attorney Gordon Thompson (D. N.Dak.)

SOCIAL SECURITY ACT

Secretary's Denial of Disability Benefits Upheld. Andrew Williams v. Anthony J. Celebrezze, (C.A. 4, No. 9667, November 23, 1965). D.J. File 137-84-254. In this per curiam opinion, the Court of Appeals noted that the Social Security Amendments of 1965 (which were passed after argument of the case in the Court of Appeals) had no effect on the case, and concluded that substantial evidence supported the Secretary's decision that claimant was not disabled. The record showed that claimant had some fairly minor impairments, including minimal silicosis. No vocational findings were made. Apparently the Court adopted, sub silentio, our argument that for a man with only these minor impairments, no more need be shown in denying benefits.

Staff: Robert C. McDiarmid (Civil Division)

SUITS IN ADMIRALTY ACT

Suits in Admiralty Act Limitation Period Held Tolled During Contractor's Exhaustion of Administrative Procedures. Northern Metal Co. v. United States (C.A. 3, No. 15070, August 27, 1965). D.J. File 61-62-430. On the ground that an overpayment had been made on a stevedoring contract between the parties, the Government on November 30, 1961, deducted $530.96 in paying an invoice which had been submitted by the contractor on November 24, 1961 in connection with another contract. Following the disputes clause prescribed in its contract, the contractor protested the deduction to the contracting officer and appealed his adverse decision to the Board of Contract Appeals. On November 26, 1963, three months after the Board's adverse decision, the contractor commenced this action under the Suits in Admiralty Act to recover the amount of the deduction. On the Government's motion, the district court entered summary judgment holding that the suit was barred by the two-year Suits in Admiralty Act limitation provision, 46 U.S.C. 745, since the cause of action accrued on November 24, 1961, when the contractor submitted its invoice, not on November 30, 1961, when the Government paid the amount of the invoice less the deduction. The court rejected the contractor's argument that the time it consumed in exhausting the administrative procedures required by its contract extended the limitations period.

The Third Circuit agreed that the cause of action accrued when the invoice was submitted, reasoning that "the Government's nonpayment of this sum -- or its deduction, as libelant calls it -- is not a tort for which a separate cause of action arose. It is nothing more than the nonpayment of part of the contract price." The Court of Appeals also rejected the contractor's contention that its suit was timely since its cause of action did not arise until the final decision of the Board of Contract Appeals was rendered. However, the Third Circuit, disagreeing with the decision of the Second Circuit in States Marine Corp. of Delaware v. United States, 283 F. 2d 776 (1960), reversed on

the ground that the statutory limitation period was tolled during the pendency of the administrative proceedings, and, therefore, appellant's suit was timely when filed on November 26, 1963.

Staff: Martin Jacobs (Civil Division)

DISTRICT COURT

FALSE CLAIMS ACT

Application for Government Loan Is Not "Claim" Within Meaning of False Claims Act. United States v. Neifert-White Company (D. Mont., December 6, 1965). D.J. File 120-44-88. In a civil suit under the False Claims Act, 31 U.S.C. 231, defendant was alleged to have submitted fraudulent documents to the Commodity Credit Corporation as a basis for twelve loans, as a result of which the latter disbursed more loan funds than allowed by the program. The loans were not in default and the complaint demanded recovery of the statutory forfeitures (of $2,000) for each false loan application presented. The District Court, applying the definition of a "claim" set forth in United States v. Cohn, 270 U.S. 339, granted defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted, reasoning that loan applications supported by invoices furnished by defendant were not "claims for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant". The Government relied on United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa 1963), involving the same program and the same type of fraudulent invoice in support of loan applications, in which it was held that where money was actually paid out in response to a false application for a loan there was a "claim" within 31 U.S.C. 231. The Court in the instant matter did not find Cherokee "convincing". Further, the Court appears to have read into the False Claims Act a requirement that there be a pre-existing contractual liability on the part of the Government to the applicant for Government payment. The Court took no cognizance of the fact that the obligation of the Government to disburse funds was created by Congress.

Staff: United States Attorney Moody Brickett and Assistant United States Attorney Clifford E. Schleusner (D. Mont.).

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

ASSIMILATIVE CRIMES ACT
18 U.S.C. 13

Prosecution of Military Personnel. The Assimilative Crimes Act punishes acts committed on federal reservations if they would be offenses under the law of the state in which the reservation is located and if they are not made punishable by any other "enactment of Congress." The Uniform Code of Militay Justice punishes some acts which are not otherwise federal offenses but which may be offenses under state law. Since the Uniform Code of Military Justice was "enacted" by Congress, the question has arisen whether military personnel who commit, on federal reservations, acts punishable under the Uniform Code of Military Justice may be prosecuted in federal court under the Assimilative Crimes Act. It is the position of the Department, based on Franklin v. United States, 216 U.S. 559 (1910), that military personnel, although subject to the Uniform Code of Military Justice, are prosecutable under the Assimilative Crimes Act for offenses committed on Federal reservation.

RIGHT TO COUNSEL BEFORE GRAND JURY

Denial of Petition to Have Counsel Present With Witness Before Grand Jury Is Not Appealable; No Constitutional Right to Counsel Before Grand Jury (Dictum). Directory Services, Inc., et al. v. United States (C.A. 8, No. 18,169 November 22, 1965). D.J. File 97-56-35. (See other case reported in United States Attorneys' Bulletin, Vol. 13, No. 23, p. 475.)

Directory Services, Inc., whose officers were ordered to appear with corporate records before a grand jury pursuant to a subpoena duces tecum, petitioned the district court to permit the officers' counsel to appear with them before the grand jury. The petition asserted that the grand jury investigation seeks evidence under which an indictment may be returned against the corporation or its officers who have a constitutional right under the Sixth Amendment to counsel, presumably on the ground that the process had become accusatory rather then investigatory. The petitioner relied principally upon Escobedo v. Illinois, 378 U.S. 478 (1964). The district court denied the petition and petitioner appealed under 28 U.S.C. 1291. The Court of Appeals held that the order appealed from was not a "final order", thus not appealable, relying on Cobbledick v. United States, 309 U.S. 323 (1940) and DiBella v. United States, 369 U.S. 121 (1962), and dismissed for want of jurisdiction. In dictum the Court stated that the appeal was frivolous because there is no constitutional right to counsel before a grand jury.

BRIBERY

No Proof of Intent to Influence Official Action Required for Conviction Under 18 U.S.C. 201(f). United States v. Irwin (C.A. 2, December 10, 1965). Irwin, a certified public accountant, was convicted in a jury trial in the Southern District of New York for giving $400 to an employee of the Internal Revenue Service because of her auditing of the income tax returns of several of his clients. Irwin was sentenced to one year's imprisonment.

In affirming Irwin's conviction, the Court of Appeals held that in order to convict a person under 18 U.S.C. 201(f) proof of the specific intent to influence the actions of a Government official is not required stating:

> /W/hat Congress had in mind /in enacting Section 201(f)/ was to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity for or because of an official act already done or about to be done. The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees. . . .

However, the Government must prove that the emolument was knowingly given for the purpose of giving the public official additional compensation or a reward, gratuity, or similar favor, by reason of some official act performed or to be performed by such public official.

This case represents the first court of appeals' interpretation of Section 201(f)-(i) of the recently revised bribery provisions. Before dismissing any bribery prosecution because of a lack of proof that the emolument was paid or accepted with the intent to influence official action, careful consideration should be given to the possibility of maintaining an action under these subsections.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Andrew J. Maloney, John E. Sprizzo and David M. Dorsen (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Second Circuit in Banc Reverses Ruling as to Standard of Proof in Deportation Case of Long-Term Alien Residents. Joseph Sherman v. INS (C.A. 2, No. 29,487, January 17, 1966) D.J. File 39-36-329.

In the United States Attorneys Bulletin of October 15, 1965 an opinion of September 22, 1965 in the above case by the majority of a panel of the Second Circuit was reported which held that in deportation proceedings involving long-term alien residents the evidence must establish deportability of the alien beyond a reasonable doubt. Judge Waterman writing for himself and Judge Smith said it was for the Board of Immigration Appeals to decide who were to be considered as long-term alien residents. Judge Friendly dissented on the ground that the imposition of a special judicially prescribed burden of persuasion on an ill-defined group of cases would introduce confusion and uncertainty into deportation law. He viewed the Immigration and Nationality Act and its legislative history as clearly indicating that in all deportation cases deportability was to be established upon the basis of reasonable, substantial and probative evidence. He felt that since the Government had met this burden of proof in the case the petition for review of the deportation order should have been denied.

A petition for rehearing in banc by the respondent, the Immigration and Naturalization Service, was filed and the Second Circuit agreed to reconsideration of the petition for review of the deportation order. After reconsideration in banc the Second Circuit denied the petition for the reasons stated in the dissent of Judge Friendly. Judges Waterman and Smith dissented and adhered to the views expressed in their prior opinion.

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

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Port Security. Joseph Clinton McBride v. E. J. Roland, Commandant, U. S. Coast Guard (S.D. N.Y., Civil No. 1510). Plaintiff, a merchant seaman, was denied a special validation of his mariner's documents by the Commandant of the Coast Guard. This denial was based on evidence developed at a full confrontation hearing that for more than twenty years (beginning in 1936 when plaintiff joined the Communist Party) plaintiff had knowingly and actively participated in the Party and, at the direction of the Party, in Party-inspired organizations and activities. This evidence also established that plaintiff was well indoctrinated in and fully recognized, accepted and approved the aims and objectives of the Communist Party, including the overthrow of the present form of government in the United States by force and violence and Communist Party domination of the world.

On the basis of evidence of record the Commandant concluded that plaintiff's presence on board vessels would be inimical to the security of the United States. After an extensive review of the evidence, the Court (Ryan, C. J.), in an opinion filed December 16, 1965, found that the Commandant's conclusion was fully warranted on the evidence.

The Court also found that the procedures employed by the Coast Guard in reaching the administrative decision, which were based on the Magnuson Act, 50 U.S.C. §191, Executive Order No. 10473, 15 Fed. Reg. 7005, and the Coast Guard Regulations issued pursuant to 33 C.F.R., Part 6 and 121, afforded plaintiff all the required constitutional safeguards.

Plaintiff contended, inter alia, that as the evidence did not establish he had engaged in illegal (as distinguished from legal) activities on behalf of the Party and as he was only a rank and file member of the Party, plaintiff had a "guiltless" membership in the Party which could not be used as a basis for denial of a validated document. The Court ruled that once it was determined that an individual willingly performed activities at the direction of the Party, such as organizing peace demonstrations during the Korean War, the Commandant could reasonably find that such an individual might just as easily follow Party directions and orders to hinder or obstruct the sailing of a vessel with emergency materials, in some other war. The Court stated:

> Besides there is a tremendous and substantial difference between the activity required to be proved for a Smith Act conviction, under Noto and Scales, and the degree of activity within the Communist Party which might constitute reasonable grounds for barring a seaman from a vessel as a security risk. The one is directed to teaching and advocating and inciting to violence; the other need be simply a loyalty and willingness to carry out orders of an organization which might endanger the security of this country's vessels and harbors whether by violent or peaceful means. To say that plaintiff's right to work on a ship may not be interfered with until it has been shown that he has engaged in some prior

illegal activity on behalf of the organization is to say that a security program may not employ reasonable preventive measures but must wait until the harm sought to be protected against has been done. The purpose of the screen-program was to secure vessels, shipments and waterfront facilities from potential as well as actual danger and any regulation reasonably related to this purpose is lawful (Shaughnessy v. United States, 345 U.S. 206).

We conclude that the denial of security clearance as a merchant seaman to one who held meaningful membership for over 20 years in the Communist Party was a valid application of the Coast Guard regulations, since it might reasonably be assumed that such a person might "engage in activities inimical to the security of the United States" (Communist Party v. Control Board, 367 U.S. 1 (1961)).

The Court also rejected plaintiff's contention that the regulations were unconstitutionally vague with respect to the requirement of knowing membership in an organization as well as plaintiff's contention that the regulations were invalid for permitting the Commandant to use plaintiff's membership in certain organizations on the Attorney General's list as an element of evidence from which an inference ultimately may be drawn. The Court specifically observed that the Commandant did not use plaintiff's membership or activities in these other organizations as conclusive or presumptive evidence that plaintiff would endanger the security of shipping.

On January 20, 1966 plaintiff filed an appeal from the judgment dismissing his complaint.

Staff: Assistant United States Attorney Robert E. Kushner (S.D. N.Y.); Benjamin C. Flannagan and Thomas H. Boerschinger (Internal Security Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS
District Court Decisions

Foreclosure of Tax Liens; Marshalling of Assets Not Applicable Were Prejudicial to Federal Tax Collection. United States v. Max Pollack, formerly d/b/a Max Pollack Company, et al. (E.D. New York, September 29, 1965). (CCH 65-2 U.S.T.C. Par. 9665). Federal tax liens totaling $30,243.43 were filed against taxpayer, Max Pollack, on sundry dates between May 12, 1958 and January 30, 1962. Of these, $6,719.29 were filed prior to August 7, 1958. On August 7, 1958 taxpayer sold a parcel of property located in Middle Village, New York to defendants Mestel. The Government commenced this lien foreclosure action against the Middle Village property and against property owned by taxpayer in Rego Park, New York. While the present suit was progressing, the first mortgagee sued in Queens County Supreme Court to foreclose its mortgage on the Rego Park property; the United States was joined under 28 U.S.C., 2410. The Rego Park property was sold in foreclosure for $33,700 leaving a surplus approximating $21,000 payable to the United States. If in the Rego Park foreclosure the Government presented its tax liens for payment in the order of their filing dates, the tax liens filed before August 7, 1958 would be paid in full, thereby exonerating the Middle Village property owned by the Mestels.

After granting the Government's motion for summary judgment, permitting foreclosure on the Middle Village property, the Mestels, who were in default, moved for a stay of the sale. The Court granted the stay pending the distribution of the $21,000 surplus in the Rego Park foreclosure, United States v. Max Pollack, 233 F. Supp. 775. In granting this stay, the Court held that the Government was not bound to satisfy the tax liens in the order of their filing, but could reserve the older dated liens that attached to the Mestels' property for satisfaction out of that property if by so doing they produced no inequity and simply served the collectability of their total claim. After receiving the $21,000, the Government applied it to the tax liens arising after August 7, 1958. In this way the Government's liens against the Middle Village property were protected.

Defendants Mestel then moved to vacate their default, to continue the stay and for permission to file an answer. Defendants argued that the Government should have applied the $21,000 to its earlier liens. The Government opposed this motion and moved for a dissolution of the stay. In denying the defendants' motion and granting the Government's motion, the Court held that the state court distribution followed the pattern required by United States v. Buffalo Savings Bank, 371 U.S. 228, and that the state court's decree took the form provided for in Buffalo Savings Bank v. Victory, 13 App. Div. 2d 207, affirmed, 12 N.Y. 2d 1100. The essence of the Court's ruling is that the Government is not compelled to marshall assets where the collection of some of the tax liens might be prejudiced. See also American National Insurance Company v. Vine-Wood Realty

Company, 199 Atlantic 2d 440, (S. Ct. Pa.). Defendants Mestel have filed a notice of appeal.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Cyril Hyman, (E.D. N.Y.); Charles A. Simmons (Tax Division).

Statute of Limitations; Waivers; Provision in Offers in Compromise Suspending Statute of Limitations While Offer Was Pending Held Valid Since Taxpayer's Conduct Indicated Offers Had Not Been Withdrawn. United States v. Charles H. Mortell. (N.D. Ill., November 10, 1965). (CCH 66-1 U.S.T.C. Par. 9111). In this action the Government sought to collect taxes withheld by taxpayer as an employer and moved for partial summary judgment. Taxpayer admitted that he was an employer under the relevant statutory provisions and agreed that the Government's computation of the amount due was correct. He opposed the motion, on the theory that the action was barred by the statute of limitations notwithstanding the fact that he had submitted two offers in compromise in which he purportedly waived the benefit of the statute of limitations while the offers were pending and for one year thereafter.

In granting the Government's motion for partial summary judgment, the Court rejected taxpayer's contention that the waiver in the offers was effective only for a "reasonable time" and that the two years, nine months and eight days which elapsed between the submission of the first offer and its rejection was unreasonable. The Court noted that unlimited waivers were subject to withdrawal after a reasonable time but that taxpayer was required to give notice that the waiver would expire. Taxpayer's continued requests for a determination with respect to the offer was found to be an indication of his willingness to abide by the terms of the offer, including the waiver provision, rather than an indication that the offer had been withdrawn. The fact that the waiver was open-ended while the offer was pending did not conflict with the statutory scheme permitting an agreement suspending the statute of limitations.

Staff: United States Attorney Edward V. Hanrahan and Assistant United States Attorney Thomas Curoe (N.D. Ill.).

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Vol. 14 February 4, 1966 No. 3

I N D E X

INDEX

INDEX