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DEPARTMENT OF JUSTICE

Vol. 14 No. 7

UNITED STATES ATTORNEYS

BULLETIN

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Vol. 14 April 1, 1966 No. 7

NEW APPOINTMENTS--DEPARTMENT

The following nominations have been confirmed by the Senate:

Assistant Attorney General, Office of Legal Counsel - Frank M. Wozencraft
Assistant Attorney General, Tax Division - Mitchell Rogovin

NEW APPOINTMENTS--UNITED STATES ATTORNEYS

The nomination of the following new appointee as United States Attorney has been confirmed by the Senate:

Nevada - Joseph L. Ward

Mr. Ward was born November 13, 1923 in Taunton, Massachusetts, is married and has 7 children. He received his A.B. degree from the University of Nevada in 1954, and his LL. B. degree from George Washington University, Washington, D. C. in 1958. He was admitted to the Bar of the State of Nevada in 1959. From 1942 to 1945 Mr. Ward served in the United States Navy. From 1946 to 1955 he was employed successively in the Cranston, Rhode Island Print Works; as a teacher at the Yomba Indian Reservation School, Reese River, Nevada; and as a teacher in the Waverly School, Stockton, California, and the public schools of Sparks, Nevada. From 1955 to 1958 he was Assistant Clerk to Senator Alan Bible of Nevada, and from 1958 to 1960 he served as a Legal Assistant in the Internal Revenue Service at Reno, Nevada. From 1960 up until his appointment as United States Attorney, Mr. Ward was engaged in the private practice of law in Las Vegas, Nevada.

The nomination of the following incumbent United States Attorney to a new four-year term has been confirmed by the Senate:

Florida, Northern - Clinton N. Ashmore

The nomination of the following new appointee as United States Attorney has been submitted to the Senate for confirmation:

Washington, Eastern - Smithmoore P. Myers

In addition to those listed in previous issues of the Bulletin, the nomination of the following incumbent United States Attorney has been submitted to the Senate for confirmation:

Delaware - Alexander Greenfeld

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration Ernest C. Friesen, Jr.

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 3, Vol. 14 dated February 4, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
278-S4	2/4/66	U.S. Attorneys	Form of Judgments in Social Security Cases
446	2/21/66	U.S. Attorneys	Government Printing and Binding Regulations
447	2/24/66	U.S. Attorneys	Transfers of Federal Prisoners
448	3/3/66	U.S. Attorneys	Analysis of Public Law 89-141, 89th Cong., First Session, to amend title 18, USC, to provide penalties for assassination of the President or Vice President, and for other purposes, together with copies of House Report No. 488, Senate Report No. 498, and the Public Law.
449	3/2/66	U.S. Attorneys	Bail and Other Court Bonds of United Benefit Fire Insurance Co., Omaha, Nebraska
450	3/4/66	U.S. Marshals	Daily Log - Revision of Form No. USM-110
451	3/14/66	U.S. Attorneys & Marshals	Telegraphic Communications

ORDERS	DATED	DISTRIBUTION	SUBJECT
353-66	1/26/66	U.S. Attorneys & Marshals	Amendment to Department of Justice Organization Order (No. 271-62) Redefining Part of Functions of Civil Division
354	2/21/66	U.S. Attorneys & Marshals	Designating Commissioner of Immigration and Naturalization and Immigration Officers as Competent National Authorities for Purposes of Section XXIV of Treaty of Friendship and General Relations Between U.S. and Spain

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

ADMINISTRATIVE LAW

Legislative Rule-Making Procedures Without Adjudicatory Type Hearing May Be used to Modify Rights of Class of Air Carrier Under Their Certificates so Long as Classification and Regulation Have Reasonable Basis. American Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc. v. Civil Aeronautics Board (C.A.D.C., Nos. 18833, 18834, 18840) D.J. File 88-16-229. The Court of Appeals on rehearing en banc, 3 judges dissenting, has sustained Civil Aeronautics Board regulations concerning "blocked space service." In "blocked space service" the air carrier offers shippers cargo space aboard aircraft to be reserved for a fixed period of time at wholesale rates. The regulations provide that only all-cargo carriers may offer such service; combination carriers (passengers and cargo) no longer may do so.

On petition for review, the combination carriers contended that the regulations were invalid because they accomplished a suspension or modification of their certificates of public convenience without an adjudicatory hearing. The Court of Appeals held the regulations to be substantively valid because the distinction in treatment between all-cargo and combination carriers is based on a reasonable classification and because the regulations themselves have a rational basis. It held them to be procedurally valid because an adjudicatory hearing is not required where questions of transportation policy of general applicability to all carriers in appropriate classes are being resolved by legislative rules.

The Court noted that general rulemaking may change rights enjoyed under administratively granted authority, such as licenses and certificates, without adjudicatory proceedings. This is recognized in the Administrative Procedure Act which expressly distinguishes between adjudicatory and rulemaking procedures. The former are reserved to situations which involve essentially accusatory action against a particular carrier. But the latter is preferable to adjudication where general policies are being laid down. As a matter of sound administrative practice it enables the agency to dispense with the delays of litigation and to rely upon its expert staff in resolving broad policy issues. The Court cautioned that rulemaking cannot be used as a sham substitute for accusatory sanctions against individual carriers, but it found no indication of that here. Since the carriers were properly treated as a class, the regulations are not a modification of their certificates in the sense that a change in an individual carrier's route authorization would be.

The Court observed that even though the statutes do not require oral testimony in legislative rulemaking, fair procedure may acquire it in some classes of cases; it is better policy to include such hearings in the rulemaking process, if testimony is necessary, than to convert flexible rulemaking into prolonged and rigid administrative adjudications. But here the facts to be found rest on forecasts and expert opinions; such matters are peculiarly legislative in nature and testimony is not necessary. Moreover, the Commission here went beyond the minimum rulemaking requirements (notice, opportunity to submit written views, and the right to petition) and received oral argument

from all of the interested carriers. This was more than sufficient. In addition, the Commission has announced that it intends to re-examine its regulations in the light of experience. The Court's affirmance of the regulations is expressly declared to be without prejudice to the right of the combination carrier to re-open the issue and to seek judicial review of the Board's action or inaction should actual experience show injury to them.

Staff: Associate General Counsel, O. D. Ozment, (Civil Aeronautics Board); Lionel Kestenbaum, (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

NOTICES

VA FORECLOSURES

The Veterans Administration has agreed to have a check made to determine the occupancy of property scheduled for foreclosure at the time a foreclosure request is submitted to the Department of Justice. Inquiry will be made at the mortgaged premises to determine who is occupying the premises, if the mortgagor is not, and who is collecting the rentals if any. At the same time, inquiry will be made as to the military status of the mortgagor.

COURT OF APPEALS

EMPLOYEE DISCHARGE

Eighth Circuit in First Federal Employee Discharge Case Before It, Recognizes Limited Scope of Review and Upholds Employee Appellant's Removal for Failure to Pay Debts. Grant Jenkins v. John W. Macy, et al. (C.A. 8, No. 17,958, February 21, 1966). D.J. File 35-42-6. Appellant, a custodial laborer with GSA, was discharged from his job for failing to pay his debts. After exhausting his administrative remedies, he sought judicial review of the final administrative determination. The district court upheld his removal; the Court of Appeals affirmed. In the first employee discharge case considered by the Eighth Circuit, the Court recognized the limited scope of review in these cases, and then went on to reject each of the five "legal points" raised by appellant. The Court stated, inter alia, that there was "no doubt that proper agency procedures were followed and that appellant was given due process of law." With respect to appellant's contention that he was being penalized twice for the same offense since he previously had been discharged from his job for failing to pay his debts, the Court noted it to be without merit since the Civil Service Commission, when it discovered that a procedural error had been committed, ordered appellant restored to his job with back pay. In addition, relying on Brown v. Zuckert, 349 F. 2d 461 (C.A. 7), the Court held that appellant had not been denied his right to confront and cross-examine witnesses.

Staff: Lawrence R. Schneider (Civil Division).

FEDERAL RULES OF CIVIL PROCEDURE

Party Failing to Make Offer of Proof Precluded From Attacking District Court's Exclusion of Evidence on Appeal. Jean Marrone v. United States (C.A. 2, No. 29856, January 5, 1966). D.J. File 157-14-226. In this action under the Federal Tort Claims Act, plaintiff alleged that her decedent died as the result of the malpractice of employees of a VA hospital in Connecticut. During the trial, plaintiff examined three of the hospital's doctors as adverse witnesses

under F.R. Civ. P. 43(b). One of the doctors was permitted to express his opinion as to whether the treatment of plaintiff's decedent met community standards of skill, care, and ordinary diligence. The other two doctors were permitted to testify about actual procedures followed and to give their opinions about the propriety of the treatment, but were not allowed to express an opinion about the standards of care ordinarily possessed and exercised by doctors in the community in like cases. On appeal, plaintiff attacked the exclusion of such testimony, arguing that it was based upon an improper interpretation of Rule 43(b).

The Court of Appeals refused to rule on the propriety of the exclusion of that testimony on the ground that at the trial appellant failed to comply with the Rule 43(c) requirement of an offer of proof to establish the significance of the excluded evidence. The Court stated that although an offer of proof is not necessary in all cases where testimony has been excluded by the trial court, "where the significance of the evidence sought to be introduced is not obvious, the appellate court cannot be expected to hold exclusion to require reversal on the possibility that the exclusion was harmful error." The Court added that in this case it was not obvious that the excluded testimony would have either added to, or detracted from, the testimony of the first doctor on the same point.

Staff: United States Attorney Jon O. Newman and Assistant United States Attorney Samuel Heyman (D. Conn.)

FEDERAL TORT CLAIMS ACT

Government Not Liable for Injuries Caused by Negligence of Employee of Star Route Contractor for Transportation of Mail. Claire Irene Fisher, etc. v. United States (C.A. 6, No. 16404, February 21, 1966). D.J. File 157-57-293. The Court of Appeals affirmed the district court's entry of summary judgment for the United States in this Tort Claims Act suit. Plaintiff had sued to recover for the alleged wrongful death of her husband resulting from injuries sustained in a collision between his automobile and a truck driven by an employee of a star route contractor for the transportation of mail. At the time of the accident the truck was being driven by that employee in performance of that contract for the transportation of mail. The Court of Appeals concluded, upon analysis of the contract, that the driver of the truck was an employee of an independent contractor, not an employee of the Government. The Court also rejected the argument that the Government could be held liable on a theory of "non-delegable duty," stating that that doctrine was inapplicable to the United States in this action.

Staff: Morton Hollander, Michael W. Werth (Civil Division)

United States Liable for Negligence in Allowing Mentally Disturbed Airman to Obtain Automatic Pistol. Frank J. Underwood v. United States (C.A. 5, No. 21924, January 26, 1966). D.J. File 157-2-59. The Court of Appeals, reversing the district court, held that the Government was liable under the Federal Tort Claims Act for the death of the former wife of a mentally disturbed airman, Edward F. Dunn. The Court found the Government negligent in failing to transmit

to a psychiatrist at the hospital at Maxwell Field, Alabama, information that Dunn might inflict harm on himself or Mrs. Dunn, so that the psychiatrist returned Dunn to duty without recommending restrictions on his activity. The Court further held that Government employees were negligent in permitting Dunn to draw a pistol and ammunition without the authority of his supervisor who had reason to know of Dunn's unstable mental condition at the time, and who might not have authorized the issuance of weapons to Dunn.

The Court distinguished its previous decision in United States v. Shively, 345 F. 2d 294, stating that since in Shively there was no history of mental illness of the person to whom the weapon was issued, the shooting of the wife there was not a reasonably anticipated result of the negligent issuance of a weapon. The Court further said that the Georgia law of proximate cause applied in Shively was far more strict than the Alabama law applicable here. The Court refused to follow its dictum in Shively that such suits present a "claim arising out of assault," specifically excepted from recovery under the Tort Claims Act, 28 U.S.C. 2680(h).

Staff: United States Attorney Ben Hardeman and Assistant United States Attorney Rodney R. Steele (M.D. Ala.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Court of Appeals Remands to Deputy Commissioner to Explain Significance of One of His Findings. Edith L. Higley v. J. J. O'Leary, Deputy Commissioner. (C.A. 9, No. 20,155, January 13, 1966). D.J. File 83-61-26. In this action brought by a widow to set aside the Deputy Commissioner's denial of death benefits under the Longshoremen's and Harbor Workers' Compensation Act, the court of appeals reversed the district court's affirmance of the compensation order. The Court of Appeals found that the Deputy Commissioner's holding that "the work in which [the employee] was engaged at the date of his death was similar to and no more strenuous than the type of work in which he was engaged" was ambiguous. The Court found that this finding either was based on an "erroneous legal standard," was factually erroneous, or was surplusage. The Court noted that the correct legal standard provided that "an injury or death arising out of a workman's employment * * * is compensable under the Act despite the fact that the work being performed at the time was not unusual." Accordingly, it remanded the case to the Deputy Commissioner to resolve the ambiguity.

Staff: United States Attorney Sidney I. Lezak and Assistant United States Attorney Roger G. Rose (D. Ore.)

SOCIAL SECURITY ACT

Sixth Circuit Again Rejects Argument That no Specific Job Availability Findings Need Be Made When It Is Clear That Many Types of Work are Generally Available. Kermit Slone v. John W. Gardner. (C.A. 6, No. 16,376, February 2, 1966). D.J. File 137-30-279. This disability case involved a 34-year-old claimant having a congenital weak back condition. The Secretary found that

since claimant's sprained back had healed (even though he still had the congenital condition), he could return to the coal mines. This finding was made despite medical testimony that if claimant returned to the mines he would in time suffer a recurrence of his back injury. In the Court of Appeals, the Government argued that even assuming claimant could not return to the mines, it was clear that there were numerous jobs available to a 34-year-old man having an eighth grade education and the ability to perform light to moderate labor; it was also argued that no specific job availability findings by the Secretary were necessary.

The Sixth Circuit rejected both the Government's arguments. It held that the disability shown by the evidence was "a far cry" from that found by the Secretary. The Court then reaffirmed its position that once a claimant established that he could no longer perform the type of work he had done in the past, the burden of proof shifted to the Secretary to show that he could perform some other kind of substantial gainful activity available to him. Accordingly, the Court affirmed the district court's direction to the Secretary to grant benefits.

Staff: Lawrence R. Schneider, Robert C. McDiarmid
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

MOTIONS TO AFFIRM

Practice of Permitting Motions to Affirm, as Authorized by Rule 16(1) of Rules of Supreme Court, Held Applicable to Appeals in Ninth Circuit. Ernest Page v. United States (C.A. 9, January 14, 1966). D.J. File 12-11-449. Defendant was convicted on six counts of an indictment charging him with violations of the Federal narcotics laws. He was sentenced to imprisonment for twenty years on each of the counts, the sentences to run concurrently. In his opening brief on appeal, he alleged error relating to his conviction on two of the six counts. The Government moved to dismiss the appeal on the grounds that even if there were merit in the defendant's argument directed to his convictions on two of the six counts, the concurrent sentences on the other four counts would remain in effect, citing Lawn v. United States, 355 U.S. 339 (1958). Defendant did not in his opening brief contend that the asserted errors as to the two counts deprived him of a fair trial on the other four counts. Such assertion was first made by defendant during oral argument.

The Court ruled that the narcotics transactions described in the four counts as to which no error was alleged were entirely independent of those described in the other two counts and that the convictions on the four counts were not tainted by the alleged error. The Court then stated that it preferred to treat the Government's motion as one to affirm rather than dismiss. It was noted that while the Rules of the Ninth Circuit did not specifically provide for a motion to affirm, its Rule 8(2) provided that the practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable. Accordingly, the practice of permitting motions to affirm as authorized by Rule 16(1) of the Rules of the Supreme Court was held applicable to appeals in the Ninth Circuit.

The Court stated that motions to affirm should be made only after the appellant's brief is on file and only where, as in this case, the insubstantiality of the question on appeal is clearly ascertainable from an examination of the record and the opening brief.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Jerrold M. Ladar (N.D. Calif.).

NARCOTICS

Appeal From Order Which Suppressed Narcotics Seized on Defendant at Arrest for Lack of Probable Cause. United States v. Llanes (C.A. 2, No. 30,133, March 8, 1966). D.J. File 12-51-1117. In this case the Government appealed, pursuant to 18 U.S.C. 1404(2), from an order of the United States District Court for the Southern District of New York, which suppressed narcotics seized on the defendant at the time of his arrest.

The pertinent facts show that by previous arrangement, an undercover agent of the Federal Bureau of Narcotics met with Llanes for the purpose of purchasing narcotics. The undercover agent asked Llanes if he was ready to do business

and had the stuff with him. Llanes replied that he was ready to do business and had the stuff. However, disgruntled because the arrangement did not suit him, Llanes walked away. The undercover agent then gave a pre-arranged signal to a second agent who arrested Llanes.

The Court of Appeals reversed the order of the District Court and held that probable cause existed for the arrest and search.

Referring to this appeal, the Court pointed out that "18 U.S.C. §1404 significantly departs from past practice and permits the Government to appeal from an order suppressing evidence in a narcotics case, and it expressly enjoins the Government to proceed with expedition."

> Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted.

Continuing with this same topic the Court said: ". . . there is every reason why appeals from orders suppressing evidence in narcotics cases should be expedited. Failure of the Government to seek review promptly may well merit dismissal in the absence of good reason for delay. And, in the future, we will look with increasing skepticism upon the justification suggested here for lack of expedition--the necessity to refer the matter to Washington."

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Paul K. Rooney and Neal J. Hurwitz (S.D. N.Y.).

OBSTRUCTION OF JUSTICE

Obstruction of Proceeding Before Departments, Agencies and Committees; 18 U.S.C. 1505. Rice, et al. v. United States (C.A. 8, February 28, 1966). D.J. File 156-39-46. Defendants, representatives of the Seafares International Union (SIU), were convicted by a jury of conspiracy to intimidate and impede witnesses in a proceeding before the National Labor Relations Board by the use of force and violence in violation of 18 U.S.C. 1505. At the trial the victims of the conspiracy, all seamen and members of SIU, testified that they had filed charges with the NLRB Regional Office against a dredging company and the Inland Boatmen's Union, an affiliate of SIU, charging discrimination in shipping assignments. After threats and violence upon them by the defendants to compel them to withdraw the charges they did withdraw and the case was closed in the NLRB Regional Office. On appeal, defendants contended that the mere filing of a charge of an unfair labor practice with the NLRB did not initiate a proceeding and that a proceeding was not pending before the Board until the General Counsel issued a complaint. The Circuit Court rejected this contention and held that the filing of a charge with the NLRB was not materially different from the filing of a complaint before a United States Commissioner. "Congress," the Court said, "clearly intended to punish any obstruction of the administrative processes by impeding a witness in any proceeding before a Government agency--at any stage of the proceedings, be it adjudicative or investigative." The cause was remanded for new trial on other grounds.

Staff: Assistant United States Attorneys Sidney P. Abramson and Patrick J. Foley (D. Minn.).

BANKRUPTCY

Bankruptcy Fraud: Lack of Verification Under Oath of Bankruptcy Petition Not Grounds for Collateral Attack on Adjudication of Bankruptcy in Prosecution for Concealment of Assets. United States v. Vanderberg (C.A. 7, March 7, 1966). Appellant, convicted of fraudulently concealing an account receivable from the receiver, trustee, and creditors in a bankruptcy proceeding in violation of 18 U.S.C. 152, sought reversal of his conviction on the ground, inter alia, that lack of verification under oath of his voluntary bankruptcy petition was a jurisdictional defect in his adjudication as a bankrupt, and therefore precluded his conviction for concealment of assets in a bankruptcy proceeding. At trial the notary public who had notarized the petition testified that defendant had been asked to read the petition and sign it if correct and that he had acknowledged his signature, but that no oath had been administered and defendant did not swear to or affirm the contents of the petitions.

The Court affirmed the conviction on the ground that verification of a bankruptcy petition is not jurisdictional, and therefore does not afford a basis for collateral attack on the adjudication of bankruptcy in a criminal prosecution for concealment of assets so as to bar prosecution or upset a conviction. The Court stated:

> In our opinion an adjudication in bankruptcy is presumed to be regular and valid and, although it may be shown to be invalid in a direct proceeding for that purpose, it may not be attacked collaterally in a criminal proceeding where, as here, the record of adjudication shows upon its face a duly executed, verified, and filed voluntary petition. [Citations omitted.]

Staff: United States Attorney James B. Brennan (E.D. Wisc.).

FRAUD

Securities Violations: Evidence as to Motive for Failing to File Registration Statement With SEC and Manner of Conducting Affairs of Company Relevant in Prosecution for Sale of Unregistered Stock. United States v. Abrams, et al. (C.A. 2, March 4, 1966). D.J. File 113-51-122. Joseph Abrams, Sidney L. Albert and the latter's company, Richland Securities, Inc., were convicted in the Southern District of New York for violations of the securities laws in connection with the sale of unregistered stock of Automatic Washer Company. On appeal, appellants contended that much of the proof went beyond that which was relevant to the narrow issue of illegally selling unregistered stock. The Second Circuit held that it was relevant for the Government to show that the failure to file a registration statement with the Securities and Exchange Commission was motivated by the desire of the appellants to conceal their fraudulent activities, and it was necessary to an understanding of the charges to know how appellants acquired the stock and conducted the affairs of companies under their control. The Court stated that it was pertinent to show that appellants must have known that they could not have obtained registration of the Automatic stock by the SEC and that they therefore had a motive for concealing their activities and the true condition of Automatic. This has previously been so held when the fraud itself is at issue in the counts of the case. It is no less relevant on motivation where the fraudulent activities, if revealed, would prevent SEC registration.

Abrams alleged that he had secured immunity by testifying before an examiner of the SEC in response to a subpoena duces tecum, and on subsequent occasions. The Court of Appeals rejected his claim, noting that Abrams never made a contemporaneous claim of privilege when he testified and was never compelled to answer any questions as to which he claimed his privilege. "The statute [15 U.S.C. 77v(c)] is plain and unambiguous."

Appellants also complained that a defense witness was threatened and coerced by the Government into changing his testimony. The Court of Appeals discussed the factual situation and concluded the charge was wholly without support. "We note all these facts because we think we should point out that it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar and officers of this court."

The convictions were affirmed. Abrams had received a sentence of five years in prison; Albert was sentenced to three years; and Richland Securities was fined $5,000.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys John E. Sprizzo and Michael F. Armstrong (S.D. N.Y.).

MISPRISION OF FELONY

Essential Elements of Misprision of Felony Do Not Include Government's Ignorance of Commission and Perpetrator of Felony. Lancey v. United States (C.A. 9, February 3, 1966). Defendant was convicted of misprision of felony (bank robbery), 18 U.S.C. 4. He contended on appeal that the evidence was insufficient to support his conviction.

The Court of Appeals held that it is no defense in a misprision prosecution that the Government knew of the crime and the principal before the defendant failed to notify the authorities. The Court followed Neal v. United States, 102 F. 2d 643 (C.A. 8, 1939), in holding that the four essential elements of misprision of felony are commission by the principal of the felony alleged, full knowledge of that fact by the defendant, his failure thereafter to notify the authorities, and his taking an affirmative step to conceal the crime. The Court commented that harboring of the principal, with full knowledge, can constitute the forbidden concealment.

The conviction was affirmed.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Jerrold M. Ladar (N.D. Calif.).

EXPATRIATION

Constitutionality of Expatriation-by-Voting Provision Sustained. Beys Afroyim v. Dean Rusk (S.D. N.Y., February 25, 1966). D.J. File 38-51-4434. Plaintiff, who was naturalized in the United States in 1926, emigrated to Israel in 1950 and voted in a political election there in 1951. In 1960, his application for a United States passport was rejected by the American Vice Consul at Haifa, who concluded that plaintiff had expatriated himself by his

act of voting in 1951, under the provisions of Section 401(e) of the Nationality Act of 1940, now 8 U.S.C. 1481(a)(5). Following administrative affirmance of this determination by the State Department's Board of Review, plaintiff filed this action for a declaratory judgment of citizenship against the Secretary of State, contending that Section 401(e) was unconstitutional. It was conceded that plaintiff had voted voluntarily. Notwithstanding Perez v. Brownell, 356 U.S. 44 (1958), a 5-4 decision sustaining the constitutionality of Section 401(e), plaintiff argued that Perez must be deemed overruled by more recent pronouncements of the Supreme Court in other expatriation cases.

District Judge Frederick P. Bryan rejected this motion. Conceding that there has been a sharp cleavage in the Supreme Court on the question of Congressional power to accomplish involuntary expatriation, the Court held that Perez still stands as the controlling authority. Plaintiff will appeal.

Staff: United States Attorney Robert M. Morgenthau; Special Assistant United States Attorney James G. Greilsheimer (S.D. N.Y.).

INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

That Stolen Treasury Bonds Were Cancelled and Replaced by Treasury Department, Did Not Alter Fact That Bonds Remain Genuine Obligations of United States, the Word Genuine Meaning That They Were Not False, Forged, Fictitious, Simulated, Spurious or Counterfeit; In Simultaneous Trial of Multiple Defendants, Some Before Court and Some Before Jury, Conspirator Has No Right to Demand That Other Conspirators Be Tried First. Wright, et al. v. United States (C.A. 5, No. 20478, February 1, 1966). Eight United States Treasury 4% registered bonds, each having a face value of $10,000, were included in the loot of a burglary committed in Mount Holly, New Jersey, in 1961. Approximately one year later Edward Hugh Wuensche purchased the bonds from one DiFronzo for the total sum of $8,000, and transported them to Houston, Texas. Later he and Allen Eli Wright travelled from Houston to Laurel, Mississippi. There a financial arrangement was made with John Walker for disposition of the bonds. Wuensche forged the endorsement of the true holder on the bonds in the presence of one Millette and Richardson, a Mississippi attorney, who each received $5,000. for their part in the scheme.

A nineteen count indictment was returned. Eighteen counts charged Wright and Wuensche with substantive violations of receiving, transporting, forging and uttering the bonds. Count 19 charged eleven defendants with conspiracy relative to the operation. Wright, Wuensche, and Grafft were tried by a jury and the other defendants were tried simultaneously by the court without a jury. Wright and Wuensche were convicted on all 19 counts and Grafft was acquitted. The judge found Richardson and Naidich guilty on the conspiracy count and acquitted the other defendants tried by him. Wright, Wuensche, and Richardson appealed their convictions.

Wright's principal contention on appeal was that the Government failed to prove an essential element contained in all counts of the indictment, namely that the securities in question were genuine United States 4% Treasury bonds. While it was uncontroverted that within a few months after the theft of the

bonds, the Government cancelled and replaced them, the Court of Appeals held that the bonds remained genuine obligations of the United States even after their cancellation on the records of the United States Department of the Treasury. The Court stated that the word "genuine" as applied to bonds and securities means that they are not false, forged, fictitious, simulated, spurious or counterfeit. Since the bonds were not counterfeit or false, the fact that they were cancelled would affect their redeemability but not their genuineness.

A second point raised by Wright on appeal arose from the fact that Wright, Wuensche and Grafft were tried by the jury and Richardson and others by the Court. At the close of the Government's case all defendants moved for judgment of acquittal and all such motions were denied. Wright then attempted to call certain of his co-defendants to testify in his behalf concerning the substantive counts in which they were not charged. Counsel for these defendants refused to permit them to testify, whereupon none of the defendants, including Wright, presented any evidence. Wright contended that the trial judge, in denying the motions for judgment of acquittal at the close of the Government's case of these defendants whom he later acquitted on the same evidence, effectively denied Wright the benefit of their testimony in violation of his Fourteenth Amendment rights under the Constitution of the United States. Wright pointed out that he had filed a motion for severance before the trial. The Court of Appeals stated that for the trial judge to have granted the motion for severance would have required him to prejudge the case without having heard the evidence and that there is no rule giving a conspirator the right to demand that other conspirators be tried first. In reserving decision on the motion for judgment of acquittal at the close of the Government's case, the trial judge was carefully seeking to protect the rights of all the defendants and did not wish his ruling on the motions to influence the jury.

Staff: United States Attorney Woodrow Seals; Assistant United States Attorney Fred L. Hartman (S.D. Texas).

FEDERAL COMMUNICATIONS ACT

Telephone Company's Divulgence of Telephone Toll Records Under 47 U.S.C. 605. United States v. Russo, et al. (E.D. Pa., February 8, 1966). Defendants filed motions to suppress, arguing that all the materials seized during a search pursuant to a warrant were illegally obtained and should be suppressed and returned because the affidavits of special agents of the Federal Bureau of Investigation for probable cause relied principally on long-distance telephone toll records, which information had been secured from the telephone company without a valid subpoena, allegedly in violation of Clause 1 of the wiretapping statute, 47 U.S.C. 605. Clause 1 of this statute provides in relevant part as follows:

> "No person receiving or assisting in receiving or transmitting or assisting in transmitting any interstate communication ... by wire ... shall divulge ... the existence, contents, substance, purport, effect or meaning thereof, except ... in response to a subpoena ..."

Chief Judge Clary, by written opinion filed February 8, 1966, denied defendants' motion holding that Clause 1 does not apply to telephone company

accounting employees or data e.g. telephone customer long-distance toll records reflecting the mere existence of telephone calls, since the statute is not to be interpreted literally but rather in light of its legislative history which evinces a purpose to protect the integrity of the means of communication and therefore applies only to telephone operators and technicians who may have knowledge of the contents, and a fortiori the existence, of telephone messages.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorneys Shane Creamer and David Abrahamson (E.D. PA.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Deportation Order Upheld Notwithstanding Charges of Illegality as to Alien's Arrest, Detention and Conduct of His Deportation Hearing. George Peter Klissas v. INS (C.A.D.C., No. 19,439, March 16, 1966.) Petitioner was ordered deported on the charges that he overstayed his authorized leave after an admission in 1957 as an alien crewman and that he failed to submit address reports to the Attorney General. In these proceedings brought to review the deportation order, he alleged a number of administrative and procedural errors with respect to his arrest, detention and deportation hearing and sought to set aside the deportation order on the ground that these errors so permeated the entire deportation proceedings as to render the administrative process null and void from its inception to its conclusion.

The Court found substantial support in the record of petitioner's claims insofar as the charge of alienage and overstaying was concerned and stated that if the case were decided on these aspects of the deportation order alone the Court might have to reverse the order and remand the case for a new hearing. However, the Court found the deportation record supported by the second deportation charge that petitioner failed to file address reports. The Court based its finding on the fact that at a hearing subsequent to the occurrence of all of the irregular conduct, and while he was free on bond and counseled by his attorney, he freely and voluntarily admitted his alienage and that he failed to submit address reports because of his fear that the immigration authorities would apprehend him.

Subsequent to the filing of briefs and oral argument, the Court permitted petitioner to file a memorandum in support of his claim that he was eligible for suspension of deportation in the light of the Supreme Court's recent decision in Soric v. INS, 34 U. S. Law Week 3217. After review of petitioner's memorandum and the opposing one filed by respondent, the Court denied petitioner's request to remand the case to permit his filing an application for suspension of deportation. The deportation order was affirmed.

Staff: United States Attorney David G. Bress, and Assistant U. S. Attorney Frank Q. Nebeker (Dist.Col.) of Counsel: General Counsel L. Paul Winings and Douglas P. Lillis (Immigration and Naturalization Service)

Failure to Exhaust Administrative Remedies Precludes Judicial Review of Deportation Case. Ng Tze Choi v. Esperdy (S.D.N.Y., 66 Civ. 306, March 2, 1966.) Relator, a native and citizen of China, was admitted as an alien crewman in 1963 and deserted his ship. He was apprehended and placed under deportation proceedings. During the course of his deportation hearing and while represented by counsel, he declined to apply for discretionary relief and requested to be deported to Red China. The Special Inquiry Officer

directed that he be deported to Red China and further directed that if that country refused to accept him he be deported to the Republic of China on Formosa. After being ordered to surrender for deportation, he retained other counsel and requested reopening of his hearing to apply for voluntary departure. This request was denied by the Special Inquiry Officer. On the day before the Special Inquiry Officer entered his decision, Relator's counsel sued out a writ of habeas corpus contending that his deportation should be stayed to permit him to exhaust his administrative remedies on his motion to reopen.

Because Relator's counsel did not exhaust his administrative remedies by filing an appeal from the denial of the motion to reopen, which appeal would have stayed the deportation order pending its deposition by the Board of Immigration Appeals, the Court held that the writ had to be dismissed under General Rule 27(b) of the Court and 8 U.S.C. 1105a.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.); Special Assistant U. S. Attorney Francis J. Lyons, of Counsel.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act - Communist-Front Organizations. Nicholas deB. Katzenbach, Attorney General v. W.E.B. DuBois Clubs of America. D.J. File 146-1-9155. On March 4, 1966, the Attorney General petitioned the Subversive Activities Control Board for an order to require the W.E.B. DuBois Clubs of America to register as a Communist-front organization as provided by Section 7 (b), (c) and (d) of the Subversive Activities Control Act of 1950, as amended. This is the twenty-third petition filed before the Board alleging an organization to be dominated, directed, or controlled by the Communist Party, USA, and primarily operated for the purpose of giving aid and support to the Communist Party.

The organization, whose headquarters is in San Francisco, California, was founded in June 1964 and currently has chapter comprised of student and working youth in many of the states throughout the country. The petition alleged that the Communist Party has furnished the leadership for the DuBois Clubs and continues to furnish it financial and other support. The organization, as alleged in the petition, has uniformly adopted and supported positions advanced by the Communist Party and through classes, training and indoctrination in Marxism-Leninism has prepared its members for recruitment into the Party.

Staff: Oran H. Waterman, Francis X. Worthington, and Robert A. Crandall (Internal Security Division)

Comtempt of Congress

United States v. Robert M. Shelton; United States v. James R. Jones; United States v. Calvin Fred Craig; United States v. Marshall R. Kornegay; United States v. Robert E. Scoggin; United States v. Robert Hudgins; United States v. George Franklin Dorsett (D.C. 146-400-012-1) During October 1965 each of the above defendants, pursuant to subpoenas duces tecum, appeared before a Subcommittee of the House Committee on Un-American Activities, which was investigating the various Ku Klux Klan organizations in the United States and their activities. The subpoenas duces tecum called for documents pertinent to the subject under inquiry. Upon demand, each defendant refused to produce any of the documents called for by the subpoenas.

On March 3, 1966, one count indictments were returned against each of the defendants by a Federal grand jury in the District of Columbia, charging each of them with making a willful default in failing to produce the required documents in violation of 2 U.S.C. 192.

Staff: United States Attorney David G. Bress (D.C.) and Paul C. Vincent (Internal Security Division)

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Public Lands; Coal Entry; Administrative Law; Mandatory Injunctions; United States Necessary Party. Southport Land and Commercial Co. v. Stewart Udall, et al. (Civil No. 42385, N.D. Cal., Nov. 26, 1965) D.J. File 90-1-18-706. In 1883, plaintiff filed a Cash Coal Entry for 320 acres of land in Contra Costa County, California. The application was rejected because the rights of certain claimants to the land, including plaintiff, were at that time being litigated. The litigation was finally resolved in favor of plaintiff, Mullan v. United States, 118 U.S. 271 (1886), which was thereupon advised by the Department of the Interior that it (plaintiff) was authorized to make entry upon the lands in dispute, upon proper application, a showing of compliance with the laws regulating coal lands, and the payment of twenty dollars per acre. No record exists of the filing by plaintiff of an application, or the payment of the twenty dollars per acre, but from 1886 to 1964 plaintiff paid all real property taxes assessed against the land, and considered itself to be the legal owner of the property. Upon the discovery that a patent to the land had never issued to it, plaintiff initiated an administrative proceeding for the equitable adjudication of its entry; when the proceeding terminated unfavorably to plaintiff, this action, seeking an order requiring the Secretary of the Interior to issue a patent to plaintiff, was initiated.

The Court granted defendant's motion to dismiss on the grounds of lack of jurisdiction. The Court held that this was not a proceeding under the Administrative Procedure Act, because that Act confers jurisdiction only to review an administrative decision, and does not confer upon the court jurisdiction to issue mandatory orders compelling the issuance of land patents. The Court also held that 28 U.S.C. 1361, which confers upon district courts jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," was also inapplicable, since plaintiff had never filed a proper application for the land it claimed, and could not establish therefore that there was any duty owed it by the Government. The Court further held that the failure of plaintiff to join the United States as a party defendant was alone fatal, since an action seeking the transfer to plaintiff of Government property is necessarily an action against the Government.

Staff: Assistant United States Attorney J. Harold Weise (N.D. Cal.).

Federal Water Control; Colorado River Water Delivery Contracts; Authority of Secretary to Decrease Water Deliveries in Times of Water Shortage; Sovereign Immunity. Yuma Mesa Irrigation and Drainage District v. Udall (Civil No. 1551-64, D.C., Dec. 17, 1965) D.J. File 90-1-2-739. In May 1964, the Secretary of the Interior announced that, as a result of unusually low spring runoffs for the second consecutive year, deliveries of water stored in Lake Mead

to those organizations and individuals in the Lower Basin of the Colorado River having the right by contract to divert such water would be decreased by ten percent. Plaintiff had by contract the right to have delivered to it by the United States "such quantities of water * * * as may be ordered by the District * * * and as may be reasonably required and beneficially used for the irrigation of not to exceed 25,000 irrigable acres * * *." Plaintiff brought this action to enjoin the Secretary from reducing by ten percent the water to be delivered to it, and to have the order declared illegal, set aside and cancelled.

In granting defendant's motion to dismiss, the Court held that under the Boulder Canyon Project Act, 43 U.S.C. 620 et seq., the Secretary of the Interior had the authority to enter into the contract with plaintiff, that the ten percent reduction by the Secretary of the amount of water which plaintiff might order was not a violation of the Secretary's obligation to plaintiff under the contract, and was within the Secretary's statutory authority, that the statute (the Boulder Canyon Project Act) is constitutional, that the Secretary exercised his power under the statute in a constitutional manner, and that, therefore, the action of the Secretary was the action of the sovereign, and, in the absence of the sovereign's consent, could not be enjoined, or otherwise made the subject of any court proceedings.

Staff: Walter Kiechel, Jr., and Martin Green
(Land and Natural Resources Division).

Federal Water Projects; Jurisdiction; Action for Preliminary and Permanent Injunctions Requiring United States and Officials of Corps of Engineers to Release Water from Painted Rock Dam, Arizona, at Accelerated Rate to Prevent Flooding of Plaintiffs' Lands; Dismissal for Lack of Jurisdiction. W. O. Narramore, et al. v. United States, et al. (Civil No. 5852, D. Ariz., Jan. 28, 1966) D.J. File 90-1-23-1226. This action was brought to obtain preliminary and permanent injunctions requiring defendants to release water from the Painted Rock Dam in the Gila River Basin, Maricopa County, Arizona, at an accelerated rate, in accordance with a plan of the Corps of Engineers relating to the discharge of water from the dam. Plaintiffs alleged that flooding easements were taken by the United States over their lands in condemnation proceedings, with the understanding that the plan of the Corps of Engineers would be effective with respect to the amount of water which would be released from the dam, and that if the water was not released in accordance with the plan, approximately 4,000 acres of their crop lands would be destroyed by flooding. Plaintiffs alleged that the plan required the release of water at a rate of 2,500 second feet and that the present rate of discharge was between 500 and 1,000 second feet.

On January 28, 1966, the Court entered an order denying plaintiffs' motion for a preliminary injunction and dismissing the complaint upon the grounds that (1) the action was a suit against the United States to which the United States had not consented and (2) the Court lacked jurisdiction to grant the injunction. The Court further stated that if plaintiffs' lands are being damaged by the negligent operation of the dam or if the United States is exercising a greater estate than that acquired in the condemnation

proceedings, plaintiffs have an adequate remedy at law under the Federal Tort Claims Act, 28 U.S.C. 1346(b), or the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491.

Judgment dismissing the action on the merits was entered February 3, 1966.

Staff: Assistant United States Attorney Richard S. Allemann (Arizona) and David D. Hochstein (Land and Natural Resources Division).

Public Lands; Administrative Procedure; Oil Shale. Brennan v. Udall (Civil No. 8542, D. Colo., Feb. 18, 1966) D.J. File 90-1-18-654. The Act of July 17, 1914, 30 U.S.C. 121, provided that homestead patents could be issued on lands classified as valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, provided there be reserved to the United States the particular minerals on the basis of which the classification was made. No specific mention of oil shale appears in this legislation. In 1916, the General Land Office classified some 87,000 acres of oil shale land in Colorado as mineral lands "valuable as a source of petroleum and nitrogen." With approval of the homesteader, a homestead patent thereafter issued containing a reservation of "all the nitrate, oil, and gas in the lands so patented."

With the recent revival of interest in oil shale as a source of petroleum, the scope of the 1914 Act and the effect of patent reservations on oil shale has assumed a new importance. In 1963, an oil company holding a mineral lease from the present owner of the land wrote to the Secretary, stating that its lease included the oil shale because (a) the 1914 Act did not refer to lands classified because of oil shale deposits and (b) the reservation in the patent referred only to oil and gas--and not to oil shale. The Secretary disagreed and this suit followed.

In an opinion dated February 18, 1966, Judge Doyle upheld the Secretary's position. Although the Court first recognized that oil and oil shale are not synonymous and that oil shale contains kerogen, which must be refined into a petroleum product, it noted that the oil shale was valuable only as a source for production of oil and gas, that the 1914 Act, in permitting classification for "oil, gas, or asphaltic minerals," included authority to classify oil shale lands whose mineral value consisted in their availability as a source of oil production and that, because the lands had been classified on the basis of their oil shale value, the reservation in the patent of "all the nitrate, oil, and gas" included a reservation of oil shale.

One of the matters mentioned by the Court was the fact that the original homesteader was faced with the choice of losing his homestead entirely or taking a patent with a reservation of minerals. In other words, if the lands had been classified for some mineral not covered by the 1914 Act, the homestead application could not proceed to patent. However, because the classification was clearly made in order to conserve a source of oil and gas, the situation came within the purpose of the 1914 Act, even though oil shale is not mentioned therein, and issuance of a patent reserving that source was proper. The Court rejected a contention that the suit should be dismissed as an

unconsented suit against the United States.

It has been ascertained that there are hundreds of homestead patents in the Colorado oil shale area that contain a mineral reservation similar to the one interpreted in this case. Accordingly, this decision will be of widespread application. Undoubtedly, it will be appealed.

Staff: Assistant United States Attorney David I. Shedroff (D. Colo.) and Thos. L. McKevitt (Land and Natural Resources Division).

Indians; Allotments to Those Not Residing on Reservations (25 U.S.C. 334); Denial of Patent to Allotment Selection After Issuance of Certificate of Eligibility. Lee Ella Daniels, et al. v. United States and Stewart Udall (Civil No. 64-240, W.D. Okla.) D.J. File 90-2-11-6790. 25 U.S.C. 334 provides generally that when 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 vacant public domain lands in Oklahoma. 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 to require the Secretary to issue a patent. A motion for summary judgment was filed on behalf of defendants, the United States and the Secretary of the Interior. At the first hearing, the Court denied the motion, stating that since plaintiffs had not had their day in court to show why the land should be opened to entry, a factual question was presented which should be determined. After the denial of the motion for summary judgment, we filed a motion for reconsideration, pointing out that the factual determinations made by the Secretary in an administrative proceeding are conclusive when supported by substantial evidence, citing Best v. Humboldt Mining Co, 371 U.S. 334; Cameron v. United States, 252 U.S. 450; Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F. 2d 836 (C.A. D.C. 1959); Noren v. Beck, 199 F. Supp. 708 (S.D. Cal. 1961); cf. United States v. Carlo Bianchi & Co., 372 U.S. 709.

Upon the filing of our motion for reconsideration, the motion for summary judgment was reinstated and the Court entered a memorandum opinion in which he determined that although the decision of the Secretary was subject to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. 1009, such review is not a trial de novo but the Court is limited to a review of the administrative record, citing Noren v. Beck, 199 F. Supp. 708. On the basis of such judicial review, the Court found that the Secretary in his discretion

is authorized to examine and classify all public lands withdrawn by Executive Order No. 6964, issued pursuant to the Taylor Grazing Act; that the Secretary's decision was based upon substantial evidence that the land was not suitable for an Indian homestead, and that the decision should be sustained.

The Tribal Indian Land Rights Association, Inc., named as a plaintiff, joined plaintiff, Daniels, in her request for the relief sought and attempted to make this a class action by alleging that it represented numerous other Indians similarly situated. The Court held, however, that grounds for a class action clearly were not stated under Rule 23, F.R. Civ. P.

Staff: Assistant United States Attorney David A. Kline (W.D. Okla.), and Herbert Pittle (Land and Natural Resources Division).

Federal Tort Claims Act; No Damages Recoverable for Injury to Health, Fright and Mental Anguish Caused by Noise and Vibration of Low-Flying Military Jet Aircraft Without Physical Invasion of the Person. Harold Soldinger and Annette Soldinger v. United States (Civil No. 4251, E.D. Va., Nov. 19, 1965) D.J. File No. 90-1-23-1050. Plaintiffs, husband and wife, brought suit under the Federal Tort Claims Act to recover damages of $50,000 for the aggravation of a coronary condition suffered by the husband and for nervousness, fright and mental anguish suffered by the wife as the direct result of noise and vibration created by low and frequent flights of naval jet aircraft operating from the Naval Air Station at Norfolk, Virginia. Plaintiffs also sought to recover $24,250 under the Tucker Act as just compensation for the diminution in value of their property caused by the low-flying jet aircraft.

On motion for a summary judgment filed by the Government as to the claim under the Federal Tort Claims Act, the Court held that the law of Virginia governed the rights of the parties, 28 U.S.C. 1346(b), and that there could be no recovery under Virginia law for nervousness, injury to health, fright and mental anguish in the absence of a physical invasion of the person.

Since plaintiffs had reduced their claim under the Tucker Act to $10,000 for the diminution in value of their property, which was within the monetary jurisdiction of the court (28 U.S.C. 1346(a)(2)), the Court stated that an appropriate hearing would be held with respect to the alleged "taking."

Staff: Assistant United States Attorney Roger T. Williams (E.D. Va.) and David D. Hochstein (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CIVIL TAX MATTERS

Appellate Decisions

Statute of Limitations; State Statute of Limitations Not Binding on Suit Brought by Government; Federal Statute of Limitations Applicable to Suit to Collect Taxes From Transferee; Government Given Leave to Amend Complaint on Remand to Allege Transferee Liability Where Question Was Fairly Presented to Trial Court Originally Although Not Specifically Alleged. United States v. West Texas State Bank (C.A. 5, March 3, 1966; 17 A.F.T.R. 2d 488). In August 1956, taxpayer assigned its assets to the appellee West Texas State Bank, and the Bank agreed to pay all of taxpayer's debts, including corporation income taxes. At the time of this contract the bank owed withholding taxes for the previous quarter, and this liability was assessed against taxpayer on January 15, 1957. On January 14, 1963, the Government brought suit to collect this money from the Bank on the theory it was a third-party beneficiary of the assignment contract.

The Bank alleged that the suit was barred by the four-year Texas statute of limitations on written contracts, and the district court granted it summary judgment on this basis, observing, in passing, that "there seems to be some measure of probability that a transferor and transferee theory might have been tenable, but that is moot now and will be left to its own uncertainty."

The Court of Appeals reversed, holding that this was a suit to collect taxes, brought by the sovereign in its sovereign capacity, and so was not subject to the state statute of limitations.

The Fifth Circuit further held that if the suit be considered one to collect taxes from a transferee at law, it would come within the six year Federal statute of limitations, for the assessment against the transferor took place less than six years earlier. The Court held that although the pleadings did not clearly raise this issue in the trial court, the reference in the original complaint to the written agreement transferring assets to the bank was "sufficient exposure of the transfer theory * * * to defeat the Bank's contention that the Government is attempting to 'collect on an entirely different theory' than originally used." The Court held that on remand the Government should be given leave to amend its complaint "because it is clear that 'justice so requires.'"

The Court distinguished United States v. Scott, 167 F. 2d 301 (C.A. 8), relied upon by the Bank and the district court for its dictum that a state statute of limitations applied to a suit by the Government as third party beneficiary of a contract to pay tax debts. In that case the Government sued after the running of the six year Federal statute of limitations, but within the ten year Missouri statute. The Fifth Circuit here pointed out that in Scott, unlike the instant case, the state statute, which had not expired, enlarged rather

than shortened the Government's time to sue to enforce the separate contractural liability.

Staff: Burton Berkley and Joseph Kovner
(Tax Division)

Federal Tax Liens Priority: Federal Tax Lien, Notice of Which Was Filed in County Recorder's Office, Entitled to Priority Over Later Judgment Lien Levied on Motor Vehicle Owed by Delinquent Taxpayer Even Though Tax Lien Was Not Noted on Title Certificate of Vehicle. Yellow Motors Credit Corp. v. Bolling, et al.; United States of America, Appellant. (Ohio Court of Appeals, 9th Judicial Dist., Summit County No. 5563, March 31, 1965. (CCH 66-1 U.S. T.C., par. 9198). An assignee of two purchase money chattel mortgages brought suit to prevent the sale of the mortgaged property (two trucks) until the validity and priority of its liens could be determined. Subsequent to the execution of the mortgages and the assignment, and in January, 1962, the District Director filed notices of federal tax lien with the recorder of Summit County, Ohio, pursuant to the provisions of Section 6232 of the 1954 Code and Section 317.09 of the Ohio Revised Code. In May, 1964, the Government filed notice of levy whereby it attached and seized all property belonging to taxpayer. In May, 1963, a creditor secured a judgment against taxpayer and, in June, 1963, levied upon one of the trucks. The problem of priorities arose because neither the federal tax lien nor the judgment lien had been noted upon the certificates of title of the motor vehicles as required by Section 4505.13, O.R.C. The Court, following United States v. Union Central Life Ins. Co., 368 U.S. 291, held that such statutory requirement was not applicable to the United States, pointing out that to hold otherwise would subject the Federal Government to the differing and changing procedures, rules and regulations of each state, as well as subject it to such burden as in effect would give the state a veto power over the Federal Government in the matter of tax collection. It further held that priority of the federal lien was to be determined as of the time notice thereof was filed, and, accordingly, that the federal lien was entitled to priority over the lien of the judgment creditor, notwithstanding the fact that the latter levied upon the property prior to the time the Government did.

Staff: United States Attorney Merle M. McCurdy;
Assistant United States Attorney Robert J. Rotatori (N.D. Ohio);
and Clarence J. Grogan (Tax Division).

Internal Revenue Summons; Sole Shareholder's Fifth Amendment Privilege Not Applicable to Corporate Records in His Possession. United States v. Christiansen (C.A. 3, March 16, 1966). In a short per curiam opinion, the Third Circuit reaffirmed its recent decision in Wright v. Detwiler, 345 F. 2d 1012, that the sole shareholder of a corporation may not invoke his privilege against self-incrimination to prevent production of corporate books and records in his possession. This position of the Third Circuit accords with Grant v. United States, 227 U.S. 74, 79-80, and the recent reaffirmations of this rule in the Second Circuit (Hair Industry, Ltd. v. United States, 340 F. 2d 510, 511, certiorari denied, 381 U.S. 950; United States v. Fago, 319 F. 2d 791, 792-793, certiorari denied, 375 U.S. 906; United States v. Guterma, 272 F. 2d 344, 346) and in the Ninth Circuit (Wild v. Brewer, 329 F. 2d 924, certiorari denied, 379 U.S. 914).

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

District Court Decisions

Jurisdiction; Taxpayer Precluded From Attacking Merits of Tax Assessment by Instituting Suit Against United States to Quiet Title to Her Property Pursuant to 28 U.S.C. 2410 and From Enjoining Collection of Tax Pursuant to 26 U.S.C. 7421. McCann v. United States, District Director. (E.D. Pa., December 29, 1965). (CCH 66-1 U.S.T.C. 9176). Plaintiff instituted this suit naming the United States and the District Director as defendants pursuant to 28 U.S.C. 2410 for the purpose of removing the cloud of a tax lien on her property. She also sought to enjoin the Government's collection of taxes assessed against her and asked the Court to declare the tax liens null and void and to expunge them from the records.

Plaintiff alleged in her complaint that during the taxable period in question her husband was engaged in a roofing business and became delinquent in the payment of Withholding, FUTA, and FICA taxes in 1957. Sometime in 1957, two revenue officers demanded payment of the outstanding taxes due from her husband and stated that if the taxes were not paid he could no longer remain in business, the business could continue. Based upon that advice, she applied for an employer identification number. She filed employer's tax returns as operator of the business from 1957 until about July, 1962, at which time she relinquished the employer's identification number. Thereafter, her husband applied for an identification number in his name only. By 1960 her husband was again delinquent in the payment of his taxes, and assessments for the 1960 taxes were made against plaintiff and her husband. Notices of liens were filed against both. Plaintiff asserted that she was not liable for the taxes because she was not in the roofing business, and requested that the assessment against her be declared null and void and the notices of liens withdrawn. The Government moved to dismiss.

The Court ruled that it is now well settled that Section 2410 does not provide a vehicle for a taxpayer to question the validity of a tax assessment or lien. This is so even though plaintiff claims she is not a taxpayer, because she is thereby merely attempting to do indirectly what she could not do directly. When she argues she is not a taxpayer, she merely argues the conclusion she wishes to have reached in the law suit. The Court further held that it did not have jurisdiction to issue the injunction because of Section 7421. Here, it could not conceivably be said that there was no possibility that the Government could establish its claim, particularly in view of the fact that plaintiff held herself out as the operator of the business from 1957 to 1962.

Staff: United States Attorney Drew J. T. O'Keefe;
Assistant United States Attorney Sidney Salkin, (E.D. Pa.);
and John G. Penn (Tax Division).

Internal Revenue Summons; Accountant's Work Papers in Possession of Taxpayer's Attorney Held Privileged Under Fifth Amendment Rule Against Self-incrimination. United States v. Foster, Lewis, Langley & Onion. (W.D. Texas, April 19, 1965.) (CCH 65-1 U.S.T.C. 9418.) An Internal Revenue summons was issued and served upon a law firm requiring it to produce work papers that taxpayer's accountant had created and utilized during the course of preparing taxpayer's 1961 and 1962 income tax returns, and which had subsequently been turned over to tax-

payer, who, in turn, placed them in the possession of his attorney. The summons was resisted on the ground that the accountant's work papers were the property of taxpayer, and were thus protected from production by taxpayer's Fifth Amendment privilege against self-incrimination.

The District Court, in granting the respondent law firm's motion to quash the summons, held "that at the time the summons was issued, the rightful, indefinite and legitimate possession of the work papers was in the taxpayers in a purely personal capacity, through the respondent as their legal counsel". In so holding, the Court found that the work papers prepared by the accountant consisted merely of a listing and categorizing of information supplied by the taxpayers, and that the work papers would be used by the Government to whatever extent possible to sustain a criminal charge against the taxpayers.

This proceeding was differentiated from the usual "accountant's work papers" situations by the accountant's testimony that it was his practice to surrender his work papers to his clients when he had completed the preparation of their tax returns. Although the case contained elements of an "eleventh hour" transfer, they were overshadowed, at least to the satisfaction of the Court, by the accountant's testimony.

The Solicitor General has decided against the taking of an appeal in this proceeding. Consideration is being given to litigating this issue further on a better record in another forum.

Staff: United States Attorney Ernest Morgan; Assistant United States Attorney Marvin T. Butler (W.D. Texas); and Carl H. Miller (Tax Division).

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