R. Brain

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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 August 5, 1966 No. 16

APPOINTMENTS-UNITED STATES ATTORNEYS

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

Alabama, Middle - Ben Hardeman

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

Maine - Lloyd P. La Fountain

Mr. La Fountain was born January 29, 1931 at Biddeford, Maine, is married and has four children. He attended the University of Maine from September 1950 to June 1952, and Georgetown University from September 1952 to June 1955 when he received his B.S. degree in Foreign Service. He served in the United States Marine Corps from June 17, 1955 to May 24, 1957 when he was honorably discharged as a First Lieutenant. He returned to Georgetown University on September 24, 1957 and received his LL.B. degree on February 1, 1960. He was admitted to the Bar of the State of Maine that same year. From March 1960 to July 1961 he was with Willard & Hasscom in Sanford, Maine and since that time he has engaged in the private practice of law in Biddeford. He has also been County Attorney for York County since January 1963.

The nominations of the following United States Attorneys as Federal district judges have been confirmed:

Ohio, Southern - Joseph P. Kinneary
Texas, Southern - Woodrow B. Seals

This brings to 13 the total of United States Attorneys appointed to Federal judgeships since January, 1961. Two United States Attorneys have been appointed to State judgeships.

IMPORTANT NEW LEGISLATION

On July 18 and 19, 1966, the President signed four bills which were sponsored by the Department. They are:

P.L. 89-505 establishes statutes of limitations on actions brought by the Government: six years for contracts, three years for torts, and six years for erroneous overpayments to military and civilian personnel. There are some exceptions and exclusions in the Act which should be noted carefully. Any right of action subject to the provisions of the Act which accrued prior to the date of enactment shall be deemed to have accrued on the date of enactment.

P.L. 89-506 amends the Federal Tort Claims Act to require presentation to the appropriate agency of all tort claims against the Government as a precondition for filing suit. The agency heads may settle any tort claim: on their own authority for up to $25,000, and over that amount with the prior written approval of the Attorney General. Attorneys' fees are increased from 10% to 20% of any administrative award and from 20% to 25% of any award made after the filing of the suit. The Act applies to claims accruing six months or more after the date of enactment.

P.L. 89-507 authorizes the payment of court costs (except attorneys' fees) to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States in any court having jurisdiction of such action. The types of costs allowed are those enumerated in 28 U.S.C. 1920. The amounts that may be assessed are as set out in statutes, or court rules or order. This enactment applies only to judgments entered in actions filed subsequent to the date of enactment.

P.L. 89-508 authorizes agency heads to settle, compromise, or terminate or suspend collection activities with respect to claims of the Government for up to $20,000 exclusive of interest. The Act becomes effective on the 180th day following its enactment.

You will be advised in the near future of the procedures and regulations to be established for the administration of these bills and on any problems which we believe might arise with respect to them. A copy of each of these bills is being sent to each U.S. Attorney's office under separate cover.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Unreasonable Restraint and Monopoly in Medical Laboratory Business. United States v. The College of American Pathologists (N.D. Ill.) D.J. File 60-21-136. On July 7, 1966, a civil suit was filed in Chicago charging The College of American Pathologists (the Association) with violation of Sections 1, 2 and 3 of the Sherman Act. The complaint alleges that the Association and unnamed co-conspirators including the Association members engaged in an unlawful combination and conspiracy in unreasonable restraint of, and to monopolize and attempt to monopolize, the commercial medical laboratory business.

Membership in the Association is restricted to doctors of medicine who have been certified as specialists in the field of pathology or in a branch of that field by the American Board of Pathology. "Members" or "fellows" of the Association operate and own the majority of commercial medical laboratories in the United States.

Commercial medical laboratories provide bioanalytical testing on material obtained from the human body and provide reports thereon to physicians to aid them in diagnosis and treatment. The actual laboratory testing generally is done by technologists employed by the pathologists. Physicians are the actual customers for laboratory services, although laboratories owned and operated by members of the Association bill the patients directly. The 20,000 commercial medical laboratories in the United States have combined annual sales in excess of $3 billion. Six thousand of these laboratories are located on hospital premises, but are organized and operated as independent commercial enterprises.

The activities of the Association and its co-conspirators are designed to insure that all commercial medical laboratories are owned and operated solely for the profit of pathologists, to drive out of business laboratories owned and operated by chemists, physicists, and biologists regardless of the quality of their services, to eliminate price competition among themselves in the sale of laboratory services, and to eliminate price competition among themselves in the purchase of goods and services from hospitals.

The Association and its members have agreed to refuse to accept positions with or to affiliate with any commercial medical laboratory unless it is operated solely for the profit of pathologists, have agreed to attempt to organize a commercial boycott of laboratories not owned by or operated solely for the profit of pathologists, have made price-fixing agreements for the sale of laboratory services, and have made price-fixing agreements for the purchase of goods and services from hospitals.

As a result of these activities, competition in the commercial medical laboratory field has been eliminated, the introduction of modern and automated analytical devices into laboratories has been impeded, hospitals have been forced to sell goods and services at artificially low prices, charges for laboratory services have been maintained at artificially high levels, the freedom of choice of physicians has been restricted, and health insurance premiums have been forced to artificially high levels.

The complaint seeks to enjoin the defendant from continuing these activities and asks that the Court grant whatever further relief it considers necessary to restore competition in the medical laboratory industry.

Staff: Burton R. Thorman, Albert P. Lindemann, Jr., Kathleen Devine and Larry D. Knippa (Antitrust Division)

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C I V I L   D I V I S I O N

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

Government Liable Only for Negligent or Wrongful Act or Omission by Government Employee; Whether Negligent Person Is Government Employee Is Determined by Federal, Not State, Law. Jack LeFevere v. United States (C. A. 5, No. 22786, June 10, 1966). D.J. File 157-17-90. Plaintiff was struck by a jeep owned by the United States, under the control of the Florida National Guard, and driven by an unauthorized civilian. Plaintiff contended that the United States was liable under the Federal Tort Claims Act, because, he claimed, under Florida law a motor vehicle is a dangerous instrumentality, and its driver is an implied employee of the owner, who is therefore liable for the driver's negligence. On LeFevere's appeal, the Court of Appeals ruled that whether a negligent person is a Federal employee for purposes of the Tort Claims Act is governed by federal law, not state law, and that under federal law neither the unauthorized civilian driving the jeep, nor the National Guardsman in control of the jeep, was an employee of the United States, relying upon Maryland f/u/o Levin v. United States, 381 U.S. 41.

Staff: Walter H. Fleischer (Civil Division)

GOVERNMENT CONTRACTS

Supplier of Coal for Government Prime Contract Could Cancel His Obligation to Deliver Coal; Government Liable for Pre-judgment Interest on Supplier's Counterclaim, as Assignee of Prime Contract. United States v. P & D Coal Mining Co. (C.A. 6, No. 16349, March 28, 1966). D.J. File 77-31-272. The Court of Appeals, with Judge Phillips dissenting, affirmed the district court's decision that under the provisions of a Government procurement contract a supplier of coal could terminate his obligation to deliver coal at any time up to 60 days prior to the expiration of the contract, and that the supplier therefore was not liable for extra costs incurred when coal it refused to deliver had to be purchased on the open market.

The majority also sustained an award of pre-judgment interest against the Government on the supplier's counterclaim, on the theory that by taking over the claim against the supplier held by the prime contractor the Government stepped into the shoes of its assignor, and became liable for such interest. The dissenting judge agreed with our contention that, since the counterclaim was founded upon the Tucker Act, 28 U.S.C. 1346(a), interest was limited to that provided for in 28 U.S.C. 2411(b) and 31 U.S.C. 724a.

Staff: Walter H. Fleischer (Civil Division)

MILITARY DISCHARGES

Serviceman Must Exhaust His Administrative Remedy Before Seeking Judicial Injunctive Relief From Undesirable Discharge. James C. Tuggle v. Brown (C.A. 5, No. 23463, June 28, 1966). D.J. File 145-14-550. This per curiam opinion holds that a serviceman who is to receive an undesirable discharge must undergo the discharge and pursue his remedy before the Board for Correction of Military Records; the district court lacks jurisdiction to entertain a request for injunctive relief from the discharge. This decision conflicts with that of the Ninth Circuit in Schwartz v. Covington, 341 F. 2d 537, which held that an undesirable discharge constituted such "irreparable injury" to the serviceman that the district court was justified in enjoining the discharge until the Board for Correction of Military Records had acted and its action had been subjected to judicial review. The Fifth Circuit here relied on its decision in McCurdy v. Zuckert, 359 F. 2d 491, which held that the district court lacked "primary jurisdiction" to grant injunctive relief from a general discharge, which is issued "under honorable conditions." McCurdy now is pending on petition for certiorari in the Supreme Court (No. 331, Misc.)

Staff: United States Attorney Edward F. Boardman (M.D. Fla.)

RIVERS AND HARBORS ACT

If Negligently Sunk Vessel Which Obstructs Navigation Is Not Removed by Tortfeasor, Government May Either Obtain Injunction Compelling Removal or Itself Remove and Recover Costs of Removal. United States v. Cargill, Inc., et al.; United States v. 2,220,000 Pounds Chlorine Cargo, etc., et al. (C.A. 5, No. 22148, July 13, 1966). D.J. Files 62-41-5, 62-32-345. The Government instituted the Chlorine Cargo case to recover in excess of $3 million which had been expended in connection with removing liquid chlorine from aboard a sunken barge in the Mississippi River. It was alleged that the chlorine barge sank as the result of the negligence of the defendants -- the owners of the barge, a towboat and the chlorine cargo. In the Cargill case, the United States sought a judgment declaring the defendants in that suit -- the owners, managers, charterers and insurers of two other barges which sank in the Mississippi River, allegedly as a result of their negligence -- liable for the marking and removal of the wrecks. The district court consolidated the two cases and entered summary judgment in favor of all the defendants holding that, as a matter of law, the Government could not recover. The Government appealed, arguing that the right to the relief requested derived from both the Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq., and the non-statutory common and maritime law of the United States.

In a comprehensive opinion, the Fifth Circuit reversed the district court's decision, holding that under the Rivers and Harbors Act of 1899 (1) the Government may remove a wreck (and/or its contents) which obstructs navigation and then recover the costs of removal from the tortfeasors responsible for the sinking, and (2) the Government is entitled to an injunction compelling those responsible for the negligent sinking of a vessel to remove the vessel. In so holding, the Court of Appeals went into direct conflict with the decision of the Ninth Circuit, in United States v. Bethlehem Steel Corp. (The Texmar), 319 F. 2d 512, that the owner of a negligently sunk vessel may relieve itself of liability for removal by abandoning the vessel. The Court also rejected the Third Circuit's holding, in United States v. Zubik, 295 F. 2d 53, that the Government may not recover the costs of removal from the tortfeasors.

In view of its holding that the Government was entitled to the relief requested under the Rivers and Harbors Act, there was no need for the Court to consider our alternative contention that the right to such relief also derived from the non-statutory law of the United States. The Court of Appeals remanded the cases to the district court for a trial to determine whether defendants were negligent, as alleged in the libels, and the amount of the Government's damages in the chlorine barge case.

Staff: Martin Jacobs (Civil Division)

SOCIAL SECURITY ACT

Third Circuit Holds Expert Testimony on Job Availability Inadequate. William H. Baker v. Gardner (C.A. 3, No. 15586, July 5, 1966). D.J. File 137-64-80. The Court of Appeals upheld, as supported by substantial evidence, the Secretary's findings as to the extent of claimant's disability. It overturned, however, the district court's holding that the claimant has the burden of proving his inability to secure employment other than his former work and, placing that affirmative burden of proof on the Secretary, held the vocational expert's testimony here to be inadequate under the test of the second Hodgson case, 357 F. 2d 750.

Staff: United States Attorney Gustave Diamond and Assistant United States Attorney Robert E. Tucker (W.D. Pa.).

Sixth Circuit Rules That Claimant Fails to Meet Initial Burden of Proving Himself Disabled. Cecil Smith v. Gardner (C.A. 6, No. 16454, June 18, 1966). D.J. File 137-30-164. In this action for disability benefits, claimant, a 37 year-old unemployed truck driver, alleged disability resulting from a back injury and assorted other impairments. The Sixth Circuit reversed the district court's grant of benefits, finding that, although there was an anxiety neurosis present, there was medical evidence available to show that claimant had recovered from his back injury to the extent that he was able to return to work as a truck driver. Consequently, it held, there was no need for the Secretary to provide proof as to other work that claimant could do or its availability to claimant.

Staff: Robert C. McDiarmid (Civil Division)

Fourth Circuit Holds Expert Testimony on Job Availability Inadequate. Roscoe W. Stewart v. Gardner (C.A. 4, No. 10346, May 30, 1966). D.J. File 137-84-274. In this Social Security disability case, the Secretary denied benefits to claimant, a 56 year-old coal miner, for the reason that he was still capable, despite his prostate, kidney and lung impairments, of performing light work in the furniture manufacturing and assembling industry. The Secretary further found that such work existed within a reasonable distance of claimant's home. The district court reversed, finding that the evidence as to job availability was too speculative and, in any event, that the record showed that these jobs did not exist in the county in which the claimant resided. The Court of Appeals affirmed on the ground that the Secretary had failed to meet his burden of coming forward with evidence that such work exists "within the geographic area in which [claimant] can reasonably be expected to market his labor." The Court noted that while the relevant geographic market varies for each individual case, the claimant's home county, or parts of it, "is certainly included."

Staff: Howard J. Kashner (Civil Division)

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C R I M I N A L   D I V I S I O N

Assistant Attorney General Fred M. Vinson, Jr.

NARCOTICS

Fact of Possession of Cocaine Hydrochloride Held Rationally Connected with Presumed Facts of Illegal Importation and the Knowledge Thereof. United States v. Coke (C.A. 2, No. 29,975 (1966)). D.J. File 12-51-964. Defendant Coke argued that the presumption of illegal importation and knowledge in 21 U.S.C. 174 is unconstitutional where the narcotic drug found in one's possession is cocaine hydrochloride. The Court stated that the decisions which found no "rational connection" between possession of cocaine hydrochloride and the presumption of illegal importation and knowledge were based upon a strong showing that the major source of supply in the particular area involved in each case was domestic. In the instant case, the Court found a statistical survey offered by the defendant was insufficient to support a finding of no rational connection between the presumed and basic facts.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorneys Daniel Donnelly
and John A. Strichter (S.D. N.Y.).

NARCOTICS

Use of Tube and Emetic to Obtain Packets of Heroin Swallowed to Facilitate Smuggling Held Not an Unreasonable Search Even When Used Without Suspect's Consent. Blefare v. United States (C.A. 9, No. 19,825, (1966)). D.J. File 12-12-2529. Blefare and his co-defendant, Michel, were convicted of smuggling heroin into the United States from Mexico. The customs agents had knowledge that Blefare had admitted that on at least one prior occasion he had smuggled the drug into the country by swallowing a small packet and expelling it from his stomach after he had crossed the border. The evidence produced at trial was obtained by the use of a tube passing through the nose and throat to the stomach which carried a fluid that induced defendants to expel a total of 5 packets of heroin. Defendant Blefare, who consented to a physical examination by a doctor, balked at the use of the tube and emetic and was restrained while the procedure was effected. Blefare contended that this type of search, conducted without a warrant, was unreasonable and violative of his constitutional rights as was decided by the Supreme Court in Rochin v. California, 342 U.S. 165 (1952).

In a majority decision the Ninth Circuit held that the instant case was not in point with Rochin and consequently sustained the convictions in the lower court. The Court found that the Rochin situation involved an illegal entry into a room, an assault upon the person of the subject, and false imprisonment in the hospital where the process was administered. The fact of aggravated physical abuse present in Rochin was lacking in the instant case. The search of Blefare was a valid border search and the Court also observed that there was no other medically safe way to procure the evidence. In addition the fact that Blefare testified that he had intended to expel the heroin in a manner similar to the one employed was a basis for finding that such a search was not conduct which "shocks the conscience." Hence, the Court observed that the reasonableness of a search is essentially a question of degree and concluded that the type of search conducted with respect to Blefare was not violative of his constitutional rights.

Staff: United States Attorney Manuel L. Real;
Assistant United States Attorneys John K. Van de Kamp
and Phillip W. Johnson (S.D. Calif.).

JENCKS ACT

Jencks Act (18 U.S.C. 3500) Is Limited to Proceedings in Court and Is Not Applicable to Preliminary Hearings Before Committing Magistrates. Gibson v. Halleck, 254 F. Supp. 159 (D.C. D.C., 1966). Gibson, indicted by a grand jury and awaiting trial, brought an action for relief in the nature of a writ of mandamus against Judge Halleck of the D.C. Court of General Sessions, who, as a committing magistrate, conducted Gibson's preliminary hearing. At the preliminary hearing Gibson was represented by counsel and had a full opportunity to cross-examine witnesses. The relief sought was a judgment to require a reopening of the preliminary hearing and the production of statements of Government witnesses pursuant to the provisions of the Jencks Act.

District Judge Holtzoff, in denying Gibson's motion, held that the Jencks Act is to be limited to proceedings in court and is not applicable to preliminary hearings before committing magistrates. The Court reasoned:

> The statute very carefully used the words, "The Court". A committing magistrate is not "The Court". This is no oversight on the part of the draftsmen of the Act. It is a very serious matter, at times, to require the production of statements contemplated by the statute. There may be a dispute as to whether a particular document is subject to production. In that event the Court is authorized to examine the alleged statement in camera in order to determine the matter. A delicate problem may be presented. Clearly, it was not intended to leave such broad authority in the hands of committing magistrates.

Furthermore, Judge Holtzoff was of the opinion that the action was moot "because irrespective of its outcome, the defendant would remain under indictment and the indictment would have to be tried. Naturally, at the trial the defendant would have his rights under the Jencks Act and those rights would not be affected by the result of the proceeding now before the Court."

Staff: United States Attorney David G. Bress;
Assistant United States Attorneys Oscar Altshuler
and William M. Cohen (D.C.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Absence of Six Months Does Not Necessarily Interrrupt Physical Presence Requirement for Suspension of Deportation. Toon-Ming Wong v. INS (C.A. 9, No. 19,849, July 18, 1966.) D.J. File 39-12-701. This action was brought under 8 U.S.C. 1105a to review the denial by the Board of Immigration Appeals of a motion to reopen the deportation proceedings of petitioner, an alien and native of China.

The first issue was whether the action was timely since it was not filed as required by the express terms of 8 U.S.C. 1105a within six months from the date of the deportation order. The Court found it timely because it was filed within six months of the denial of the motion to reopen.

The second and last issue was whether a six months absence of petitioner in Canada, while a minor and pursuant to the instructions of his foster father, prevented him from establishing eligibility for suspension of deportation under 8 U.S.C. 1254 which provides that an applicant for suspension of deportation must have been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application. The Board in denying the motion to reopen ruled that petitioner's six months absence broke the continuity of his physical presence in the United States. The Court found this to be error and held the length of the absence as relevant but not alone determinative. The test according to the Court is whether it appears from all circumstances that there was as stated by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. The Court remanded the case to the Board to determine, in the first instance, whether petitioner's intent or that of his foster parent, or of both, is controlling under the statute, and what the intent of the appropriate person or persons in fact was.

Staff: United States Attorney Manuel L. Real
Assistant United States Attorneys
Frederick M. Brosio, Jr., and William B.
Spivak, Jr. (S.D. Cal.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Defraud United States; Standing to Question Constitutionality; Grand Jury Minutes. Dennis v. United States Supreme Court, June 20, 1966 D.J. File # 146-7-5320. Dennis and five other officers and employees of the International Union of Mine, Mill and Smelter Workers were convicted of conspiracy to defraud the United States (18 U.S.C. 371). The object of the conspiracy was to obtain for the Union the use of National Labor Relations Board services by filing false "non-Communist" affidavits under Section 9(h) of the Taft-Hartley Act. Section 9(h) was repealed in 1959. The Tenth Circuit reversed one conviction (302 F(2d) 5), but affirmed a second conviction after a re-trial. 346 F(2d) 10.

The Supreme Court granted certiorari limited to three points. As to "(1)", the Court held in an opinion by Fortas, J. that the indictment stated an offense, conspiracy to defraud the United States, because Congress in 9(h) had contemplated the filing of true affidavits and the conspiracy was directed to deceiving the Labor Board and securing fraudulently the use of its facilities in proceedings before it. The Court distinguished Bridges v. United States, 346 U.S. 209, on the ground that that case turned on the construction of the Wartime Suspension of Limitations Act and not the construction of Section 371.

(2) The Court also held that the petitioners did not have standing to question the constitutionality of Section 9(h). 9(h) was held constitutional in American Communications Assn v. Douds, 339 U.S. 382. Petitioners argued that United States v. Brown, 381 U.S. 437, had in effect overruled Douds and that it followed from Brown that 9(h) had been unconstitutional. The Court, citing Kay v. United States, 303 U.S. 1, and United States v. Kapp, 302 U.S. 214, said that there was no reason to consider the constitutionality of the statute at the behest of petitioners who had conspired to circumvent it by falsehood and deceit.

(3) The Court's reversal was based on the ground that the District Court erred in denying the defendants' motions for the production of the grand jury minutes of the testimony of four key prosecution witnesses. The indictment was returned in 1956 and the conspiracy covered the period 1948-1955, so at the time of their testimony before the grand jury was given when their memories of the events testified to would have been fresher, and since their trial testimony was essential to the prosecution's case there was a "particularized need" for the production of the minutes within Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, since they might have been used to impeach uncorroborated testimony of the witnesses. The Court also indicated that as of the date of the second trial in 1963 the importance of secrecy of the minutes was minimal, and said that two of the witnesses were accomplices, and one of them was a paid informer, and a third had reasons for hostility toward petitioners; and that one witness admitted on cross-examination that he had in earlier statements been mistaken about significant dates. The testimony of the witnesses related largely to statements claimed to have been made by petitioners. "Where the question of guilt or innocence may turn on exactly what was said, the defense

is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements."

In a separate opinion Justice Black disagreed with the holdings that an offense of conspiring to defraud the United States was alleged and that it was not necessary to pass on the validity of Section 9(h). Justice Douglas concurred in that opinion and also concurred in the part of the majority opinion relating to grand jury minutes.

Staff: The case was argued by Nathan Lewin (Office of the Solicitor General). With him on the brief were Assistant Attorney General Yeagley, Kevin T. Maroney, and George B. Searls (Internal Security), and Sidney M. Glazer (Criminal Division).

Espionage (18 U.S.C. 794 (c), 371, and 951). United States v. William Henry Whalen. (E.D. Va.), D.J. File 146-7-79-412. On July 12, 1966, a federal grand jury in Newport News, Virginia returned a three-count indictment charging William Henry Whalen with conspiring to commit espionage, conspiring to act as an agent of the Union of Soviet Socialist Republics in the United States without notifying the Secretary of State, and with the substantive offense of acting as such an agent. Two Soviets were named as co-conspirators, but not as defendants: Colonel Sergei Edemski, Assistant Military attache at the Soviet Embassy in Washington, D. C. from 1955 to 1960, and Mikhail A. Shumaev, also known as "Mike," First Secretary at the Soviet Embassy from 1959 to 1963. Neither of these men are currently in the United States.

Whalen, a retired Army lieutenant colonel, was assigned from 1955 to 1957 as Assistant Chief, U.S.A. Foreign Liaison Office, Washington, D. C. From July 1957 to October 1960, he served with J-2 (Intelligence) of the Office of the Joint Chiefs of Staff. The indictment alleges that from the early part of 1959 to the early part of 1963 he conspired with the named co-conspirators to furnish information relating to our national defense to the Union of Soviet Socialist Republics. It is charged that Whalen made notes from the files of the Joint Chiefs of Staff, engaged his fellow officers in conversation for the purpose of securing national defense information, and sought employment in the Department of Defense subsequent to his retirement, all as part of his conspiracy with the Soviets.

As overt acts, it is charged that Whalen received money from the Soviets and that he met surreptitiously with his co-conspirators in various shopping centers in Alexandria, Virginia.

Whalen was arrested on July 12, 1966. He was taken before a United States Commissioner and released on $15,000 bail. Arraignment was set for July 26, 1966, but was subsequently postponed and a new arraignment date has not been set.

Staff: United States Attorney C. Vernon Spratley (E.D. Va.); Brandon Alvey and Lee M. Schepps (Internal Security Divsion)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

NOTICE

BANKRUPTCY ACT AMENDMENTS CONCERNING FEDERAL TAXES

On July 5, 1966 two amendments to the Bankruptcy Act directly affecting the collection of federal taxes in bankruptcy proceedings became law. The first, Public Law 89-496 (H.R. 3438), provides for the discharge, with certain exceptions, of taxes which became due more than three years prior to bankruptcy, clarifies the existing jurisdiction of Bankruptcy Courts to hear and determine the merits of federal taxes, and grants priority status under Section 64(a)(4) generally only to tax liabilities within three years of bankruptcy. The amendment as finally enacted is reprinted in the Prentice Hall Federal Tax Service at paragraph 59,211, and excerpts from the Senate Judiciary Committee report appear at paragraph 59,211.1. The effective date of this new law is October 3, 1966, and will affect tax claims in bankruptcy actions pending at that time.

Public Law 89-496 (H.R. 136) which became effective on July 5, 1966, establishes the priority of liens in bankruptcy, provides a statutory solution to the circuity of lien problems and codifies the decision of the United States Supreme Court in United States v. Speers, 382 U.S. 266 (1965). The amendment is reprinted in Prentice Hall Federal Tax Service at paragraph 59,221, and the enlightening report of the Senate Judiciary Committee appears at paragraph 59,221.1.

These bills are now under study by the Tax Division and the Internal Revenue Service, and an announcement of basic interpretations will be made in the near future. All matters concerning the new legislation should be immediately referred to the General Litigation Section in accordance with usual procedures.

CIVIL TAX MATTERS

District Court Decision

Enforcement of Levy: Levy Served on Bank Covering Account Utilized as Security Device to Cover Outstanding Loan for Which Taxpayer Was in Default; Held Taxpayer-Depositor no Longer Had Property Interest in Bank Account Even Though no Affirmative Acts Were Exercised by Bank to Effect Set-Off. Home Savings and Loan Association v. United States. (D. N.Mex., April 4, 1966). (CCH 66-1 U.S.T.C. ¶9451). The taxpayer-depositor secured a loan from the Home Savings and Loan Association pledging as security, among other items, a bank account which was formed out of a portion of the loan proceeds. The security agreement by and between the bank and the taxpayer-depositor provided for a set-off if default should occur provided, however, that if the loan balance was reduced to a certain amount or if one year should pass, whichever occurred first, then the account would vest in the taxpayer-depositor. After this agreement was executed, taxes were assessed against the taxpayer, a notice of lien was filed, and a levy was served upon the bank; the levy was served more than one year after the agreement was executed. Within one year of the agreement, the taxpayer-depositor defaulted without having reduced the loan to the agreed-upon sum; the bank, however, took no action to effect a set-off within that one-year period. The pass book to the bank account had been surrendered to the bank and was at no time returned to the taxpayer.

The Court found that as the taxpayer-depositor did not reduce the loan to the stated amount and as he did default, that control and ownership of the account remained in the bank and did not vest in the taxpayer-depositor according to the terms of the security agreement. Accordingly, it was held that the bank account was not subject to the tax lien.

Staff: United States Attorney John F. Quinn and Assistant United States Attorney Ruth C. Streeter, (D. N.Mex.).

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