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Vol. 14 November 11, 1966 No. 23

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

FEDERAL COURT TRANSCRIPT RATES

New maximum transcript rates were approved by the Judicial Conference of September 1966. These rates become effective in each district only after receipt in the Administrative Office of the United States Courts of the certification by the district court.

The new rates are:

Ordinary transcript: 90 cents for the original
30 cents for each copy

Daily transcript: $1.50 for the original
* for copies

* The rates for copies remain as previously set by the Judicial Conference of September 1958.

To date the new rates have become effective in the following districts:

Ala. M.	Ga. N.	Minn.	N.C. W.	Tenn. E.
Ariz.	Ga. M.	Miss. N.	N.D.	Tenn. W.
Ark. E.	Ga. S.	Miss. S.	Ohio N.	Tex. E.
Ark. W.	Guam	Mo. E.	Okla. W.	Tex. S.
Calif. S.	Idaho	Nevada	Ore.	Vt.
Calif. C.	Ill. S.	N.M.	Pa. E.	Va. E.
Colo.	Ind. S.	N.Y. N.	Pa. M.	Va. W.
Del.	Iowa N.	N.Y. E.	Pa. W.	Wash. E.
D.C.	Kans.	N.Y. S.	R.I.	W.Va. N.
Fla. M.	Maryland	N.C. E.	S.C.	W.Va. S.
Fla. S.	Mass.	N.C. M.		

Appropriate changes will be made in the United States Attorneys' Manual in the near future.

MEMOS AND ORDERS

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

MEMOS	DATED	DISTRIBUTION	SUBJECT
484-S1	10-10-66	U.S. Attorneys	Enforcement of Penalties for Violations of Conditions of Release Under Bail Reform Act of 1966

MEMOS	DATED	DISTRIBUTION	SUBJECT
487-S1	10-4-66	U.S. Attorneys & Marshals	Cost Reduction in Procurement, Supply and Property Management
487-S2	10-12-66	U.S. Attorneys & Marshals	Operation Cleanup
488	10-10-66	U.S. Attorneys & Marshals	Reduction in Costs of Office Equipment
489	10-18-66	U.S. Attorneys	Standards Governing Admin. Collection, Compromise Closing, and Referral of of Gov. Claims for Money or Property
490	10-18-66	U.S. Attorneys	Bankruptcy Legislation, 89th Congress, Second Session
491	10-20-66	U.S. Marshals	Redesign of Disbursing Officer Checks to Permit Use of Reg. Check Window Envelopes

ORDERS	DATED	DISTRIBUTION	SUBJECT
368-66	9-26-66	U.S. Attorneys & Marshals	Designating William T. Woodard, Jr., as Member of Youth Correction Div. Within Board of Parole

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Plumbing Companies Charged With Violation of Sherman Act. United States v. American Radiator & Standard Sanitary Corporation, et al., United States v. American Radiator & Standard Sanitary Corporation, et al., and United States v. Plumbing Fixture Manufacturers Association, et al. (W.D. Pa.) D.J. File Nos. 60-3-146, 60-3-152, and 60-3-153. On October 6, 1966, a grand jury in Pittsburg, Pennsylvania, returned two separate one-count indictments each charging a combination and conspiracy to raise, fix, maintain and stabilize prices of plumbing fixtures in violation of Section 1 of the Sherman Act. The first indictment (U.S. v. American Radiator & Standard Sanitary Corporation, et al.) named the nation's eight largest manufacturers of plumbing fixtures, eight of their executives and the Plumbing Fixture Manufacturers Association. The second named the Plumbing Fixture Manufacturers Association, three of the same companies and seven other companies.

Named as defendant in the first indictment were:

American Radiator & Standard Sanitary Corporation; its president, Plumbing and Heating Division, Joseph J. Decker; and its vice president of sales and marketing, Plumbing and Heating Division, Daniel J. Quinn;

Kohler Co., and its sales manager and director, Norman R. Held;

Crane Co., and its vice president, Plumbing-Heating and Air-Conditioning Group, Robert S. Casner;

Wallace-Murray Corporation, and its president, John B. Balmer;

Universal-Rundle Corporation and its vice president of marketing, Stanley S. Backner;

Rheem Manufacturing Company, and its vice president of marketing, Home Products Division, Robert J. Pierson;

Borg-Warner Corporation, and its president and general manager, Ingersoll-Humphryes Division, George W. Kelch;

Briggs Manufacturing Company; and

Plumbing Fixture Manufacturers Association

The indictment charged that beginning some time in September 1962 and continuing thee after at least until some time in 1966, the defendants and co-conspiratorsengaged in an unlawful combination and conspiracy pursuant to which

they held meetings at various times under the guise of so-called "official" PFMA meetings and during conventions of plumbing fixtures distributors and wholesalers at hotels, and clubs, at which times they agreed to increase prices of enameled cast iron and vitreous china plumbing fixtures. Such plumbing fixtures include enameled cast iron bathtubs, lavatories and sinks and vitreous china water closets, lavatories and urinals.

The indictment also charged that at the illegal meetings the defendants and co-conspirators agreed to limitations on maximum discounts from published prices of enameled cast iron and vitreous china plumbing fixtures; agreed to discontinue the manufacture of regular enameled cast iron plumbing fixtures, which were lower-priced than acid-resistant enameled cast iron plumbing fixtures; and agreed to seek and to obtain, as part of the agreement to discontinue the manufacture of enameled cast iron plumbing fixtures, the revision of the Enameled Cast Iron Commercial Standard to provide for only acid-resistant enameled cast iron plumbing fixtures.

In addition to charging the defendants and co-conspirators with having done those things which were agreed upon at the illegal meetings, the indictment further charged that the defendants and co-conspirators used the office of Secretary of PFMA, among other things, to schedule and arrange for the aforesaid meetings, to maintain a line of communication between said defendants and co-conspirators and to co-ordinate the efforts of said defendants and co-conspirators in seeking and obtaining the revision of the aforesaid Enameled Cast Iron Commercial Standard.

The defendant corporations account for about 98 per cent of the total sales of enameled cast iron plumbing fixtures and about 80 per cent of the total sales of vitreous china plumbing fixtures in the United States. During the period of time covered by the indictment, total sales of enameled cast iron and vitreous china plumbing fixtures by the defendant corporations were approximately one billion dollars.

A companion civil complaint was filed based upon the facts as alleged in the first indictment. The complaint asked, among other things, that the association be dissolved and that the companies be enjoined from the continuation and renewal of the conspiracy alleged.

Named as defendants in U.S. v. Plumbing Fixtures Manufacturers Association, et al., the second indictment, were:

> Plumbing Fixture Manufacturers Association; Crane Co.; Universal-Rundle Corporation; Briggs Manufacturing Company; Gerber Plumbing Fixtures Corp.; Ogden Corporation; Mansfield Sanitary, Inc.; Peerless Pottery, Inc.; Kilgore Ceramics Corporation; Lawndale Industries, Inc.; and Georgia Sanitary Pottery, Inc.

Named as co-conspirators were Verson Manufacturing Company and Chicago Pottery Company.

The indictment charged that beginning some time in November 1960 and continuing to June 1962, the defendants and co-conspirators engaged in an unlawful combination and conspiracy pursuant to which they met in hotel and motel rooms in 1960, 1961, and 1962, at which times they agreed to raise and stabilize the prices of staple vitreous china plumbing fixtures (the defendants' lowest-priced line of residential water closet combination and lavatories), to issue price sheets and bulletins reflecting the prices agreed upon, to stagger the issuance of such price sheets and bulletins in order to avoid suspicion of price-fixing activities, and to continue to meet as necessary in order to insure the effectiveness of the conspiracy.

Staff: John C. Fricano, Rodney O. Thorson, Charles W. K. Gamble, Richard P. Delaney, Joel Davidow and S. Robert Mitchell (Antitrust Division)

Court Denies Defendants' Motion to Impound Particulars to Be Furnished Government. United States v. The American Oil Company, et al., (D. N.J.) D.J. File No. 60-57-170. In an opinion filed October 20, 1966, Judge Wortendyke, after granting, in part, and denying, in part, defendants' motion for a bill of particulars, denied a motion by defendants that the particulars to be furnished "be impounded until further order of the court, entered after trial of their action and final judgment herein; . . . ."

In their briefs, defendants had argued that the particulars to be furnished by the Government would of necessity involve disclosure of information obtained before the Grand Jury and that the secrecy of the Grand Jury proceeding "should not be unnecessarily violated;" that an existing treble-damage complainant could use the particulars as a basis for his own discovery proceedings which would in turn yield to the Government "the benefits of pretrial discovery to which it is not entitled"; and that disclosure of the particulars at this time would "erode the presumption of innocence". In connection with the latter argument, defendants took the position that the interests of a treble-damage complainant do not in any event require disclosure of the Government's particulars until after conviction or a guilty plea because 15 U.S.C. 16 intends only that a final judgment be prima facie evidence in a treble-damage suit. Finally, defendants argued that "no reason has been shown" why there should be "imposed" upon them a "choice" of either having "to forego their right to ask for particulars necessary to their defense, or assume the risk of public disclosure of those particulars".

In denying defendants' motion, Judge Wortendyke stated that particulars to be furnished by the Government will not constitute evidence in the Government's action, nor in a private civil action, but will serve only to limit the Government's proof and to assist the defendants in preparing their defense. They " . . . become part of the pretrial record in the cause" and . . ." are, therefore, equally open to public inspection as are the indictment and the plea or pleas thereto". The Court held that the "Defendants have failed to show any fact, or cite any authorities, which would justify this court in surrounding with the secrecy of an impounding order either the demands for particulars, or the particulars themselves . . ."

As far as we know, the only other opinion on the subject of impounding particulars was an unreported one filed in U.S. v. Anaconda American Brass Co., Cr. 10725 (D. Conn. 1963). There a motion to impound particulars was granted. In our brief on the instant motion we argued that the decision in Anaconda was in error even on its distinguishable facts. In his opinion Judge Wortendyke stated that he did not consider himself bound by Anaconda.

Staff: Bernard Wehrmann, Bertram M. Kantor and Robert D. Canty (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General J. William Doolittle

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Court Reviews Regulation of Veterans Administration Prohibiting Resident Physicians From Engaging in Outside Employment, and Finds It Reasonable. Mulry et al. v. Driver et al., (C.A. 9, No. 20,514, September 15, 1966) DJ File 145-151-174. A group of resident physicians at the Veterans Administration Hospital in Long Beach, California brought this action to attack a VA regulation stating that resident physicians are employed on a full time basis and may not engage in outside practice (with certain limited exceptions). Plaintiffs alleged that the regulation was arbitrary and unreasonable and deprived them of the right to earn an adequate livelihood, in view of the VA's low pay. The district court dismissed the complaint on the grounds that it was an unconsented suit against the United States. The Court of Appeals held that this ground for dismissal was erroneous -- that the district court should have focussed its attention on whether the suit was allowed by Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, which, if applicable, would supply the necessary consent to the suit.

On appeal, the Government argued that agency regulations regarding the terms of employment are matters "committed to agency discretion" within the meaning of Section 10. The Court of Appeals found it unnecessary to decide that question. Noting the wide limits of agency discretion even in cases where the agency action is subject to review, the Court held -- despite the lack of any record evidence on the point -- that the VA regulation is reasonable. The Court found it "unnecessary to adduce any evidence to disclose what are necessarily the facts in respect to the operation of [veterans] hospitals." Since patients require care around the clock, a resident doctor who is away on other employment may not be available when needed in an emergency. "Whether these doctors, performing their residencies' services in the veterans hospitals, ought to be subject to instant call and immediate service, is a question of policy." Thus the Court concluded that there was no need to remand the case with directions to entertain the application for review, since the district court could only decide that there was a rational basis for the regulation.

Staff: Former Assistant Attorney General John W. Douglas and Robert V. Zener (Civil Division)

FEDERAL TORT CLAIMS ACT

Alleged Negligent Examination and Discharge by VA Doctor From Hospital Not Clearly "Discretionary Function" so as to Render Complaint Subject to Motion to Dismiss For Failure to State Claim. Supchak v. United States, (C.A. 3, No. 15,758 August 31, 1966) DJ No. 157-63-102. In this action for personal injury and wrongful death under the Federal Tort Claims Act, plaintiff alleged that decedent had been a paraplegic veteran eligible for treatment in V.A. hospitals who had a long history of treatment at the V.A. hospital in Wilkes Barre, Pa. Allegedly,

he suffered a convulsive seizure (of a type for which he had been treated before) early one morning, and, on the advice of a private physician, was rushed to the Wilkes Barre V.A. hospital where he was received, negligently examined, and turned away. While still in the ambulance returning from the hospital, he suffered another seizure and died.

The United States Attorney moved to dismiss the complaint for failure to state a claim, on the ground that the admittance of an applicant to a hospital was a discretionary function within the exception of 28 U.S.C. 2680(a), and the district court did so dismiss.

On appeal, the Third Circuit held that it did not appear from the complaint that the acts alleged constituted a discretionary function making the complaint subject to dismissal. Consequently, the case was remanded for trial.

Staff: Robert C. McDiarmid (Civil Division)

Alleged Negligent Conduct of Federal Officer Leading to False Arrest, False Imprisonment and Defamation Does Not Avoid Bar of 28 U.S.C. 2680(h) Against Tort Claims Arising Out of False Imprisonment, False Arrest, Libel and Slander. Margaret Sopp v. United States, (C.A. 3, No. 15,816, October 12, 1966). DJ File 157-64-217. In this Federal Tort Claims Act action, plaintiff alleged that a postal inspector had negligently conducted an investigation into the sending of obscene letters through the mail resulting in her arrest, imprisonment and defamation by local police officers who falsely charged her with solicitation to commit sodomy. The Goverment moved for summary judgment contending, inter alia, that the action was barred by 28 U.S.C. 2680(h). The district court granted the motion.

The Third Circuit affirmed the judgment of the district court, holding that the action was one "arising out of . . . false imprisonment, false arrest, . . . libel, slander . . ." and therefore barred by 28 U.S.C. 2680(h).

Staff: Harvey L. Zuckman (Civil Division)

INSURANCE

Where Insurer Pays Full Amount of Insurance on Destroyed Aircraft to Lessee, Claim of United States, as Lessor, Against Insurer for Share of Proceeds Is Barred by One-year Limitation Period in Insurance Policy, But Claim Under Lease Against Lessee for Share of Insurance Proceeds Is Not Barred; Interest Runs Against Lessee Despite Tender of Full Amount Due. United States v. Eastern Air Lines, Inc., Glens Falls Insurance Company, et al., (C.A. 2, No. 30264, September 19, 1966) DJ File 77-749. This case concerns a controversy over the insurance proceeds of an aircraft which crashed over Washington National Airport on November 1, 1949. The plane was owned by the War Assets Administration and leased to Eastern Air Lines. Under the hull insurance policy covering the plane, the proceeds were payable to the United States or Eastern, at the election of the United States. Under the lease, insurance proceeds were to be paid to the United States "for the account of all interests involved." The lease required the United States then to pay the proceeds to Eastern after deducting amounts due under the lease. In event of destruction of the aircraft, Eastern was to be liable for the value of the

aircraft, computed according to a formula set forth in the lease. The insurance proceeds in this case were $380,000; the value of the plane at the time of the crash, under the lease formula, was $126,000.

Contrary to the terms of the policy, the insurance company paid the full proceeds to Eastern. On July 12, 1950, Eastern tendered $126,000 to the United States, with a letter stating that the tendered amount was in full satisfaction of all claims to the insurance proceeds. The United States returned Eastern's check, stating that it elected to be paid the full proceeds under the policy, and indicating that it believed it was entitled to the full $380,000, less a $38,000 adjustment. Eastern never renewed the tender. The Government made one more demand for the full proceeds, in 1952. Ten years later, it started this action. The district court held that the Government was entitled only to $126,000. It rejected the contentions of Eastern and the insurer that they were protected by the one-year limitation provision in the insurance policy. The district court also awarded pre-judgment interest of 4% from December 29, 1949 (the date the insurer paid Eastern the proceeds of the policy). The United States did not appeal, but Eastern and the insurer appealed the holdings regarding limitations and interest.

The Court of Appeals held that the Government's action against the insurer was time-barred. Despite the general rule that statutes of limitations do not run against the sovereign, the Court held that, since the claim was under the policy, the limitations provision of the policy governs. However, the Court also held that Eastern could not take advantage of the limitations provision because the Government's claim against Eastern was under the lease, which contained no limitations provision and did not incorporate the provisions of the insurance policy.

The Court of Appeals affirmed the award of pre-judgment interest. Eastern argued that the tender of the full amount due in July, 1950, stopped the running of interest. However the Court concluded that the tender was inadequate, since it did not include interest from the date Eastern received the proceeds from the insurer, and since the Government was entitled to be paid initially the full proceeds, pending settlement of its dispute with Eastern. The Court also pointed out that, in view of Eastern's position that it was entitled to the one-year limitation period of the insurance policy, it presumably would not have renewed the tender at any time after November, 1950. Moreover, despite the fact that the "extraordinarily tardy manner in which the Government has pressed its claim deserves censure," the Court pointed out that Eastern had had the use of the money.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Lawrence W. Schilling and Alan G. Blumberg, (S.D. N.Y.)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Suit Challenging Union Election Becomes Moot When Union Holds Another Election; Where Candidate Is Excluded From Ballot, Secretary Need Not Show That He Might Have Prevailed in Order to Show That His Exclusion "May Have Affected" Outcome. Wirtz v. Local 30, Local 410, International Union of Operating Engineers. (C.A. 2, Nos. 29998 and 30085, August 1, 1966) D.J. Files 156-50-43, 156-51-518. In these suits under Section 402 of the Labor-Management Reporting

and Disclosure Act (LMRDA), 29 U.S.C. 482, the Secretary of Labor sought to set aside two union elections held in 1962, on the ground that the unions had imposed unreasonable qualifications for candidacy. It was shown that candidates had been excluded from the ballot in both elections on the basis of provisions in the union constitution which the district courts either held, or assumed, were unreasonable and illegal. However, both district courts held that the Secretary had not fulfilled the statutory requirement of a showing that the candidacy qualifications "may have affected" the outcome of the elections. The district courts reasoned that there was no indication that persons other than those actually elected might have prevailed had the illegal candidacy qualifications not been imposed.

In 1965, after the district court decisions, the unions held their next regularly scheduled elections. (Union elections are required by the LMRDA to be held at least once every three years. 29 U.S.C. 481(b)). The Court of Appeals held that these new elections rendered the case moot. The Court reasoned: "It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election * * *, we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot." The Court went on to state that the result was "unfortunate", since there is a need for appellate review in LMRDA election cases. Pointing out that most of the delays in these cases occur at the district court level, the Court suggested that expedited procedures be followed in the district courts, and that in appropriate cases the district courts give temporary relief to avoid mooting pending suits. (In a later case involving a different local of the same International, the Court of Appeals reinforced this latter suggestion by reversing the district court's refusal to enjoin a regularly scheduled election for the purpose of preventing a pending LMRDA suit challenging the union's previous election from becoming moot. Wirtz v. Local 545, International Union of Operating Engineers, C.A. 2, No. 20745, September 13, 1966.) See 14 U.S. Atty. Bull. 414.

Despite its holding that the cases were moot, the Court of Appeals also indicated the district courts erred on the merits. Where a willing candidate has been excluded from the ballot, the Court stated, the Secretary need not show that he might have prevailed in order to demonstrate that the exclusion "may have affected" the outcome.

Staff: United States Attorney, Robert M. Morgenthau; Assistant United States Attorneys Arthur S. Olick and Robert E. Kushner (S.D. N.Y.)

MORTGAGES - BANKHEAD-JONES FARM TENANT ACT

Tenth Circuit Rules That District Court Erroneously Prohibited Secretary of Agriculture From Foreclosing Farmers Home Mortgage as Result of Political Reasoning and Not Legal Rules. United States v. Darrow et al (C.A. 10, No. 8564, October 14, 1966) DJ File 136-29-325. In this action the Government sought to foreclose two mortgages given to secure two low interest loans by the Farmers

Home Administration under the Bankhead-Jones Farm Tenant Act. Each mortgage contained a provision, as required by the original statute, that the Secretary of Agriculture could accelerate the debt and "thereupon exercise any remedy provided herein or by law" if the original mortgagor sold, assigned, or leased, the property without the consent of the Secretary. The property was sold, after 15 years, without the consent of the Secretary, to another, who promptly sought to bring the payments (which had been in default) up to date. The Secretary demanded payment in full, however, on the ground that the vendee was not eligible for transfer of a FHA loan, and, when payment was refused, brought suit for foreclosure. The district court denied foreclosure on equitable grounds.

On our appeal, the Court of Appeals reversed, noting that "the judgment of the trial court is premised upon political reasoning and not legal rules." The Court held that "if, as the trial judge appears to believe so firmly, events subsequent to the passage of [this Act] now indicate that the Act's original worthy purposes cannot now be furthered by the acceleration of the maturity of existing mortgages, such a change should be reflected in legislative expression and not in a naked judicial judgment."

Staff: Robert C. McDiarmid (Civil Division)

SOCIAL SECURITY ACT

Wage Earner Held Entitled to Old Age Benefits Despite Fact That He Continued to Render Substantial Services to His Family-held (subchapter S) Corporation. Gardner v. Eli Hall (C.A. 10, No. 8680, September 12, 1966) DJ File 137-59-42.

The Court of Appeals for the Tenth Circuit rejected the Government's argument that deductions should be imposed against the old age insurance benefits, because claimant rendered substantial services (as President) to his family-owned subchapter S (26 U.S.C. 1371 et seq.) small business corporation, and received the benefits of payments made by the corporation to his wife. The Court held that the Secretary's finding that claimant had rendered valuable services to the corporation was supported by the record but there was no showing that claimant actually received wages for his services.

In reaching this conclusion, the Court noted the various inconsistent theories adopted at different stages of the administrative proceedings by the Secretary to establish that Mr. Hall had received wages by means of the access he had to the monies paid his wife. The Court went on to rule that while the Secretary had the authority and duty to reallocate wages received by different members of a family, if the arrangement is not in accord with reality, the record must support a finding that the wages were not earned by the person to whom it was paid but in fact earned by the claimant, and there was no such finding in this case. Finally, the Court noted that while the Commissioner of Internal Revenue had statutory authority (26 U.S.C. 1375(c)(3)) to reallocate for tax purposes the earnings (whether or not distributed) of an electing small business corporation among the shareholder members of the family in order to reflect the value of services rendered to the corporation by the shareholders, there is no statutory authority whatever which would give the Secretary of Health, Education and Welfare this

power. Judge Breitenstein concurred on the ground that, although the Secretary had ample basis in the record here for reallocating the wife's salary to the claimant, he had not specifically done so in his administrative decision.

Staff: Jack H. Weiner (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

BANKRUPTCY

Bankruptcy Act Provision, 11 U.S.C. 25(a)(10) Providing No Testimony Offered by Bankrupt, Except Testimony Given by Him in Hearing Upon Objections to His Discharge, Shall Be Offered in Evidence Against Him in Any Criminal Proceeding, Does Not Provide Complete Immunity From Prosecution. United States v. Lawson, 255 F. Supp. 261 (D.Minn., 1966). Petition for an involuntary bankruptcy was filed against the corporation of which defendant was president. During bankruptcy proceedings he testified that he received payment for the sale of bankrupt's property but was unable to recall the disposition which was made of these funds. An indictment was subsequently returned charging him with violating 18 U.S.C. 152, by concealing and transferring assets of the bankrupt. He moved to dismiss the indictment on the grounds that he had acquired immunity from prosecution by virtue of having testified in the bankruptcy proceedings.

11 U.S.C. 25(a)(10) provides that no testimony given by a bankrupt shall be offered in evidence against the bankrupt in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge. Defendant relied on Albertson v. Subversive Activities Control Board, 382 U.S. 90 (1965), wherein the Supreme Court ruled invalid orders of the Board requiring petitioners to register as members of the Communist Party. The registration statute provided that the fact of registration shall not be received in evidence in any criminal proceeding. The Supreme Court held that the immunity provision did not validate the registration orders. In Counselman v. Hitchcock, 142 U.S. 547 (1892), also argued by the defendant, the Supreme Court stated that an immunity statute is valid only if it grants the witness an absolute immunity against future prosecution for the offense to which the question relates.

The motion to dismiss the indictment was denied. Defendant maintained that the bankruptcy provision must be interpreted as granting complete immunity if it is to be constitutional. The Court disregarded defendant's contention and set forth the following standard: if a statute forces an individual to choose between answering or being punished for invoking the privilege, without at the same time granting complete immunity, then it is unconstitutional. The Court concluded that no such burdensome choice is placed upon a bankrupt, citing Arndstein v. McCarty, 254 U.S. 71 (1920), which held that notwithstanding the protection of §25(a)(10) a bankrupt may still claim the privilege against self-incrimination.

The Court also noted the bootstrap character of defendant's argument. He was claiming immunity on the ground that he had testified in the bankruptcy proceeding, but the gravamen of the indictment was concealment and transfer of corporate assets. In the bankruptcy proceeding he had claimed inability to recall disposition of the funds realized from the sale of these same assets.

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

MEAT INSPECTION ACT

Provision of Meat Inspection Act of 1907, 21 U.S.C. 90, Making It Crime for Meat Inspector to Accept Thing of Value From Person Engaged in Interstate Commerce Is Constitutional. United States v. Robert Wilson (S.D. N.Y., August 23, 1966). Defendant, a meat inspector with the Department of Agriculture, is charged in eight counts of a fifteen-count indictment with unlawfully receiving money from persons engaged in interstate commerce, in violation of Section 90, Title 21, United States Code. That section, in pertinent part, provides:

> ...any inspector...authorized to perform any of the duties prescribed by [sections 71-91 of Title 21]...who shall receive or accept from any person, firm, or corporation engaged in interstate or foreign commerce any gift, money or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony....

Prior to trial, defendant moved to dismiss the Section 90 counts on the ground that the quoted portions of the statute are "unconstitutional and void under the Fifth and Sixth Amendments of the Constitution." He urged that the statute is "so broad in scope and so vague and indefinite as to the ascertainable standards of guilt and the requirements of notice" that it deprives the accused of due process in that it does not inform him with any degree of definiteness as to the nature and cause of the accusation made against him. No reported case had previously considered the constitutionality of this section, a part of the "Meat Inspection Act of 1907" (34 Stat. 1260, et seq.).

Chief Judge Sylvester J. Ryan held that the section was not unconstitutionally vague. He stated that the portions of the section quoted above are specifically phrased to prevent the acceptance of gifts, etc. from those "engaged in interstate or foreign commerce" and acceptance from such a person is not required to be shown to have been motivated by a purpose or intent to influence official action of the donee, but is generally prohibited if "given with any purpose or intent whatsoever." Thus, the Court said:

> The section alleged in the indictment declares the acceptance charged to be a malum prohibitum and only 'knowing' acceptance of a thing of value by one who has the duty of enforcement need be established. 'Knowing' acceptance requires only that there be evidence establishing that it was had with knowledge that the donor was at the time 'engaged in interstate or foreign commerce.'

Since the indictment and the statute sufficiently informed the accused of the time of acceptance, the identity of the donor and of the fact that the donor is alleged to have been engaged in interstate or foreign commerce, and since it was not denied that the defendant was at the time charged a person authorized to perform the duties prescribed by the Meat Inspection Act, the Court found that all constitutional requirements as to definiteness of the charge and due process were met.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Daniel R. Murdock (S.D. N.Y.).

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Issue of Right to Take May Be Decided on Motion to Strike; Court Upholds Taking of Land Around Perimeter of Reservoir to Permit Recreational Use; Army Engineers Not Limited to Every Detail of Plans Submitted to Congress. United States v. Bowman; United States v. Seeber (C.A. 7, October 19, 1966, D.J. Files 33-15-283-29 and 33-15-283-240). The appellants objected to the taking of their lands in connection with the construction of the Monroe Reservoir in the State of Indiana. The issue was raised by their answer, which alleged that their lands above the upper pool limit were not being taken for use by the United States as a part of the authorized flood control project, but solely to be leased or deeded to the State of Indiana. It was alleged that the State of Indiana would use the land to grant franchises for profit to private individuals to maintain docks, boats and similar equipment for sailing, boating, swimming, fishing and other recreation. The Government filed a motion to strike these answers and asserted that the necessity, nature and extent of a taking of land for public purposes was a legislative matter not reviewable by the courts. The district court sustained the motion, and on appeal it was affirmed.

The appellants contended that their answers raised a question of fact, viz., whether the taking was for a public purpose, and that they were entitled to a hearing on this matter. They argued that at the hearing they would show the taking of land above the upper pool limited was without specific congressional authority, was arbitrary and capricious, and was made in bad faith. The Government answered that the motion to strike admitted all well-pleaded facts, and that this left a purely legal decision for the district court. The Court of Appeals held that the district court might properly strike a defense where it is insufficient on the facts alleged in the answer.

On the right to take, the Court pointed out the broad statutory authority to the Secretary of the Army to condemn land for river improvements. Another statute authorized the maintenance of park and recreational facilities at water resource development projects and permitted construction of such facilities by local interests. Congress usually authorizes projects in general terms, and each change of plans after the commencement of the project that results in the taking of additional land does not require a new congressional authorization. In addition to the land which will be flooded, such land as in the discretion of the condemning authorities may be necessary or desirable to protect the reservoir or to permit incidental public use may be taken. It is not necessary that land taken for a public purpose remain in the ownership of the United States.

Staff: A. Donald Mileur (Land and Natural Resources Division).

Condemnation: Whether Provision That Answer "Shall" Be Served Within 20 Days Is Permissive or Mandatory, Refusal of Permission to File After That Period Is Discretionary With Trial Court; Substantial Compensation Is Owing by United States for Taking of Right to Use Navigable Stream for Port Purposes.

R. B. Rands et ux. v. United States (C.A. 9, October 7, 1966, D.J. File No. 33-38-564-247). In connection with the construction of the John Day Dam as part of the river improvement program on the Columbia River, riparian land belonging to Rands was condemned. Although this land was concededly valuable as a port site, the district court refused to allow evidence of value for this purpose because of the Government's contract over use of navigable streams. The district court also would not allow the landowners to file an answer denying the right to take after the 20 days allowed by Rule 71A(e), F.R.Civ.P., had expired.

On appeal, the Court reversed and remanded for further proceedings. It held that while the provision of Rule 71A(e) that an answer shall be served within 20 days could be interpreted to be permissive rather than mandatory, it was not necessary to decide the question. Even if it were permissive, the trial court had discretion to refuse the filing of an answer after the 20-day period, in the circumstances of this case. However, on the commerce issue, the Court reversed the lower court. It held under United States v. River Rouge Improvement Co., 269 U.S. 411 (1926), that while reparian rights are subject to the Government's commerce power, the mere existence of the Government's power to destroy them does not justify their valuation in a condemnation case at a nominal amount. Instead, riparian rights are to be valued in the light of a realistic estimate of the chance that the Government would, in fact, exercise the servitude. It limited the holding of United States v. Twin City Power Co., 350 U.S. 222 (1956), to value arising from "the flow of the stream." The Ninth Circuit also relied on the fact that compensation had been paid for a lock and dam in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913), and that this had not been expressly overruled in the later Supreme Court cases. The Department is now considering whether to seek certiorari.

Staff: Roger P. Marquis and A. Donald Mileur
(Land and Natural Resources Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

EXPATRIATION

Service in Italian Army After Conscription Held Voluntary Expatriating Act. Antonio Cafiero v. Kennedy, (D.N.J. Civil No. 338-62, October 27, 1966) D.J. File 39-16-430. This was a declaratory judgment action by which plaintiff sought a judgment declaring him to be a citizen of the United States and setting aside an order for his deportation.

Plaintiff acquired United States citizenship by birth in Italy of a father who was a United States citizen. He was conscripted into the armed forces of Italy and served from May 5, 1953 through July 1, 1955. He entered the United States as an alien crewman in 1956 and remained beyond the period of his authorized admission. In a deportation proceeding it was held that he had lost his United States citizenship by his service in the Italian armed forces and that he was deportable for having overstayed his temporary admission as an alien crewman. In the proceeding plaintiff contended that his Army service was involuntary because of his conscription and that, therefore, it did not serve to expatriate him. Because of his more than ten years of physical presence in Italy and the fact that he was also an Italian national, the Special Inquiry Officer held that under 8 U.S.C. 1481 (b) his military service was conclusively presumed to be voluntary.

In this action plaintiff requested the Court to declare 8 U.S.C. 1481 (b) to be unconstitutional but the Court found it unnecessary to pass on this issue. It was the Court's opinion that plaintiff's service in the Italian Army was voluntary notwithstanding that he had been conscripted. The Court pointed out that under Italian law he could have, but did not, challenge his conscription into the Italian Army and that he had failed to seek the aid of an American Consul to prevent his conscription. The Court further noted that he had not faced a threat of physical violence and compulsion if he had resisted entering the Army and that his service had been performed during peace time in Italy when it was a military ally of the United States and a democratic partner in the North Atlantic Treaty Organization. Because of these circumstances, the Court distinguished plaintiff's case from Nishikawa v. Dulles, 356 U.S. 129 in which the Supreme Court held that the Government had not proved Nishikawa's service in the Japanese Army after conscription was voluntary by clear, convincing and unequivocal evidence. The Court dismissed the action and upheld the validity of the deportation order.

Staff: United States Attorney David M. Satz, Jr.
Assistant U. S. Attorney Paul A. Nejelski (D. N.J.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Military Discharge: Resignation Submitted Upon Receipt of Charges Constitutes Waiver of Any Right Officer May Have to See Confidential Reports Relating to Charges. Mitchell Van Bourg v. Paul Nitze, Secretary of the Navy (D.C., Civil No. 2920-65, D. J. File 145-6-785). In 1951, Van Bourg, an officer in the inactive Naval Reserve, received from the Navy a letter of charges alleging membership and office-holding in the Communist Party and involvement in other Communist activities. Van Bourg did not file a reply to the charges, or respond to a set of interrogatories, nor did he request a hearing. Instead, allegedly acting upon the advice of his personal counsel, he submitted his resignation and accepted a discharge under conditions other than honorable. Twelve years later, in 1963, Van Bourg applied to the Navy Discharge Review Board for a change in the character of his discharge. Van Bourg was granted a hearing at which he was permitted to appear with counsel and testify concerning the charges and the circumstances surrounding his subsequent resignation and discharge. Van Bourg contended that his 1951 resignation was not voluntary because he was informed by his counsel that he would not be given the privilege of seeing the confidential reports relating to the charges and he demanded that he thereupon be granted the right to see the confidential reports and to be confronted with witnesses at the Discharge Review Board hearing. This demand was not granted and his request for a change in the character of his discharge was denied. Van Bourg then petitioned the Board for the Correction of Naval Records for relief alleging error and injustice in the Navy Discharge Review Board proceedings. His application was denied, whereupon Van Bourg filed this action. In granting summary judgment to the Secretary, the Court, Holtzoff, J., in a memorandum opinion filed October 6, 1966, ruled that it need not decide whether the right to see confidential reports existed either in 1951 or at the Navy Discharge Review Board hearing in 1963. The Court held that Van Bourg had not at the proper time either requested a hearing or an opportunity to inspect the confidential reports, but had knowingly and deliberately waived his rights by resigning.

Staff: Garvin L. Oliver (Internal Security Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

District Court Decisions

Levy: District Director's Seizure of Funds in Taxpayer's Bank Account Were Monies of Plaintiff Who Could Recover Same Because Government Was Not Bona Fide Purchaser for Value. Dallas Airmotive, Inc. v. Frank S. Schmidt, et al. (S.D. Fla., July 14, 1966). (CCH 66-2 U.S.T.C. §9578). This was a suit brought by a non-taxpayer seeking the return of its monies which were seized pursuant to a Notice of Levy served upon the taxpayer's ASA, bank account.

The taxpayer, a shipper, agreed to send two aircraft engines C.O.D. to Peru for the plaintiff who had reconditioned them. When the monies were cabled from Peru to taxpayer's account in Miami, the District Director was given three checks drawn on taxpayer's account before the plaintiff was paid. The Court reasoned that since the United States was a preexisting creditor of the taxpayer, it was not a bona fide purchaser for value and accordingly liable to the plaintiff for the amount of its monies seized. In tracing the funds held by ASA in trust for the plaintiff, the Court applied the rule of first in -- first out (FIFO).

Staff: United States Attorney William A. Meadows, Jr; Assistant United States Attorney Alfred E. Sapp (S.D. Fla.); and Frank N. Gundlach (Tax Division).

Levy: Plaintiff, Nontaxpayer, Failed to Sustain Burden of Proof That Monies Seized by District Director From Taxpayer's Bank Account Were Its Funds. Trader Jon, Inc. v. Laurie W. Tomlinson, (S.D. Fla., July 5, 1966). (CCH 66-2 U.S.T.C. §9600). This was a suit by a nontaxpayer seeking either a transfer of a credit of money from taxpayer's, Martin Weissman, delinquent cabaret tax account to his delinquent income tax account or a return of its monies allegedly seized by the District Director.

The first issue was argued successfully on a motion for summary judgment. The Court relied primarily upon the District Director's discretion in applying monies seized pursuant to a levy. At the trial, the taxpayer, Martin Weissman, testified that as business manager and former majority stockholder of the plaintiff corporation he personally directed the affairs of Trader Jon, Inc. He further testified that other monies had been withdrawn from the corporate checking account and placed in his savings account; but at the trial, he changed his position, given at the time of his deposition, as to the ownership thereof. The Court concluded that the plaintiff failed to sustain its burden of proof as to the ownership of the monies seized.

Staff: United States Attorney William A. Meadows, Jr; Assistant United States Attorney Alfred E. Sapp (S.D. Fla.); and Harry D. Shapiro (Tax Division).

Federal Tax Liens; Foreclosure Against Security Deposit on Bond, Government's Motion for Summary Judgment Denied. United States v. Blue Ribbon Products Corp., et al. (S.D. N. Y., August 4, 1966). (CCH 66-2 U.S.T.C., Par. 9594). The Government instituted this action to foreclose its tax liens against a cash deposit made by the taxpayer with a surety company as security for a bond issued by the surety. The bond was issued to Sears, Roebuck and Co., and covered an agreement between Sears and the taxpayer whereby the taxpayer could use certain of Sears' master records.

The Government moved for summary judgment on the basis of an affidavit stating that the taxpayer had gone out of business in 1959, that the master records were returned, and that no claims have been asserted against Sears or the surety with respect to any undertakings of the taxpayer under the agreement or bond. Sears opposed the motion on the ground that, although the master records had been returned and there were no known claims or obligations under the agreement, the agreement and bond are still in force and effect since there may have been some use of the records, unknown to Sears, from which claims under the agreement and bond may arise.

The Court denied the Government's motion because there was no satisfactory proof that the taxpayer did not use the master records, so that there appeared to be a triable issue of material fact.

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

President of Corporation, Who Held 50% Stock Interest in Corporation, Signed All Checks for Business, and Authorized Payment of Other Bills While Corporation's Social Security and Withholding Taxes Remained Unpaid. Found to Have Willfully Failed to Pay Over Withheld Taxes. United States v. Gefen, (M. D. Fla., Aug. 5, 1966). CCH 66-2 U.S.T.C. 9620. Gefen was an incorporator of the corporation and a member of its board of directors as well as its president. The corporation accrued as his salary the sum of $2,000 per month and carried this accrual as a liability on its books; however, Gefen never actually received payment of his salary as president of the corporation. He signed the withholding tax returns covering the withholding and social security taxes for the last two quarters of 1954 and the first quarter of 1955. These returns were filed without payment. The Court held that an assessment made pursuant to Sections 6671 and 6672 is presumptively correct and that the burden was upon Gefen to show that he was not a responsible officer within the meaning of Sec. 6672, Internal Revenue Code of 1954, and that he did not "willfully" fail to pay over the withholding taxes involved. The Court defined the term "willfully" as used in Section 6672 as being synonymous with the phrase "knowingly and intentionally" or "without reasonable cause".

Staff: United States Attorney Edward F. Boardman Assistant United States Attorney William J. Hamilton; (M.D. Fla.) and Clarence J. Grogan (Tax Division).

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