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BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 December 23, 1966 No. 26

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

FEDERAL COURT TRANSCRIPT RATES

The new maximum transcript rates shown in the U. S. Attorneys' Bulletin, November 11, 1966, have become effective in the following additional districts:

Ala. - N.	Ky. - E.	Tenn. - M.
Ala. - S.	Ky. - W.	Tex. - W.
Conn.	Mich. - W.	Utah
Hawaii	Mo. - W.	Wisc. - W.
Ill. - E.	N. J.	Wyo.
Ind. - N.	P. R.	

La. - W. and S. D. have raised the ordinary transcript rates to $.90 and $.30.

The rates in Maine have been raised to $.80 and $.30 for ordinary and the daily to be approved by the Court but not to exceed the new maximum rates.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 23, Vol. 14 dated November 11, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
342-S3	11/2/66	U.S. Attys. & Marshals	Overtime and Leave Regulations.
492	11/1/66	U.S. Attys. & Marshals	Cost Reduction in Procurement, Supply, and Property Management.

MEMOS	DATED	DISTRIBUTION	SUBJECT
493	11/3/66	U.S. Attorneys	Cases Involving Wiretapping or Electronic Surveillance.
495	11/7/66	U.S. Attorneys	Federal Tax Lien Act of 1966 (P.L. 89-719).

ORDERS	DATED	DISTRIBUTION	SUBJECT
369-66	11/7/66	U.S. Attys. & Marshals	Placing Assistant Attorney Gen. Harold Barefoot Sanders, Jr., in Charge of Civil Division.
370-66	11/10/66	U.S. Attys. & Marshals	Assigning Additional Functions to Internal Security Division.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Indictment Filed Charging Violation of Sec. 1 of Act. United States v. Ohio Honda Dealers Sales Association, Inc., et al., (S. D. Ohio) D. J. File 60-233-6. On November 22, 1966, a grand jury in Columbus, Ohio, returned a one-count indictment charging a combination and conspiracy to fix, maintain, and stabilize retail prices of Honda motorcycles and parts in the State of Ohio in violation of Section 1 of the Sherman Act.

Named as defendants were: Ohio Honda Dealers Sales Association, Inc.; American Honda Motor Company, Inc.; Axelband & Brown & Associates, Inc.; Russell E. March, Ohio District Manager for American Honda; and Richard L. Klamfoth, Honda dealer and President of the Association.

The indictment charged the conspiracy as beginning at least as early as April 1964 and continuing until at least sometime in 1965. The retail value of Honda motorcycles and parts sold to Ohio dealers in 1965 was approximately $9,500,000.

Staff: Carl L. Steinhouse, Lester P. Kauffman, David G. Budd and Joseph J. Calvert (Antitrust Division)

Court Rules For Government On Various Motions In Bank Case. United States v. First National Bank of Hawaii, et al. (D. Hawaii) D. J. File 60-111-1014. This Section 7 case involves the merger of the second largest bank and the third largest trust company in Hawaii. The merger had previously been approved by the Federal Deposit Insurance Corporation under the Bank Merger Act of 1966. Shortly after the case was filed, the Comptroller of the Currency moved to intervene.

The Bank Merger Act of 1966 provides that the "responsible" banking agency--i.e. the agency which first passes on the merger under the Act--may intervene as of right in any subsequent antitrust proceeding attacking the merger. While in this particular instance the F. D. I. C. clearly had that right, it expressed its willingness to defer to the Comptroller. The Comptroller asserted that he too had passed on the merger under the National Banking Act which requires his approval of all mergers involving national banks. Hence he claimed he also was a "responsible" agency for whom intervention as of right was provided by the Bank Merger Act of 1966.

The Government objected to the Comptroller's proposed intervention on the ground that the requirements for his approval under the National Banking Act are concerned solely with fiscal and corporate matters, such as protection of

minority stockholders, valuation of shares, etc., and provide for no consideration by him of competitive issues. Accordingly he was not a "responsible agency" in the context of the Bank Merger Act of 1966. It was pointed out that representation of the Government in litigation before the courts is clearly the responsibility of the Attorney General, and other agencies should not be permitted to appear in opposition to him. While Congress has on occasion provided for limited exceptions--as in the Bank Merger Act of 1966--such exceptions should be narrowly construed in the interest of orderly process of Government litigation. Here the appropriate agency to intervene was the F. D. I. C., and it should not be permitted to "delegate", or another agency to succeed to, that right. The Court denied the Comptroller's motion on these grounds. Subsequent motion by the F. D. I. C. to intervene in its own right was granted.

The Court also denied defendant's motions to dismiss or in the alternative for summary judgment. The motion to dismiss was based on the contention that the Government's complaint only alleged a violation of Section 7, and did not allege a violation of the Bank Merger Act of 1966; hence it failed to state a cause of action.

The Court, following the lead of the court in the Provident bank merger case in Philadelphia agreed that the suit was in reality brought under the Bank Merger Act of 1966 and the complaint should perhaps have so alleged. However, defendants were informed with reasonable particularity of the claim against them, and under the liberal principles of "notice" pleading, a motion to dismiss could not be sustained.

The summary judgment motion was based on evidence introduced during a previous hearing on defendants' motion to lift the automatic stay against the merger provided in the Bank Merger Act of 1966. The evidence had allegedly shown that one of the merging parties was in difficult financial condition, and might not be able to survive protracted antitrust litigation, and it was on the basis of this, inter alia, that another judge (Judge Lindberg of Seattle) had lifted the stay. This, argued the defendants, established the "failing company" defense and left no triable issue.

The Court denied the motion, agreeing with the Government that the evidence on the subject had obviously been received and considered by the court on a prima facie basis, and its decision lifting the stay was clearly interlocutory in scope and never intended to be a determination of the ultimate issues in the case.

Staff: Herbert G. Schoepke and Robert C. Weinbaum
(Antitrust Division)

Bank Merger Held Not in Restraint of Trade. United States v. Third National Bank of Nashville, et al. (M. D. Tenn.) D. J. File 60-111-759. On November 22, 1966, an opinion was filed holding that the merger of Third

National Bank and Nashville Bank and Trust Company was not in restraint of trade and consequently not prohibited by Section 18(c)(5)(B) of the Federal Deposit Insurance Act, as amended by the 1966 Amendment. The Court further concluded that the effect of the merger will not be substantially to lessen competition or tend to create a monopoly in violation of Section 18(c)(5)(B) of the 1966 Amendment, "the analogue of Section 7 of the Clayton Act."

The Court will, in the near future, enter and file detailed findings of fact and conclusions of law to implement and supplement the opinion. Pending such filing, entry of final judgment denying the relief sought by the complaint will be withheld.

This case involved the acquisition by Third National Bank, the second largest bank in Davidson County having the third largest trust department, of Nashville Bank and Trust Company, the fourth largest bank having the second largest trust department. At the time of the merger Third had total resources of $357 million; the Trust Company had $50.8 million. Within the relevant market are two other large banks, comparable in size to Third National, and four small institutions. Nashville Bank and Trust Company was the only medium-sized bank in the community. The Government urged that the latter constituted the sole bank having sufficient resources and independence to provide meaningful competition to the monolithic policies of the "big three."

The complaint was filed on August 10, 1964, and trial was completed in June 1966. During February 1966, Congress passed the 1966 Amendment to the Bank Merger Act. This provides that bank mergers having substantial anticompetitive effects are not to be approved by the bank regulatory agencies unless these anticompetitive effects are "clearly outweighed" in the public interest by the probable effect of the transaction in meeting the "convenience and needs" of the community. The Amendment also provides that in any antitrust proceeding attacking a bank merger, the courts are to "review de novo the issues presented" and apply the same standards as those specified for the banking agencies.

The Court construed the 1966 Amendment to provide that the enumerated banking factors, including facts on "convenience and needs", were relevant to a determination of the competitive issues. By this process, after finding the acquired institution to have become a "stagnant" bank despite constant growth and large profits, the "floundering" bank concept was used in the manner of the failing company doctrine to justify the merger.

The Court predicated its methodology upon the assertion that the 1966 Amendment expanded the inquiry of the Philadelphia and Lexington cases by taking into account all material factors with respect to each institution in the setting of the relevant market. This is supported by recourse to Justice Harlan's dissent in Lexington and the assertion that the 1966 Amendment revitalized the factors found to be controlling in Columbia Steel. In fact, the

Court found the banking factors enumerated in the 1966 Amendment "sufficiently comprehensive in character not only to embrace the Columbia Steel criteria, but also to require an even broader scope of inquiry and analysis with respect to the antitrust issue".

On the question of judicial review, the Court ruled that its review of anticompetitive effects should be broader than "convenience and needs." Although the banking agency's findings with regard to the competitive issues should be accorded some weight in view of its expertise, a violation of antitrust standards is primarily a legal issue on which courts have traditionally considered they should make an independent determination. The opinion continues, "On the other hand, since the question whether anticompetitive effects are outweighed in the public interest by the convenience and needs of the community is, . . . , 'plainly and unquestionably a legislative or administrative determination. . .,' the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence."

Staff: James L. Minicus, Robert C. Weinbaum, Arthur I. Cantor, Daniel R. Hunter and Josef Futoran (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

SUPREME COURT

FEDERAL TORT CLAIMS ACT

Availability of Workmen's Compensation Remedy Under 18 U.S.C. 4126 to Federal Prisoners Injured at Work Bars Their Right to Sue U.S. Under FTCA for Such Injuries. United States v. Demko, (Supreme Court, No. 76, Oct. Term, 1966; December 5, 1966) 35 Law Week 4028, D.J. File 157-64-185. The Supreme Court has ruled that a federal prisoner injured while working at an assigned prison task may not sue the United States under the Federal Tort Claims Act to recover for such injuries. In reversing the Third Circuit's decision to the contrary (reported at 350 F. 2d 698), the Court held ... that Congress intended the workmen's compensation remedy afforded federal prisoners under 18 U.S.C. 4126 to be the exclusive remedy for work-connected injuries, even though that statute does not say so specifically. The Court accepted the Government's argument that workmen's compensation remedies were traditionally enacted in lieu of, rather than in addition to, tort recovery, and provide a simple and certain remedy, free of questions of fault and other common law defenses and delays. The Supreme Court found no congressional intent in enacting 18 U.S.C. 4126 to depart from the "general rule [of] the exclusivity of remedy under such compensation laws." The Court further noted that to accept the Third Circuit's decision as correct and allow tort recovery to federal prisoners injured at work "would be to hold that injured prisoners are given greater protection than all other government employees who are protected exclusively by the Federal Employees' Compensation Act, a congressional purpose not easy to infer."

The Supreme Court also distinguished its prior decision in United States v. Muniz, 374 U.S. 150. Muniz, the Court stated, held only that prisoners who are not eligible for a compensation remedy under 18 U.S.C. 4126 could sue the United States under the Tort Claims Act.

Staff: Richard S. Salzman
(Civil Division)

COURT OF APPEALS

COURTS - MANDAMUS TO REVIEW CONTEMPT CITATION

Where Party Has Been Threatened With Contempt for Failure to Comply With District Court's Discovery Order on Claim of Privilege, Mandamus in Court of Appeals Will Lie to Review Contempt Order. United States, et al. v.

Hon. Robert W. Hemphill, District Judge, et al. (No. 11,047, C.A. 4, November 24, 1966) D.J. File 143-67-40. This case arose from an action by the Secretary of Labor to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act. Although the Secretary had provided the defendant employer with the names of all persons having knowledge of the case as well as a list of all affected employees, the defendant employer propounded interrogatories seeking in addition the names of the particular employees who had informed the Secretary of the violations. The Secretary declined to disclose his informers and filed a formal claim of privilege regarding such information.

Notwithstanding a settled line of authority supporting the Secretary's position, the district court overruled the claim of privilege and ordered the Secretary to disclose the informers. When the Secretary declined to do so, instead of dismissing the complaint -- which would have thus enabled the issue to be resolved in ordinary course on appeal -- District Judge Hemphill ordered the Secretary to appear personally before him in South Carolina and show cause why he should not be cited and punished for criminal contempt of court.

The Government then petitioned the Fourth Circuit for a writ of mandamus or prohibition ordering the district court to vacate both its show cause order and its order directing the Secretary to disclose his informers as well as to prohibit the trial court from imposing any other sanctions for the Secretary's refusal to answer the improper interrogatories. The Fourth Circuit, agreeing that the Secretary's claim of privilege was fully warranted and should have been sustained by the district court, granted the relief sought in an extraordinary session. Citing the Supreme Court's decision in Schlagenheuf v. Holder, 379 U.S. 104, as authority for its grant of mandamus relief, the Court of Appeals held that where the district court's actions in overruling the claim of privilege and granting its discovery order were "improvident and clearly erroneous," mandamus is the appropriate means by which a party threatened with a contempt citation may obtain review of the underlying discovery order. The Court added the caveat, however, that in order to secure such relief the refusal to comply with the lower court's order must have been both "formal and respectful."

Staff: David L. Rose and Richard S. Salzman
(Civil Division)

COURTS

Piecemeal Hearing of Case By District Court Warrants Criticism, But Was Not Prejudicial Error. Kemnitz v. United States (C.A. 7, No. 15692, November 10, 1966) D.J. File 157-23-651. Plaintiff-appellant brought a Tort Claims Act suit to recover for personal injuries suffered when he was struck

by a Post Office truck. After a full trial, the district court found for the United States, holding that the post office driver had not been negligent, and that plaintiff had not exercised due care for his own safety.

On appeal, one of plaintiff's contentions was that he had been prejudiced by the piecemeal hearing of the case. Although there had been relatively few witnesses, the trial had taken place in six sessions spread over a six week period. On this point, the Seventh Circuit stated that "The intermittent schedule followed by the court, although due to the press of other matters to which it attended during the interim periods involved, is not a practice to be recommended or encouraged. Such procedure warrants only criticism. It rarely can be productive of any benefit insofar as the matter on trial is concerned; it more often carries a potential for harm." The Court noted, however, that plaintiff had not objected to the procedure, but had agreed to the various recesses, and pointed out that the detailed findings of the district court showed that that court had been completely familiar with the record. Consequently, it determined that no prejudicial error had been shown, and affirmed.

Staff: United States Attorney Edward V. Hanrahan, Assistant United States Attorneys John P. Lulinski and Jack B. Schmetterer (N. D. Ill.)

FEDERAL TORT CLAIMS ACT - SCOPE OF EMPLOYMENT

Employee Utilizing Government Vehicle to Drive Mourners to Cemetery After Uncle's Funeral Not Acting Within Scope of His Employment. Tomack v. United States (C. A. 2, No. 30642, November 28, 1966) D. J. File 157-51-1320. Plaintiffs sued to recover for personal injuries sustained when they were involved in a collision with a Government-owned automobile. The Government driver obtained the auto from the pool for an authorized trip from Brooklyn to upstate New York. On obtaining the car he certified that he would use it only on official Government business. After embarking on his trip, he was contacted by his wife, who advised him that his uncle had died. He then returned to the Bronx to attend the funeral services for his uncle, and agreed to transport mourners to the cemetery thereafter. While so doing, he collided with another car, causing the injuries here complained of.

The district court granted summary judgment for the Government, and the Second Circuit affirmed. The Second Circuit held that under New York law it was clear that the driver had abandoned his Government employment and had not yet re-entered it.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorneys Dawnald R. Henderson, Ronald P. Huntley (S. D. N. Y.)

SCOPE OF EMPLOYMENT

Navy Enlisted Man Held Not Within Scope of Employment While Driving His Own Car From His Home to His Duty Station. Perez v. United States (C. A. 1, No. 6781, November 16, 1966) D. J. File 157-36-1104. The First Circuit here ruled that a Navy enlisted man, who was driving his own car from his home to his duty station was not within the scope of his employment. Appellant, an injured pedestrian, relied on the fact that the Navy paid a subsistence allowance, and that the driver was subject to call and could be court-martialled for proscribed activities while on liberty. The Court concluded that the United States could not be held liable for the injuries resulting from the serviceman's allegedly negligent driving, because it would assume, absent an affirmative showing to the contrary, that Connecticut would follow the traditional rule (Restatement (Second) Agency, § 229, comment d) that "servant is not engaged in his master's business when travelling between home and work."

Staff: J. F. Bishop
(Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Res Judicata Bars Award of Compensation Death Benefits Where Underlying Issue Could Have Been Raised in Prior Compensation Proceedings Between Parties. Chicago Grain Trimmers Association, Inc., et al. v. Enos, Deputy Commissioner (C. A. 7, No. 15,342, July 13, 1966, rehearing denied, October 6, 1966) D. J. File 83-23-44. This action was brought to set aside a compensation order awarding death benefits to the widow and minor children of John J. Banks. At, and prior to, the time of his death, Banks was employed by plaintiff as a longshoreman. Shortly after returning home from work on January 30, 1961, Banks was standing at the head of the basement stairs in his home when he suddenly pitched forward, falling eleven steps. His head struck the concrete floor, causing injuries that resulted in his death 13 days later. In February 1961, his widow filed a claim for compensation benefits urging that her husband, while at work on January 26, 1961, was struck on the head by a cable and that that injury caused him to later lose consciousness and fall down the flight of basement stairs in his home. The deputy commissioner found that the evidence failed to establish that Banks' fall was the consequence of an injury arising in the course of his employment and denied the widow's claim for benefits. In August 1961, the widow filed a second compensation claim, this time alleging that Banks was injured while at work on January 30, 1961, and that the blow to the head sustained by him on that date resulted in his fall at home. By agreement of the parties proceedings were thereafter stayed while the widow prosecuted a wrongful death action against a third party, Norris Grain Company, on whose premises Banks was injured on January 30, 1961. In the third-party action, the jury returned a $30,000 verdict in the widow's favor. However, after the district court ordered a new trial unless Mrs. Banks

filed a remittitur in the amount of $11,000, a remittitur was filed and a $19,000 judgment entered. Thereafter, in the compensation proceedings, the deputy commissioner found that the deceased suffered a work injury on January 30, 1961, producing an acute subdural hematoma which caused him to fall down the flight of stairs in his home two hours later, and awarded death benefits.

In the district court, the employer and the insurance carrier challenged the award on each of three grounds: (1) it was barred by the doctrine of res judicata; (2) it was barred by the compensation statute because, in agreeing to a remittitur without first obtaining the employer's consent, Mrs. Banks "compromised" her claim; and (3) it was unsupported by substantial evidence. The district court rejected each ground of challenge and affirmed the award. The Court of Appeals reversed on the ground of res judicata, reasoning that Mrs. Banks could have urged in her first claim for compensation that the January 30, work injury was the cause of death and therefore she was barred from thereafter raising it in a second claim for benefits. The Court pointed out that while the proceedings before the deputy commissioner were administrative rather than judicial, their quasi-judicial nature justified application of the res judicata doctrine. In view of its holding on res judicata, the Court did not consider the merits of the compromise and substantial evidence points raised by the plaintiffs.

Attorney: Martin Jacobs
(Civil Division)

SOCIAL SECURITY ACT - DISABILITY

Testimony From Vocational Expert That Claimant Could Engage in Specified Activities Though Suffering Pain Not Substantial Evidence. George D. Johnson v. Gardner (C.A. 10, No. 8708, November 9, 1966) D. J. File 137-29-117. Claimant, a 47 year old male, blind in one eye and suffering from serious bilateral club feet, applied for Social Security disability benefits on the basis of the pain he allegedly suffered in his feet and legs. The Secretary denied benefits on the theory that claimant, whose IQ was measured at 130, could engage in activities far more sedentary than the laboring jobs he had held in the past. Although the only recent medical report stated that claimant suffered considerable pain and was probably unemployable, the Secretary apparently relied upon the testimony of a vocational witness, who testified that claimant would be qualified for certain jobs he described even if taking enough sedatives to assuage his pain.

The Court of Appeals reversed the district court's affirmance of the Secretary, holding that the vocational witness was unqualified to testify to this effect, even though he based his testimony on consultations with medical specialists in previous vocational work with afflicted persons. Accordingly, the Court

found that without the vocational witness's testimony there was no substantial evidence to support the Secretary's findings, and remanded the case for further hearings by the Secretary and new findings based thereon.

Staff: Robert C. McDiarmid
(Civil Division)

Fourth Circuit Upholds Appeals Council's Reversal of Examiner in Denying Benefits Upheld; Testimony of Doctor Based Wholly on Examination of Record, Without Physical Examination of Claimant, Given Weight. Laws v. Celebrezze, (C.A. 4, No. 10,328, October 21, 1966) D.J. File 137-80-84. After an initial denial of benefits by the Secretary, this case was remanded from the district court on the Secretary's motion for further administrative proceedings. On remand, the examiner determined that claimant was disabled and entitled to benefits. The Appeals Council reversed. The district court affirmed the decision of the Secretary and the Fourth Circuit that of the district court. In affirming, the Fourth Circuit specifically noted the use by the Secretary of testimony of a medical specialist who had not examined claimant, but had examined the medical records and had listened to the testimony. That doctor had testified that the conditions documented in the record would not preclude claimant from returning to the coal mines. The Court held that while this judgment could not be considered as conclusive as to the ultimate fact in issue, it could "serve as a basis for an evidentiary inference as to the ultimate fact."

The Court also noted that, although great weight should be attached to the examiner's findings when credibility of witnesses is involved and the final agency findings differ, the only real issue here was medical, and consequently no special weight should be accorded the findings of the examiner.

Staff: Assistant United States Attorney William C. Breckinridge,
(W.D. Va.)

SOVEREIGN IMMUNITY

Suits Against Secretary of Treasury to Reach Money on Deposit in U.S. Treasury to Account of Third Party, Where U.S. Has Interest In Such Funds, Is Unconsented Suit Against U.S. and Cannot Be Maintained. Schmitz, et al. v. Societe Internationale (Interhandel) (C.A.D.C. No. 19,955, November 14, 1966) D.J. File 9-21-1335. In 1963 the Attorney General and Societe Internationale (a Swiss holding company commonly called Interhandel) settled the lawsuit between them arising from the vesting by the Alien Property Custodian as enemy property of certain shares of General Aniline & Film Company stock, of which shares Interhandel claimed ownership. Pursuant to the stipulation of settlement, the stock was sold to the public in 1965 for $320,000,000. Interhandel's share, approximately $120,000,000 was deposited in the United States

Treasury where it was held subject to provisions in the settlement agreement. Under the settlement, Interhandel was required to indemnify the United States, the Attorney General and other Government employees against any liability arising from that settlement and the Secretary of the Treasury was to hold the funds until the Attorney General was satisfied that they would no longer be needed to insure that the indemnity agreement would be carried out.

Plaintiffs brought this suit against Interhandel seeking to recover a portion of those proceeds for themselves. They contended that the money was due them pursuant to an agreement between themselves and Interhandel. Plaintiffs joined the Secretary of the Treasury as a defendant in order to require that official to pay a portion of the funds in the Treasury to themselves rather than to Interhandel.

The district court dismissed, for want of jurisdiction, the suit against the Secretary as in reality being one against the United States to which it had not consented. The Court of Appeals affirmed on the opinion of the district court (240 F. Supp. 757, D.D.C.). The Court of Appeals thus upheld the lower court's ruling that suits to reach money in the Federal Treasury cannot be maintained without the consent of the United States, particularly where the Federal Government has a substantial interest in the funds in suit.

Staff: Richard S. Salzman
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FALSE PERSONATION

Revision of Prosecutive Policy Under 18 U.S.C. 912. A case has recently been brought to the attention of the Department in which an individual was indicted for violation of 18 U.S.C. 912. The alleged offense consisted of impersonating a technical sergeant in the armed forces and obtaining merchandise for personal use on credit. There was no pretense of acting under the authority of the Federal Government. This prosecution was consistent with the Department's expressed prosecutive policy: "The policy of vigorous prosecution in cases of impersonation of Federal officers and employees applies to instances where the subject passes bad checks or receives merchandise while posing as a Government employee as well as to cases where the subject pretends to be and acts as an officer of the United States." United States Attorneys' Bulletin, Vol. 11, No. 20, pp. 525, 526.

However, dismissal of the indictment has been authorized under the authority of United States v. Grewe, 242 F. Supp. 826 (W.D. Mo., 1965); United States v. Martin, No. 31902-CD (S.D. Calif., July 15, 1963); United States v. York, 202 F. Supp. 275 (E.D. Va., 1962). These cases have held that in order to violate 18 U.S.C. 912, the defendant must pretend not only that he is an employee of the United States, but also pretend to be acting under Federal authority. The courts believed this interpretation was necessary if the required pretense of "acting under the authority of the United States" and also the words "in such pretended character" were not be read out of the statute.

It is the policy of the Department, based on the above cited cases, that prosecution under 18 U.S.C. 912 should be sought where the subject, in addition to impersonating a Federal officer or employee, pretends to be acting under color of authority. Prosecution should also be considered where the subject expressly or implicitly suggests that the valuable thing demanded or obtained was necessary for the performance of his "official" or "authorized" duty.

INDIANS

With this issue of the Bulletin there is being transmitted to all United States Attorneys an analysis of Public Law 89-707 entitled:

INDIANS

Public Law 89-707, Amendments to 18 USC 1153
Relating to Offenses Committed by Indians
Against The Person Or Property Of Other
Indians In The Indian Country.

INDIANS

Public Law 89-707, Amendments to 18 U.S.C. 1153 Relating to Offenses Committed by Indians Against The Person Or Property Of Other Indians In The Indian Country.

A. Background of the Amendment

On November 2, 1966, Public Law 89-707 was signed by the President and became effective immediately (80 Stat. 1100). This legislation was sponsored by the Department of Justice and the Department of the Interior and amends 18 U.S.C. 1153. Prior to the amendment, Section 1153 listed ten major crimes and provided that an Indian who commits within the Indian country any of these offenses against the person or property of another Indian shall be subject to the same laws and penalties that apply to other persons committing those offenses within the exclusive jurisdiction of the United States. Section 1153 further provided that the offense of rape shall be defined in accordance with the laws of the state in which the offense was committed and that an Indian who commits the offense of rape shall be imprisoned at the discretion of the court. Section 1153 also provided that the offense of burglary shall be defined and punished in accordance with laws of the state in which such offense was committed.

The prosecution of offenders under Section 1153 disclosed several law enforcement problems which Public Law 89-707 was designed to remedy. In a number of states the offense of carnal knowledge of a female under a certain age is defined as rape. Notwithstanding the fact that Section 1153 adopted the state definition of rape, Federal courts in a number of instances refused to sustain indictments against Indians where the sexual offense charged did not include the element of force, and held that the rape provision of Section 1153 related only to common law rape. Illustrative of cases in this category are Petition of McCord, 151 F. Supp. 132; United States v. Davis, 148 F. Supp. 478; United States v. Red Wolf, 172 F. Supp. 168; United States v. Rider, affirmed 282 F. 2d 476.

Another problem related to prosecution for the offense of assault with a dangerous weapon which is listed as one of the ten major crimes in Section 1153. The definition in Federal law (18 U.S.C. 113) includes the element of "intent to do bodily harm and without just cause or excuse," while the offense mentioned in Section 1153 does not contain the intent requirement. The absence of that intent precluded Federal prosecution for a number of serious acts that should have been prosecuted. It was further observed that although incest is one of the ten major crimes in Section 1153, the Federal offense of incest (former 18 U.S.C. 517) applicable to places under the exclusive

jurisdiction of the United States, was omitted from the 1948 revision of the code and there was no Federal statute specifically defining and punishing this offense.

B. Effect of the Amendment

Public Law 89-707 expands the coverage of the first paragraph of Section 1153 to include the offenses of assault with intent to commit rape and "carnal knowledge of any female, not his wife, who has not attained the age of sixteen years." The law provides that the offense of assault with intent to commit rape (as well as rape) shall be defined in accorance with state law and that an Indian who commits the offense shall be imprisoned at the discretion of the court. The law amends the third paragraph of Section 1153 to provide that the offenses of assault with a dangerous weapon and incest, in addition to burglary, shall be defined and punished in accordance with the law of the state in which such offenses are committed. The law also amends Section 3242 of Title 18, United States Code, relating to the trial of Indians committing the offenses set forth in Section 1153 to include therein the offenses of carnal knowledge and assault with intent to commit rape.

It is to be observed that under Public Law 89-707 the first paragraph of Section 1153 contains the same definition of carnal knowledge as that used in 18 U.S.C. 2032 which applies to the commission of that offense by a non-Indian against an Indian in the Indian country by virtue of the provisions of 18 U.S.C. 1152. Thus there will be uniform law enforcement in the future with respect to this offense.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Supreme Court Imposes New Burden of Proof in Deportation Proceedings. Elizabeth Rosalia Woodby v. INS and Joseph Sherman v. INS (Supreme Court Nos. 40 and 80, December 12, 1966) D. J. Files 39-58-35 and 39-36-329. The question before the Supreme Court in the above cases was what burden of proof the Government must sustain in deportation proceedings. Justice Stewart, writing for the majority, held that the Government must establish the facts supporting deportability by clear, unequivocal and convincing evidence. The Immigration and Naturalization Service had contended that the issue was controlled by the following sections of the Immigration and Nationality Act, as amended. Section 106(a)(4) (8 U.S.C. 1105a) which deals with judicial review of deportation orders, states that a deportation order "if supported by reasonable, substantial and probative evidence on the record considered as a whole shall be conclusive." Section 242(b)(4) (8 U.S.C. 1252(b)) which governs the conduct of deportation hearings provides inter alia that "no decision of deportability shall be valid unless it is based upon reasonable substantial and probative evidence." Justice Stewart read the above provisions of the Act as being addressed to the scope of judicial review of deportation orders and not to the degree of proof required at the administrative level.

Justice Clark in a dissenting opinion in which he was joined by Justice Harlan, stated in part:

> The Court, by placing a higher standard of proof on the Government, in deportation cases, has usurped the legislative function of the Congress and has in one fell swoop repealed the long-established "reasonable, substantial and probative" burden of proof placed on the Government by specific Act of the Congress, and substituted its own "clear, unequivocal and convincing" standard. This is but another case in a long line in which the Court has tightened the noose around the Government's neck in immigration cases.

Both deportation cases were remanded to the Immigration and Naturalization Service for further proceedings consistent with the opinion as might be deemed appropriate.

Staff: Woodby: Solicitor General Thurgood Marshall;
Assistant Attorney General Fred M. Vinson, Jr.,
(Criminal Division);

Assistants to the Solicitor General Robert S. Rifkind and Francis X. Beytagh, Jr.;
General Counsel L. Paul Winings and Deputy General Counsel Charles Gordon (I & N Service)

Sherman: Solicitor General Thurgood Marshall;
Assistant Attorney General Fred M. Vinson, Jr., Beatrice Rosenberg and Paul C. Summitt (Crim. Div.);
Deputy General Counsel Charles Gordon (I & N Service)

Supreme Court Holds Evasion of Quota Restrictions of Immigration Laws as Not Barring Relief to Aliens Related to United States Citizens or Permanent Resident Aliens. INS v. Giuseppe Errico and Muriel May Scott v. INS (Supreme Court Nos. 54 and 91, December 12, 1966) D.J. Files 39-1772 and 39-51-2423. The Supreme Court granted certiorari in the above cases to resolve a conflict between the Second and Ninth Circuits as to the construction of the provisions of Section 241(f) of the Immigration and Nationality Act as amended (8 U.S.C. 1251(f)) which reads:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien other admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

The precise issue was the meaning Congress intended to be given the phrase "otherwise admissible at time of entry". The Immigration and Naturalization Service contended that, as ruled by the Second Circuit, an alien is not otherwise admissible if the alien misrepresented his status for the purpose of evading the quota restrictions of the Act. Chief Justice Warren delivered the opinion for the majority of the Court and rejected the construction of the statute urged by the Service. After review of its legislative history he concluded that if there was doubt as to the meaning of the statute it should be resolved in favor of the aliens in the light of its humanitarian purpose to prevent the separation of families composed in part at least of American citizens.

Justice Stewart was joined in a dissent by Justices Harlan and White. It was his view that the majority of the Court justified its disregard of the plain meaning and consistent administrative construction of the statute by resort to the spirit of humanitarianism which was said to have moved Congress to enact the statute. He reasoned that Congress intended to benefit Aliens from countries like Mexico which had no quota restrictions and those who had

misrepresented their national origins to avoid repatriation to Iron Curtain countries. He saw no indication that Congress enacted the legislation to allow a wholesale evasion of the Immigration and Nationality Act or as a general reward for fraud.

The Errico case was affirmed and the Scott case reversed.

Staff: Errico: Solicitor General Thurgood Marshall;
Assistant Attorney General Fred M. Vinson, Jr. (Criminal Division);
Assistant to the Solicitor General Louis F. Claiborne;
General Counsel L. Paul Winings and Deputy General Counsel Charles Gordon (I & N Service);

Scott: Solicitor General Thurgood Marshall;
Assistant Attorney General Fred M. Vinson, Jr. (Criminal Division);
General Counsel L. Paul Winings and Deputy General Counsel Charles Gordon (I & N Service)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Stipulations for Disposition of Contempt of Congress Cases Against Klan Members; United States v. Calvin F. Craig, Robert E. Scoggins and James R. Jones (Cr. No. 228, 229, 231-66, D.C.) D.J. File 146-400-012-1. On November 18, 1966, before Federal District Judge Edward Curran, each of the above-named defendants changed their plea of not guilty and entered a plea of guilty to a one-count indictment returned on March 3, 1966, charging a violation of 2 U.S.C. 192. At the same time each of the defendants and Government counsel filed a stipulation, which was accepted and signed by the Court, providing for the guilty pleas as well as an agreement to postpone the imposition of sentence until a final judgment in the case of United States v. Robert M. Shelton is entered of record. Shelton, together with the defendants named hereinabove and three other persons, Marshall R. Kornegay, George F. Dorsett and Robert Hudgins were indicted on March 3, 1966 under the Contempt of Congress statute (2 U.S.C. 192) as a consequence of hearings before the House Committee on Un-American Activities on the activities of the Ku Klux Klan in the United States. Separate indictments were returned against each of the defendants and Shelton's case, which was tried first, resulted in a conviction on October 14, 1966. Shelton was sentenced to one year in prison and a fine of $1000. His case is presently on appeal.

It was further agreed in the stipulation that if Shelton's conviction was affirmed, sentence would then be imposed upon the three defendants. In addition, it was provided that should the final judgment in Shelton result in dismissal of the indictment, the Government, through the United States Attorney, would consent to a withdrawal of the guilty pleas and would move to dismiss the indictment against these defendants.

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

Conspiracy to Injure Property of Foreign Government (18 U.S.C. 956). United States v. Rolf Dunbier and Jay Aubrey Elliott (S.D.N.Y.) D.J. File 71-125-1. On November 5, 1966, Rolf Dunbier and Jay Aubrey Elliott were arrested by FBI agents in New York City and were charged with a violation of 18 U.S.C. 956. This statute makes it unlawful for persons within the jurisdiction of the United States to conspire to injure or destroy certain types of specific property situated within a foreign country and belonging to a foreign government including bridges and railroads. On November 21, 1966, a grand jury in the Southern District of New York returned a one-count indictment against Dunbier and Elliott charging them with conspiring within the United States to destroy a railroad bridge in the Republic of Zambia. Both defendants have been released on $15,000 bond. The arraignment was set for December 6, 1966.

This is the first prosecution brought under the provisions of 18 U. S. C. 956.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Stephen E. Kaufman (S. D. N. Y.); John H. Davitt and James P. Morris (Internal Security Division).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE (BAR JOURNAL ITEM)

Suits Against the United States Under 28 U.S.C., Section 2410

In order to avoid unnecessary litigation, United States Attorneys are requested to acquaint members of the local bar and other interested parties with provisions of 28 U.S.C., Section 2410, as amended by Section 201 of the Federal Tax Lien Act of 1966 (P.L. 89-719). To that end, the following item may be inserted in local bar publications:

Under 28 U.S.C., Section 2410, as enacted and previously amended, the United States has consented to be named a party defendant in any suit instituted in a federal or state court having jurisdiction of the subject matter for the purpose of quieting title to or foreclosing a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. As amended by Section 201 of the Federal Tax Lien Act of 1966, the Government's "partition" actions, "condemnation" actions, "interpleader" actions and actions "in the nature of interpleader".

Any pleading (whether or not designated as a complaint) which attempts to join the United States as a party in the types of actions named, where the action involves liens arising under the Internal Revenue Code, must set forth with particularity the nature of the interest or lien of the United States, i.e., (1) the name and address of the delinquent taxpayer, (2) if a notice of tax lien has been filed, the identity of the internal revenue office which filed the notice, and (3) the date and place such notice of lien was filed. Moreover, as in the past, service of process must be made upon the United States Attorney's office and a copy of the process and complaint must be sent to the Attorney General of the United States by registered or certified mail. Unless these requirements are met, the pleading is defective as to the United States and is subject to a motion to dismiss. In such event, a judgment rendered in such a suit, or a judicial sale pursuant to such judgment, will not disturb the lien of the United States.

A judgment or decree in any such action shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, in a mortgage or lien foreclosure action, the property involved will be discharged from a junior federal mortgage or lien only if a judicial sale of the property is sought; in such situations, except where federal law precludes redemption,

the United States may redeem real property sold within 120 days from the date of sale, or such longer period as may be allowed under local law.

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Vol. 14 December 23, 1966 No. 26

INDEX