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UNITED STATES ATTORNEYS
BULLETIN

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FILING OF DEPOSITIONS WITH COURT

In many cases recently United States Attorneys' offices have been forwarding to the Department both the original and the copy of depositions taken by Department attorneys. Your attention is directed to the provision of Rule 30(f) of the Federal Rules of Civil Procedure requiring the officer before whom a deposition is taken to file the original with the court. If such officer erroneously transmits the original to a United States Attorney's office instead of to the Clerk of the Court, the United States Attorney's office should have the original filed with the Clerk immediately. If attention is given to this matter it will eliminate the necessity for returning original transcripts for filing.

IMPORTANT NOTICE

Attention is directed to the special notices on travel which are set out in the Administrative Division's portion of this Bulletin.

APPOINTMENTS - UNITED STATES ATTORNEYS

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

Arizona -- Edward E. Davis
California, Central -- William M. Byrne, Jr.
Massachusetts - Paul F. Markham
Rhode Island -- Edward P. Gallogly

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ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

SPECIAL NOTICES

Travel Authorizations

In many instances recently, advance authorization has not been obtained for travel outside the district or outside the country. (See the United States Attorneys' Manual, Title 8, page 109.) Also, telephonic authorization is frequently sought a few hours prior to departure. In the majority of these cases, there is sufficient advance knowledge of the trip, but the traveler neglects to seek the authority or waits until the last minute. It is important that you forward Forms DJ-10 to the Executive Office for United States Attorneys at least one week prior to departure. If a definite travel date is not known, please indicate an "on or about"-date with an explanation. Telephonic requests should be limited to the most urgent instances. (On Form DJ-10 under "itinerary," please show points between which travel will be made.)

You are reminded again that a Department attorney who recommends or approves travel of a United States Attorney or one of his assistants is not authorizing the expense; authorization of funds is the responsibility of the Assistant Attorney General for Administration. It is very important that all expenses be carefully controlled if we are to avoid a shortage of funds near the end of the fiscal year. In this connection, you are again reminded of the President's request to reduce travel wherever possible. See Department Memo 468.

Travel to Interview Witnesses

As a matter of general policy, witnesses should be interviewed by the investigating agents. Travel of trial attorneys for this purpose should only be considered in very unusual circumstances; Forms DJ-10 should contain a complete explanation of why the investigating agents are not able to conduct the interviews.

Travel to Attend Meetings

In some instances, Forms DJ-10 fail to show how attendance at meetings meets the criteria in the United States Attorneys' Manual, Title 8, page 48. These requests must be approved in advance and show in what capacity the officials will participate and what benefit will accrue to the Department from their participation.

Use of Military Airlift Command Services

Frequently, attorneys plan travel outside the continental limits of the United States or attempt to secure witnesses from outside the United States based on the premise that the Military Airlift Command Service (formerly MATS) can be used at no cost to us.

This is not the case; the Military Airlift Command provides transportation service to the Department of Defense by means of an Industrial Fund. All users of the Military Airlift Command Service, including the Air Force, are required to reimburse this Fund based upon current MACS tariffs. This is true whether the aircraft is military-owned or is a chartered commercial aircraft. We hope that this removes any illusions as to the use of MACS.

Memos and Orders

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 2, Vol. 15 dated January 20, 1967:

MEMOS	DATED	DISTRIBUTION	SUBJECT
503	1-11-67	U. S. Marshals	Time standards for service of process
504	1-16-67	U. S. Attorneys	Payment for land commissioners' services

ORDERS	DATED	DISTRIBUTION	SUBJECT
372-67	1-16-67	U. S. Attys. & Marshals	Policy with regard to inventions resulting from grants under Law Enforcement Assistance Act of 1965
373-67	1-14-67	U. S. Attys. & Marshals	Amending regulations relating to recovery from tortiously liable third persons of cost of hospital and medical care and treatment furnished by U. S. (Order No. 289-62, as amended by Order No. 344-65)

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Probable Jurisdiction Noted by Supreme Court in Bank Merger Case. United States v. First City National Bank of Houston, et al. (S. D. Texas). D. J. File 60-111-1081. This is a civil action challenging the proposed merger of the largest and sixth largest commercial banks in Houston, Texas, as a violation of Section 7 of the Clayton Act. The District Court dismissed the complaint before trial, holding that, under the Bank Merger Act of 1966, the Government is required to plead and prove not only that the proposed merger is anticompetitive but also that the competitive injury is not outweighed by the probable effect of the merger in meeting the convenience and needs of the community. The Government has appealed to the Supreme Court from the dismissal. Probable jurisdiction has been noted, and it is expected that the case will be argued this term.

In addition to the above requirement concerning proof, the Bank Merger Act of 1966 provides in relevant part that if a federal banking agency approves the merger, "[a]ny action brought under the antitrust laws" to challenge it must be commenced within thirty days; in any such action "the court shall review de novo the issues presented" and "the standards applied by the court shall be identical with those that the banking agencies are directed to apply."

The Act became effective on February 21, 1966. On May 12, 1966, First City National Bank of Houston and Southern National Bank of Houston entered into an agreement to merge. After the agreement was approved by the stockholders of each bank on or about June 16, 1966, an application for approval of the proposed transaction was made to the Comptroller of the Currency as required by 12 U. S. C. 1828(c). The Comptroller approved the proposed merger on September 20, 1966, although the Department of Justice and the Board of Governors of the Federal Reserve System had, pursuant to 12 U. S. C. 1828(c) (4), submitted reports to the Comptroller on the competitive factors involved, indicating that the merger would have substantial anticompetitive effects.

On October 19, the Department of Justice filed this civil action in the District Court challenging the proposed merger on the ground that it might substantially lessen competition in violation of Section 7 of the Clayton Act. Under the Bank Merger Act of 1966, commencement of the suit operates to stay consummation of the merger unless "the court shall otherwise specifically order." The complaint alleged that First City is the largest commercial bank in Harris County, Texas, and in the Houston metropolitan area. Together with its affiliates, it accounts for about 29. 6 percent of all commercial bank deposits in the County. Southern National is the sixth largest

commercial bank in Harris County and in the Houston metropolitan area. Together with its two affiliates it accounts for approximately 2.8 percent of all commercial bank deposits in the County. Commercial banking in Harris County is already heavily concentrated. The five largest commercial banks account for approximately 66.3 percent of all deposits and 65.2 percent of all loans of the 85 commercial banks located in the county, and this heavy concentration is in large part a direct result of past consolidations among banks in the area. The merger of First City and Southern National would produce a bank having (with its affiliates) at least 32.4 percent of all commercial bank deposits in the County, and would increase concentration among the five largest commercial banks in the Houston area to the point where they and their affiliates would account for about 78 percent of total commercial bank deposits.

On October 26, 1966, the Comptroller intervened as a party in the action (as permitted by the Bank Merger Act of 1966) and the next day moved to dismiss the complaint for failure "to state facts sufficient to support a cause of action * * *." On November 1, 1966, the banks moved to dissolve the statutory stay on the ground that plaintiff in its complaint had not challenged as arbitrary, capricious or not supported by substantial evidence the Comptroller's findings and determinations, that any anticompetitive effects resulting from the proposed merger were clearly outweighed in the public interest; that plaintiff had not alleged facts which constituted all the elements of a violation of the Bank Merger Act of 1966; and that, therefore, there was no reasonable probability that it would prevail in the trial.

On November 10, 1966, the Comptroller issued an opinion stating why he had approved the merger. He concluded that the merger would have no adverse effect on competition and that, in any event any such effects were clearly outweighed by the probable effect in meeting the convenience and needs of the Houston area community. On December 1, 1966, the day before the motions to dismiss and to dissolve the statutory stay were to be argued, the successor Comptroller (who had taken office subsequent to approval of the merger) issued a supplemental opinion. It concluded that the question of convenience and needs need not be reached because, although competition would be lessened, there were no substantial anticompetitive effects; and that even assuming that there were such effects they were outweighed by the "manifold advantages accruing to the Houston area."

After a hearing on December 2, Judge Connally orally announced his ruling from the bench. He held that, under the Bank Merger Act of 1966, the Government is required to plead and prove not only that the merger is anticompetitive, but also that the competitive injury is not outweighed by the convenience and needs of the community to be served. Accordingly, he granted the Comptroller's motion to dismiss for failure to state a cause of action, but stayed dismissal for 10 days (from December 9, 1966, the

effective date of its judgment) in order to give the Government an opportunity to amend its complaint. At the same time he also granted the defendant banks' motion to dissolve the statutory stay, to become effective (if the Government did not amend) on the date of dismissal. The Government declined to amend, and on December 19, 1966, the court dismissed the complaint and dissolved the statutory stay. The District Court at the same time refused the Government's request to stay consummation of the merger pending appeal.

On December 21, 1966, the Government applied to the Supreme Court for a stay of the proposed merger pending appeal. Argument was held on the stay application before Mr. Justice Brennan on December 28, 1966. The matter was referred to the full Court for decision, the banks agreeing not to merge pending the ruling. The Government filed its jurisdictional statement on December 27, 1966; motions to affirm were filed by the Banks and by the Comptroller on January 7, 1967.

On January 13, 1967, the Supreme Court noted probable jurisdiction and stayed consummation of the proposed merger pending appeal. The case is expected to be heard this term.

Staff: John M. Toohey and Arthur I. Cantor (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

BANKRUPTCY

In Rare Conditions, Liquidation Proceedings for Several Commonly Controlled Corporations May Be Consolidated, Even Where Creditors May Not Have Knowingly Dealt With Them as Unit. Chemical Bank New York Trust Co. v. Kheel, Scully and United States (C. A. 2, Nos. 30684-30691, December 2, 1966). D.J. File 61-51-3898. Eight corporations engaged in the shipping trade and commonly owned or controlled by former shipping magnate Manuel E. Kulukundis were all debtors in separate Chapter X proceedings. All reorganization plans having failed, each was in liquidation. The United States, as a major creditor, moved for consolidation of the proceedings, a motion eventually joined by the reorganization trustees. The referee found that the corporations were operated as a single unit, that all officers were merely fronts for Kulukundis, that little or no attention had been paid to the formalities of independent corporations, and that funds had been shifted back and forth among the corporations, and between various of the corporations and Kulukundis. He concluded that audit of the inter-company financial relationships would be a major task without assurance of the possibility of a fair reflection of the condition of the corporations as a result.

Chemical Bank, whose claims on the remaining assets were contingent upon its mortgage on a ship being declared invalid in another suit, and trustees of certain seamen's pension funds opposed consolidation. The district court granted the motion for consolidation.

On appeal, the Second Circuit affirmed, rejecting Chemical Bank's argument that consolidation was beyond the court's power absent a showing that the objecting creditors knowingly dealt with the group as a unit and relied on the group for payment. It held that, while the power to consolidate should be used sparingly because of the possibility of unfair treatment of innocent creditors, in the rare case when the inter-relationships are "hopelessly obscured" and the time and expense necessary to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors, equity is not helpless to reach a rough approximation of justice. By eliminating the inter-company claims and treating all assets as common assets and all claims as against the common fund, it held, it would be possible to determine, allow and classify claims of creditors prior to the preparation of a plan of liquidation, as required by the Act.

Judge Friendly concurred, on the ground that while a creditor who relied on the credit of a separate corporation should not be remitted to a claim against the common pool, there was insufficient proof that appellants had in fact relied on the credit of an individual corporation.

Staff: United States Attorney Robert M. Morgenthau, Assistant United States Attorneys Irwin B. Robins and Marjorie A. Fine (S. D. N. Y.)

CONTRACT SETTLEMENT ACT

Single Damages Provision of Contract Settlement Act Does Not Require Showing of Reliance. United States v. Dinerstein (C. A. 2, No. 29, 395, 362 F. 2d 852). D. J. File 146-38-51. During 1946 Dinerstein was awarded certain contracts, at a total contract price of $109, 200. The contracts were later terminated, and after the submission of numerous cost estimates and statements, payment of $70, 846. 15 was made as a settlement. The final cost statement submitted by Dinerstein had shown costs of $94, 917. 33.

In 1958, while Dinerstein's books were being audited on another matter, it was discovered that his total costs on the contracts involved had been $2, 927. 02. The Government brought suit under the Contract Settlement Act, 41 U. S. C. 119. The district court, 226 F. Supp. 368, found that Dinerstein's claims had been knowingly false and fraudulent. It allowed recovery, however, only of $2, 000 for each of three fraudulent claims, holding that in order for the Government to recover the payments received as a result of the false claims it was necessary for the Government to show that it had relied upon those false representations.

On the Government's appeal, the Second Circuit reversed the district court's denial of single damages. It held that the language of § 119(2), "as a result thereof", only limits recovery to the part of the payment made which was not properly due, and does not insert a reliance or causation requirement.

On Dinerstein's cross appeal, based on the release in the settlement agreement, the Court held that the fraud exception in 41 U. S. C. 106(c) (2) includes fraudulent statements and fraudulent tricks, and is not restricted to common law fraud, where reliance must be shown.

Staff: David L. Rose (Civil Division)

DEFENSE BASES ACT

Defense Base Act Applicable as Sole Relief to Family of Pilot Who Died While Performing Government Contract. Flying Tiger Lines, Inc., et al. v. Landy (C. A. 9, No. 20, 358, November 14, 1966). D. J. File 83-11-106. In 1962 an airplane operated by Flying Tiger Lines disappeared while transporting military personnel from California to Viet Nam. The children of the pilot brought claim under the California Workmen's Compensation Act, and were awarded $17, 500 to be paid at $70 per week. After partial payment, at the request of the beneficiaries, a lump sum payment of the remaining obligation, at present value, was paid, resulting in a total payment of $16, 819. 91.

Thereafter, the same beneficiaries filed a claim for death benefits under the Defense Base Act, 42 U. S. C. §§ 1651-1654. That Act extends the provision of the Longshoremen's and Harbor Worker's Compensation Act to employees engaged in employment under certain contracts entered into with agencies of the United States for the purpose of performing certain specified types of "public work." The deputy commissioner made an award under that Act, holding plaintiff liable for $68. 25 per week from the date of the plane's disappearance. Credit was allowed for the $16, 819. 91 actually paid pursuant to the State award.

Plaintiffs, the employer and insurer, brought this action contending that decedent's death was not compensable under the terms of the Act and that the earlier State determination was either res judicata or a binding election of remedies. The district court upheld the deputy commissioner and the Ninth Circuit affirmed.

The Court of Appeals held that the 1958 amendment to the Act had removed the basis for the decision in Walker v. American Overseas Airlines, 275 App. Div. 974, 90 N. Y. S. 2d 537, that the Act did not apply to pilots. It went on to determine that an airplane was not a "vessel" within the exclusionary clause of 42 U. S. C. 1654(3).

As to the res judicata argument, the Court noted that the applicability of the Defense Base Act was not before the California commission, and thus the relevant issue here could not be res judicata. It then held that there could have been no valid election of remedies, since liability under the Defense Base Act was expressly made exclusive of any other remedy, including any remedy available under the workmen's compensation law of any State. 42 U. S. C. 1651(c). The survivors could not properly have elected to proceed under the State Act, since that was not a valid choice, the Court determined. The Court then remanded the case so that the district court could direct the deputy commissioner to credit the full amount of the State award, $17, 500, rather than the discounted amount actually paid as a lump sum, against his award.

Staff: Leavenworth Colby, (Civil Division)

EXPORT-IMPORT BANK

District Court Improperly Reformed Unambiguous Insurance Policy Issued by Export-Import Bank. Aetna Casualty & Surety Co. and Export-Import Bank v. George Crawford, d/b/a Tradeall Co., (C. A. 5, No. 23,674, January 11, 1967). D. J. File 145-0-257. This appeal was from a decision of the district court reforming a commercial insurance policy jointly issued by the Export-Import Bank (a Government agency) and a group of insurance companies. Crawford, the insured, had shipped paint to Nigeria, to be paid for upon presentation of the sight draft. His buyer did not accept the paint, alleging that it had been shipped in wrong-sized cans, and refused to pay the sight draft. The policy did not cover this kind of loss, and indeed excluded "any loss arising from the unwillingness of the buyer to accept the products." The district court, however, reformed the contract to provide such coverage, on the theory that otherwise the policy would be inequitable and would provide no coverage for persons dealing in sight draft transactions.

On our appeal the Fifth Circuit reversed, stating that the unambiguous terms of the policy must be applied as written, since there was no evidence of mutual mistake, and that the policy in any event did provide some coverage for persons dealing in sight draft transactions.

Staff: Walter F. Fleischer
(Civil Division)

FEDERAL TORT CLAIMS ACT - SCOPE OF EMPLOYMENT

Air Force Sergeant Driving His Own Car for His Own Convenience in Traveling From Temporary Duty Station to Permanent Duty Station Was Not Acting Within Scope of Employment, Notwithstanding Applicability of Uniform Code of Military Justice. Bissel v. McElligott; Gampher v. McElligott, (C. A. 8, Nos. 18,330, 18,332, December 6, 1966). D. J. Files 157-43-295, 157-43-294. Plaintiffs sued to recover damages for the wrongful death of three persons and personal injuries suffered by three others as a result of a collision with the private automobile driven by an air force sergeant returning to his permanent duty station from temporary duty.

The sergeant had been sent to a temporary base for schooling and was directed to return to his permanent base at a specified time. To reach his destination, he was authorized to use any form of transportation, including his own automobile. He chose to use his own private automobile and received a monetary allowance of five cents per mile for the official distance between the points of ordered travel. He was not given specific instruction as to the route to be traveled or the manner in which he was to drive. He was authorized to take leave for "delay in route" so that he was not required to hurry.

The district court held that the United States was not liable, since under Missouri law an employer is not liable for the torts of its employee unless the employer had the right to control the physical acts or movements of the employee at the very moment of the occurrence. The United States, it held, had no such control here.

The Eighth Circuit affirmed. The Court of Appeals went on expressly to reject appellant's contention that since a soldier operating an automobile "is subject to the provisions of the Uniform Code of Military Justice proscribing reckless or drunken driving", his conduct is necessarily within the scope of his employment. The Court stated that "the unique over-all control which the military service has over its members does not expand the legal doctrine of respondeat superior beyond scope of employment as applied in the applicable state law for determining the liability of a private employer."

Staff: Jack H. Weiner
(Civil Division)

FEDERAL TORT CLAIMS ACT - SERVICEMENS' SUIT

Subsequent Decisions Have Not Undermined Feres v. United States, Which Bars Tort Claims Act Suits by Servicemen Injured Incident to Service. Joseph B. Sheppard et al. v. United States (C. A. 3, Nos. 16,135, 16,136, and 16,137, December 12, 1966). D.J. File 157-62-632. This suit was brought by the administrators of the estates of three servicemen killed while on active duty, concededly in the course of activity incident to that duty. Recognizing that Feres v. United States, 340 U.S. 135, would bar this Tort Claims Act suit, appellants argued that Supreme Court decisions subsequent to Feres had "destroyed the validity of that case," or limited it to situations involving a threat to military discipline. The Third Circuit rejected this argument, pointing out that in the only Supreme Court decision involving a serviceman's right to sue the United States in tort, United States v. Brown, 348 U.S. 110, the Court expressly had adhered to Feres.

Staff: Morton Hollander and Florence Wagman Roisman
(Civil Division)

FEDERAL TORT CLAIMS ACT - RESERVIST'S SUIT

Naval Reservist Injured in Military Plane Crash on Way to Weekend Drill Is Covered by Feres Doctrine and Cannot Sue Under Tort Claims Act, Despite Fact That Drill Had Not Started and Orders Did Not Require Travel on Military Plane. United States v. Carroll, (C. A. 8, No. 18,328, December 21, 1966). D.J. File 157-42-168. A Naval Reservist was injured in a crash of a military aircraft which was transporting him to a weekend drill.

His orders did not require him to be on the plane; the transportation was merely offered by the Navy Reserve as a convenience to members of the reserve unit who lived several hours' drive from the Naval Air Station where the drill was held. However, while on the plane, if they took it, the Reservists were required to be in uniform. And prior to boarding the plane, when the men gathered at the airfield from which it left, they were required to observe military courtesies. The plane crashed while attempting a landing at the Naval Air Station where the drill was to be held. Plaintiff received Veterans Administration benefits for the injuries he incurred.

The district court gave judgment for plaintiff, rejecting the Government's defense based on Feres v. United States, 340 U.S. 135 (holding that servicemen may not sue the United States under the Tort Claims Act for injuries incurred "incident to service"). The district court's holding was based on the fact that plaintiff's orders did not require him to be on the plane, but merely required his presence at the drill. The Court of Appeals reversed, holding that plaintiff was covered by the Feres doctrine. The Court found it to be "significant" that plaintiff "was travelling by military transportation * * * to a military reserve drill * * * in uniform * * * subject to military courtesies and discipline." The Court deemed irrelevant the fact that plaintiff's orders left him free to travel by private transportation: while he "could have used his own automobile, or any other method of transportation he desired, he elected to use a method of transportation which was directly connected with and was incident to his military service."

While prior decisions have held inactive reservists covered by Feres when injured after they have been mustered into their weekend drill, this decision is the first extending Feres to an injury occurring before muster.

Staff: Robert V. Zener
(Civil Division)

GUARANTORS

Burden of Proving Amount Due on Judgment Against Principal Debtor Held To Be on Government in Subsequent Suit Against Guarantors of Debt. United States v. Howard C. Hayes, et al., (C.A. 9, No. 20,374, December 8, 1966). D.J. File 105-6-4. This suit was brought against the guarantors of a loan made by the Reconstruction Finance Corporation to an Alaska partnership which defaulted on its note. In 1958 the Small Business Administration as assignee of the RFC obtained a judgment totalling $48,983 against the principal debtor, and a foreclosure decree. In 1962 a separate suit was brought against the guarantors of the note, who had not been joined as defendants in the first suit. The complaint alleged that the judgment obtained in the first suit remained unpaid in the amount of $30,691 plus accrued interest. The guarantors denied this allegation.

At the trial, the Government sought to show the amount owed on the judgment by introducing a Statement of Account supplied by the SBA. The district court refused to admit this statement into evidence because it was not a record of any act, transaction, occurrence, or event, so as to be admissible under 28 U.S.C. 1732, and was not properly authenticated so as to be admissible as a Government record under 28 U.S.C. 1733. The Government then urged that the judgment obtained against the debtor was prima facie evidence of the liability of the guarantors, who had the burden of proving any payment on the judgment. The district court rejected this contention on the ground that evidence of payments of the judgment rested chiefly within the knowledge of the Government. The Ninth Circuit affirmed, holding that the burden was on the Government because it had undertaken to prove the amount due in its pretrial statement, that a judgment entered against the principal by default is not prima facie evidence of the amount unpaid against the guarantor under Alaska law, and that the Court agreed with the district court that evidence of payment rested "chiefly or entirely" with the Government.

This decision demonstrates the need for care in preparing proof of the amount remaining due in cases of this kind against guarantors.

Staff: Martin Jacobs and Walter H. Fleischer
(Civil Division)

LABOR LAW

Court Without Power to Stay Conduct of Representation Election by National Mediation Board. Brotherhood of Railway and Steamship Clerks v. National Mediation Board. (C.A.D.C. No. 20,606, December 16, 1966). D.J. File 124-16-67. This action arose out of a representation election among the clerical and related employees of Pan American World Airways, which was bitterly contested between the Teamsters and the Railway Clerks. The original election was set aside by the National Mediation Board as a result of the discovery of certain forged documents allegedly sent to the employees by the Teamsters over the signatures of George Meany and other AFL-CIO officials. It was alleged that, whereas the certified representative (the Railway Clerks) had instructed its members to refrain from voting in the election in a strategy move to defeat the Teamsters' bid to gain the certification, the forged documents advised the employees of a change in strategy and instructed them to cast write-in votes. After setting aside the original election, the Board scheduled a new election. Plaintiff-appellant sought to enjoin the conduct of a new election until such time as the taint of the forgeries had been eradicated.

The district court, relying on Switchmen's Union v. N.M.B., 320 U.S. 297, dismissed the action on the grounds that the Board was exercising its

discretion in performing its duty under the Railway Labor Act to investigate a representation dispute and that the court was without power to substitute its view concerning the continuing effect of the alleged forgeries for that of the Board.

The Court of Appeals denied appellants' motion for a stay of the election pending appeal, concluding that there was no probability that appellants would be successful on the merits. The Court pointed out that if the election is in fact stained by the persisting impact of the forgery and/or confusion which might have been engendered by the Board's effort to clarify the posture of the election, the Board could afford relief by setting aside the election even though the ballots had been counted.

Staff: William A. Gershuny
(Civil Division)

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Suit by Secretary of Labor to Set Aside Union Election Rendered Moot by Holding of New Election by Labor Union. Wirtz v. Local 153, Glass Bottle Blowers, etc., (C. A. 3, Nos. 15, 759, 16, 048, December 16, 1966). D. J. File 156-64-121; Wirtz v. Local Union No. 125, Laborers' International Union of North America, AFL-CIO, (C. A. 6, No. 17, 344, December 15, 1966). D. J. File 156-57-122. Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. 482, authorizes the Secretary of Labor to bring suit to set aside a union election and to obtain an order for new election under the Secretary's supervision, where it is shown that violations of the Act may have affected the outcome of the election. In Wirtz v. Locals 30 and 410, International Union of Operating Engineers, 366 F. 2d 438, rehearing denied 366 F. 2d 444, the Second Circuit held that the holding by the union of its next regularly scheduled election, during the pendency of a suit challenging the previous election, moots the suit. The Solicitor General has authorized the filing of a petition for certiorari from this decision. In Local 153 and Local 125, the Third Circuit and the Sixth Circuit followed the Second Circuit's precedent, remanding appeals brought by the Secretary with instructions to dismiss the complaint as moot. The Courts also ordered the decision below on the merits vacated on grounds of mootness, following the procedure required in United States v. Munsingwear, 340 U. S. 36. In both cases, the Courts stated that in the future, district courts should expedite these cases so as to prevent mootness. In addition, the Third Circuit in Local 153, following the Second Circuit, stated that in appropriate cases the Secretary could enjoin the union's next election, to preserve the pending challenge to the prior election.

In Local 153, the Secretary proved in the district court that the violation of law which was the basis for the challenge to the prior election had continued

at the latest election. The Third Circuit, however, held that the Secretary could obtain no relief with respect to the latest election. The Act requires that, before bringing suit, the Secretary must receive a complaint from a union member who has exhausted his internal remedies within the union. This had not occurred with respect to the union's latest election, and the Court rejected the Secretary's argument that this requirement was satisfied by the complaint that had been received in connection with the prior election.

Staff: Robert V. Zener, Howard Kashner
(Civil Division)

Section 203(a) of Labor-Management Reporting And Disclosure Act Does Not Authorize Secretary of Labor to Require Reports of Employers Incorporating Findings of Judicial Bodies or Administrative Agencies Relative to Reportable Activities Engaged in by Employers. Wirtz v. Ken Lee, Inc., et al. (C.A. 5, No. 22,943, November 28, 1966). D.J. File 156-19-20. Under Section 203(a) of the LMRDA, employers are required to report all expenditures made for the purpose of interfering with their employee's right to organize and bargain collectively or for the purpose of labor espionage. Following a union's complaint and over the denials of Ken Lee's officers the NLRB found that Ken Lee had, inter alia, paid an employee $10 for the purpose of spying on fellow employees who were trying to organize Ken Lee's Atlanta factory. Following the Board's action, the Secretary of Labor first demanded that Ken Lee's officers file on behalf of the corporation a report admitting that a reportable activity had taken place and detailing the facts surrounding the incident. Following the officers' refusal to comply, the Secretary modified his demand to include a report which simply incorporated the findings of the NLRB. Compliance was still refused. The district court declined to grant the Secretary's application pursuant to Section 210 of the Act, 29 U.S.C. 440, for a mandatory injunction requiring Ken Lee's compliance on the ground that the case was too "trifling" to warrant injunctive relief.

On appeal, the Fifth Circuit affirmed, holding that the kind of report that the Secretary ultimately sought from Ken Lee was "outside the scope of the Act," which by its express terms requires direct reporting by employers or their officers. By way of dictum, the Court said that the report originally required of Ken Lee's officers was tantamount to the admission of perjury in the NLRB proceedings or, assuming the officers had told the truth in those proceedings in denying reportable activities, the filing of a false statement in violation of Section 209(b) of the Act, 29 U.S.C. 439(b).

Staff: Harold F. Reis
(Executive Assistant to the Attorney General);
Harvey L. Zuckman
(Civil Division)

NATIONAL BANK ACT - NEW BANK CHARTER

Comptroller of Currency Not Required to Hold Formal Adversary Hearing Prior to Exercising His Discretion in Determining Whether or Not to Charter New National Bank. Webster Groves Trust Co. v. Saxon (C. A. 8 No. 18, 346, December 14, 1966). D.J. File 145-3-739. This action was brought by eight banks in surburban St. Louis to direct the Comptroller of the Currency to cancel a charter to a new national bank in that area, and to enjoin that bank's operation. The basis of the complaint was the assertion that the bank had been illegally chartered because the Comptroller had issued the charter without affording the competitor banks a formal adversary hearing pursuant to the Administrative Procedure Act.

Prior to the issuance of the charter, the competitors had been informed of the application for a charter, and had been permitted to present their opposition to its grant at a meeting with the Deputy Comptroller of the Currency, but their request for a formal hearing had been denied. The district court dismissed the complaint. The Court of Appeals affirmed.

The Court of Appeals rejected the Government's contentions that competing banks have no standing to challenge the Comptroller's chartering of a new national bank, and that the Comptroller's discretionary actions are not subject to judicial review. Rather, it held, the Comptroller's action in granting new charters would be subject to limited review to ensure that he acts within his statutory grant of power and does not abuse his discretion, act arbitrarily and capriciously, or unlawfully discriminate. No such allegations were made in this case.

The Court of Appeals upheld the Government's contention that neither the National Banking Act, the Administrative Procedure Act, nor procedural due process requires a formal hearing for the grant by the Comptroller of a new charter. In reaching this conclusion, the Court pointed out that "the very nature of the decision required by the Comptroller indicates that a formal adversary type hearing would be of little benefit to him in the discharge of his discretionary powers", and that public confidence in the banking system requires that bank applicants not be subjected to "severe public cross-examination" and "public presentation of unfavorable evidence."

Staff: David L. Rose and Jack H. Weiner
(Civil Division)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Imposition of Employment Restrictions Under Perishable Agricultural Commodities Act Does Not Require Administrative Hearing Where Undisputed

Facts Plainly Demonstrate That Prospective Employee Was Plainly Person "Responsibly Connected" With Corporate Violator of Act. Birkenfield v. United States, (C. A. 3, No. 16,009, November 10, 1966, petition for rehearing denied December 20, 1966 as untimely). D.J. File 107-69-93. The Perishable Agricultural Commodities Act prohibits employment within that industry of individuals who are "responsibly connected" with a merchant who is or has been found to be in violation of the law. And the statute, 7 U.S.C. 499(a)(g), specifically defines a person responsibly connected to mean affiliated or connected as "officer, director, or holder of more than 10% of the outstanding stock of the company." This action was brought by an individual who was Treasurer, stockholder, and a member of the Board of Directors of a corporate commission merchant dealer and broker licensed under the Perishable Agricultural Commodities Act. That corporation was found by the Secretary to be a violator of the Act. Plaintiff sought to enjoin the Secretary of Agriculture from imposing, without a hearing, employment restrictions on him in the field of marketing perishable agricultural commodities.

The Third Circuit upheld the constitutionality of the statutory provisions which automatically exclude "responsibly connected" persons from employment in the industry as not irrational or arbitrary. The Court went on to uphold the authority of the Secretary to impose employment restrictions, without a trial type hearing, on this individual who was admittedly a member of the Board of Directors, Treasurer, and owner of more than 10% of the outstanding corporate stock, since there were here no questions of fact to be resolved, and plaintiff was clearly a person plainly "responsibly connected" within the statutory language.

Staff: Morton Hollander and Jack H. Weiner
(Civil Division)

SOCIAL SECURITY ACT - DISABILITY

Lengthy Sixth Circuit Opinion Not Of Precedential Value. Seldon Davidson v. Gardner, (C. A. 6, No. 16,541, December 28, 1966). D.J. File 147-30-134. This lengthy opinion (47 pages in slip opinion form), affirming a district court's decision ordering the award of disability benefits has no precedential value, although it may be widely cited by claimants' attorneys. For it stands as the opinion only of Senior Circuit Judge McAllister, its author, with the other two judges concurring only in the result.

Staff: Robert C. McDiarmid
(Civil Division)

SOVEREIGN IMMUNITY

Sovereign Immunity Bars Suit Against Agency Officials to Effect Changes in Procurement Program. Cotter Corporation v. Glenn T. Seaborg, et al. (C. A. 10, No. 8418, December 28, 1966). D. J. File 145-172-38. Cotter sued various officials of the AEC seeking, in effect, to compel them to vary the terms of the AEC's Domestic Uranium Procurement Program in order that the degree of Cotter's participation in the program might be increased. The Tenth Circuit affirmed dismissal of the complaint, holding that this was an unconsented suit against the United States.

Staff: Florence Wagman Roisman
(Civil Division)

VETERANS - NATIONAL SERVICE LIFE INSURANCE

Listing of Spouse as Beneficiary of National Service Life Insurance Policy Held Not Adequate Evidence To Establish That Affirmative Action Had Been Taken to Make Her The Beneficiary. Howard J. Benard v. United States, (C. A. 8, No. 18,288, November 30, 1966). D. J. File 146-55-3749. This action was brought under 38 U. S. C. 784 by the named beneficiary in a NSLI policy issued upon the life of George C. Benard, plaintiff's son. The district court held that George Benard had changed the beneficiary of the policy from his father to his wife, whom he had married subsequent to taking out the policy. The wife and the insurance officer of George Benard's unit testified that he had stated frequently that his wife was beneficiary. In addition, George Benard had filled out a form for the Army Mutual Aid Association, in which he listed his wife as beneficiary of the NSLI policy as well as the Army Mutual Aid Association policy he owned. The district court ruled that there was clear proof of George Benard's intent to change his beneficiary and that the Mutual Aid Association form evidenced not merely that intent but also "a past act whereby he had changed the beneficiary." 248 F. Supp. 581.

The Eighth Circuit reversed on the ground that, although it had been shown that the insured intended to change the beneficiary, there was no proof of affirmative action taken to effectuate such a change in beneficiary. The Court held that the Mutual Aid form was not such proof, because the reverse side was not entered in evidence, the form was not signed, and there was no evidence that the insured considered it to be "a request for change of beneficiary." The Veterans' Administration does not accept this decision as correct.

Staff: Robert V. Zener and Walter H. Fleischer
(Civil Division)

VA's Determination That Indication of Intent to Change Beneficiary on Incorrect Form Operates to Change Beneficiary Upheld. Ward v. United States and Cox, (C. A. 7, No. 15,798, December 28, 1966). D. J. File 146-55-3754. In 1950, shortly after decedent's marriage, he designated as co-beneficiaries on his $10,000 NLSI policy his wife and mother. In 1954, 1955, 1956, and 1958, apparently when changing duty stations, decedent filed Form DD 93. In that form for those years, which operated as a designation or change of beneficiary for a different insurance scheme, in which decedent did not participate, he listed his wife as beneficiary and his mother as contingent beneficiary only. The Court found, in accordance with the VA determination, that the filing of these forms was a sufficient manifestation of an intent to change beneficiaries to effectuate the change, and affirmed the district court's judgment against the mother.

Staff: United States Attorney Richard P. Stein,
Assistant United States Attorney David W. Mernitz (S. D. Ind.)

DISTRICT COURT

FORECLOSURES - DEFICIENCY JUDGMENTS

Government Entitled Under Federal Law to Deficiency Judgment After Foreclosure Sale. United States v. Walker Park Realty, Inc. (E. D. N. Y., No. 65-C-668, December 2, 1966). D. J. File 130-52-5891. This suit was brought to foreclose a FHA mortgage on a multi-family housing project. The principal balance due on the mortgage note was $869,112. The project was sold at foreclosure on August 10, 1966, for $535,000, and a deed was delivered to the successful bidder on October 17. A motion was then filed for a deficiency judgment. The defendant resisted this motion on the grounds (a) that the judgment of foreclosure and sale did not contain a provision for a deficiency, and (b) that plaintiff did not proceed within the time limit prescribed by the statutes of the State of New York. The Court granted the deficiency judgment, rejecting the second objection upon the authority of United States v. Flower Manor, Inc., 344 F. 2d 958 (C. A. 3). The Court rejected the first objection, pointing out that Rule 54(c), FRCP, provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Staff: Assistant United States Attorney Cyril Hyman
(E. D. N. Y.)
George H. Vaillancourt
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

WITNESSES

Selection of Witnesses Testifying as to Military Regulations and Policies. United States v. Sheets (Cr. No. 13,147, E.D. Va., September 16, 1966.) The defendants were charged with theft of Government property from a military installation. The Officer of the Day, called by the Government, testified that there was no written command control directive in effect at the time of the incident. He also testified that there had been many other incidents of theft from the yard with the knowledge and acquiescence of military authorities. On the basis of the testimony indicating permissive theft, the judge dismissed the action against the defendants.

A review of this situation has revealed that the testimony of the officer was grossly erroneous. There were in fact regulations in effect which were violated by the defendants. An inquiry revealed that the policy of the military authorities at the station was to preclude this type of activity. It is recommended that considerable care be exercised in selecting witnesses who will be testifying as to military regulations and policies. If any problems arise in the preparation of those cases, the United States Attorneys should feel free to personally contact the commanding officer of the pertinent installation for assistance.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Rulings in Miranda and Escobedo Cases Held Not Applicable to Immigration Investigatory Statements. Edward Nason v. INS, C.A. 2, No. 30623, January 10, 1967. The above case involved a petition to review an order directing the deportation of the petitioner under 8 U.S.C. 1251(a)(4) on the ground that subsequent to entry petitioner was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Petitioner, a Canadian national, entered the United States for permanent residence in 1961. On April 9, 1965, he pleaded guilty in the United States District Court for the Southern District of New York to three counts of an information charging him with unlawfully devising a scheme to defraud by use of the mails during the period November 1, 1962 through December 31, 1962 in violation of 18 U.S.C. 1341. On the same day he also pleaded guilty to three counts of the same information charging similar offenses during the period of October 2, 1963 through October 24, 1963. Because of these convictions he was ordered deported as aforesaid.

Petitioner attacked the deportation order on two grounds. He contended that it was error to receive in evidence at the deportation hearing a statement he had made to an investigator of the Immigration and Naturalization Service prior to the institution of deportation proceedings. Before taking the statement, the investigator advised the petitioner that any statement he made should be voluntary and could be used against him in any Service proceedings. Petitioner insisted this advice was inadequate because he was not told that he could be represented by counsel. The Court disagreed with petitioner holding that under express provisions of the immigration laws he was entitled to counsel at his own expense in the deportation hearing but that this right did not extend to proceedings conducted in pursuance of broad investigatory powers of immigration officers. The Court then stated that in its opinion the principles in Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) were inapplicable here but even if applicable they were of no help to the petitioner as he was not, when making his statement, in custody or under any other compulsion or restraint.

The Court did agree with petitioner's second ground of attack that the Board of Immigration Appeals did not, as required by Woodby v. INS, 385 U.S. 276, decided December 12, 1966, find that the Government had proved by clear, unequivocal and convincing evidence that the crimes for which

petitioner was convicted did not arise out of a single scheme of criminal misconduct. Without appraising the proof, the Court remanded the case for further proceedings in accordance with the opinion.

Chief Judge Lumbard dissented on the ground that no testimony could support petitioner's claim that the two felonies, so removed in time, and void of any conceivable continuity could have arisen out of a "single scheme" as Congress intended that phrase.

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

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians; Off-Reservation-Treaty-Protected Fishing Rights; Applicability of State Regulations to Such Rights; Legal Existence of Indian Tribe; Existence of Indian Reservation. Department of Game of State of Washington, et al. v. The Puyallup Tribe, Inc., et al. (No. 38611, S.Ct., Wash., En Banc decision Jan. 12, 1967) D.J. File 90-2-0-604. Individual Indians were fishing for salmon "in the usual and accustomed places," as stated in an 1855 treaty, contrary to state regulations. The district court enjoined the Tribe and certain individual members from fishing for salmon in any manner contrary to state regulations. The bases of the decision were (1) the Tribe had ceased to exist; (2) the reservation had ceased to exist; (3) neither the Indians nor the Tribe had any treaty-protected rights to fish greater than any citizen of the United States; and (4) the regulations were reasonable. The United States filed a brief amicus on behalf of the Indians, taking the middle ground between the State's position that treaty Indians have no more rights than anyone else, and the Indians' position that their rights to fish at the usual and accustomed places were absolutely free of state control.

The Supreme Court of Washington reversed in a five-to-four decision. It held: (1) State courts have no jurisdiction to determine that a tribe recognized by Congress has ceased to exist; (2) the reservation itself no longer existed, except for the cemetery, because all the rest of it had been alienated; (3) the treaty-protected right to fish at the usual and accustomed places was a valid existing right; (4) the burden of proving the state regulations both reasonable and necessary before they applied to such Indians was on the State; (5) the Ninth Circuit's test that application of the regulations must be indispensable to the preservation of fish was unworkable and too extreme; and (6) that, on the record, the State had met the burden of showing reasonableness and necessity. The remand was to narrow the broad scope of the injunction. Four opinions were written in addition to the majority, taking positions at both extremes, in whole and in part.

Staff: Assistant Attorney General Edwin L. Weisl, Jr. and Edmund B. Clark (Land and Natural Resources Division).

Eminent Domain; Navigation Servitude; Compensation for Value Attributable to Flow of Non-navigable Tributary to Navigable Water. United States v. 501 Acres, Duke Power (366 F.2d 915 (C.A. 4, 1966), cert. den., January 16, 1967) D.J. File 33-42-239-853. Construction of a dam in the navigable Savannah River caused inundation of a hydroelectric power plant in the Seneca, a non-navigable tributary to the Savannah (the Government argued that the Seneca was

navigable). The district court affirmed an award of $500,000 to Duke Power Company for destruction of its hydroelectric facilities which relied on the flow of the Seneca.

The Court of Appeals reversed and directed no recovery, on the ground that there can be no compensable right to utilize the flow of a non-navigable tributary to a navigable stream. The Court agreed with the Government that United States v. Willow River Co., 324 U.S. 499, and United States v. Grand River Dam Authority, 363 U.S. 229, had in effect overruled United States v. Cress, 243 U.S. 316, as to the right to compensation for loss of the flow of a non-navigable tributary. The Supreme Court denied Duke Power Company's petition for certiorari.

Staff: Edmund B. Clark (Land and Natural Resources Division).

Eminent Domain; Substitute Facilities; Compensation for Cost of Industrial Waste Disposal Facility Required by State Because of Federal Project. United States v. 531.13 Acres, J. P. Stevens & Company, Inc. (366 F.2d 915 (C.A. 4, 1966)) D.J. File No. 33-42-239-807. Creation of a large reservoir by a dam on the navigable Savannah River extended waters upstream on the non-navigable Seneca. J. P. Stevens & Company, Inc., had been discharging industrial waste into the Seneca. Because of the recreation facilities of the federal project, the State of South Carolina reclassified the Seneca to prohibit discharge of raw industrial waste and required expensive purification facilities. The district court affirmed an award of $500,000 to J. P. Stevens & Co. for the cost of constructing the necessary purification facilities to comply with the new classification.

The Court of Appeals reversed and directed no recovery, on the grounds that Stevens had no compensable right under state law to discharge industrial waste into a non-navigable stream and the fact that, but for the federal project, it might have continued to do so did not render the federal project a taking requiring compensation under the Fifth Amendment. This decision, in effect, overturns the Fourth Circuit's earlier decision in Town of Clarksville, Va. v. United States, 198 F.2d 238. Rehearing was denied and a petition for certiorari is anticipated.

Staff: Edmund B. Clark (Land and Natural Resources Division).

Condemnation, Appeals: Sales, Admissibility, Best Evidence; Restriction of Cross-Examination, Membership and Practices of Appraisers' Organization, Compensation for Appraisal Services; Inspection of Appraisal Notes; Instructions; Lack of Jurisdiction Because Notice of Appeal Untimely Filed. Mallon v. United States (C.A. 9, No. 20444, Jan. 12, 1967) D.J. File No. 33-5-2131-1. The jury verdict was in the amount of $155,000 (the Government's high testimony) for the taking of a 1,139-acre ranch for use in the Black Butte Dam and

Reservoir Project in California. On the landowners' appeal, the Government contended, inter alia, that (1) the district court did not abuse its discretion in excluding certain of the landowners' sales based on factors of remoteness in time from the date of taking (five years) and of physical dissimilarity, and in admitting two of the Government's sales, over the landowners' argument that ranching property purchased for a use (potential subdivision) different from the admitted existing highest and best use of the property taken (ranching) cannot as a matter of law qualify as a "comparable sale;" (2) the district court properly limited cross-examination into the significance of membership in, and the disciplinary practices of, the American Institute of Real Estate Appraisers; (3) inquiry into the compensation of the Government's appraisal witnesses was validly confined to the fact of payment, the local statutory rule of evidence permitting inquiry into the precise amount not controlling federal condemnation; (4) the landowners were not entitled of right to examine notes taken to the stand but not consulted by a Government witness in the course of his testimony; (5) the jury was correctly instructed that comparable sales are the best evidence of value and that the bases of an expert's opinion should be assessed in determining the weight to be assigned his opinion of value; and (6) jurisdiction of the appeal was lacking because the notice of appeal was not timely filed. The notice was "dated" on the last possible day for timely filing but marked "received" and "filed" three days later by the district court clerk. There was no showing of any circumstance which would change the date for filing a timely notice of appeal.

The Court of Appeals entered the following order:

> The appeal must be, and is, dismissed as not timely filed. However, we wish to state that we are satisfied from an examination of the briefs and record that no reversible error occurred.

Staff: Raymond N. Zagone (Land and Natural Resources Division).

Indians: District Court Has No Jurisdiction to Determine Validity of Tribal Election; Section 10 of Administrative Procedure Act Does Not Grant Jurisdiction in Suit Against Secretary of Interior. Twin Cities Chippewa Tribal Council v. The Minnesota Chippewa Tribe, and Stewart Udall, Secretary of the Interior (C. A. 8, No. 18,231, Jan. 17, 1967) D. J. File No. 90-2-0-588. The appellants, plaintiffs below, were a Minnesota corporation comprised of members of the Minnesota Chippewa Tribe living off the reservation and such members as individuals. The appellees were the Tribe, a federal corporation organized under Act of Congress, and the Secretary of the Interior. The complaint alleged the defendants did not comply with the applicable statute, rules and regulations in conducting a tribal election, and that a request for a hearing before the Secretary had been denied contrary to the Administrative Procedure

Act, 5 U.S.C. 1009(a)(c), and in violation of the plaintiffs' constitutional rights of due process and equal protection under the Fourteenth Amendment. The district court dismissed for lack of jurisdiction. On appeal, this was affirmed.

The Eighth Circuit held Section 16 of the Indian Reorganization Act does not on its face grant jurisdiction to the district court. In response to appellants' argument that they are entitled to an interpretation of the Act under 28 U.S.C. 1331, the appellate court held the Tribe was entitled to sovereign immunity, protecting it from suit in federal courts except as Congress has consented. 28 U.S.C. 1331 is not a waiver of sovereign immunity. Moreover, there was no "federal question" which is necessary to found jurisdiction on 28 U.S.C. 1331. The right to tribal property alleged to be involved arises from membership in the Tribe rather than the Constitution and laws of the United States.

Section 10 of the Administrative Procedure Act does not confer jurisdiction upon federal courts. Its purpose is to define procedures and the manner of judicial review of agency action. Nor is it a waiver of sovereign immunity. Moreover, the Secretary's authority to ratify and approve the tribal constitution and bylaws is discretionary, and therefore expressly beyond the purview of Section 10. Finally, the Court of Appeals held the Fourteenth Admendment applies solely to action by a state government, and has no application to Indian tribes as such. Similar reasoning precludes application of the Fifth Amendment to Indian tribes, as this applies only to the Federal Government.

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

Eminent Domain - Compensation for Loss of Future Profits; Admissibility of Evidence of Future Profits; Subsidiary Interest in Fee Cannot Add to its Value. A. G. Davis Ice Company v. United States (362 F.2d 934 (C.A. 1, 1966)) D.J. File No. 33-22-632. Land condemned by the United States had been leased by the owner for $3,000 a year for five years and, in turn, subleased under a bulk storage agreement which apparently returned $7,500 a year to the lessee. The district court excluded evidence of the bulk storage agreement and the profits under it.

The Court of Appeals affirmed on the grounds that the sublease was properly excluded, along with the evidence of anticipated profits, since the latter are not compensable, and that, since a subsidiary interest in a fee cannot increase the fee value, the sublease had no relevance except to show the profits which were inadmissible.

Staff: Edmund B. Clark (Land and Natural Resources Division).

Zoning; Maryland Change or Mistake Rule; Standing of United States as Property Owner to Protest Zoning Change. Polinger v. Briefs (No. 496, Md.

Court of Appeals, Dec. 6, 1966) D.J. File No. 90-1-0-725. The Montgomery County Council rezoned several acres lying between McArthur Boulevard (owned by the United States) and the George Washington Memorial Parkway (owned by the United States) from residential to medium-density apartment. The United States intervened before the circuit court and protested, based upon failure of the proponent to show change in character of the neighborhood or mistake in the original plan. The circuit court held that the United States, as an adjacent property owner, had standing and reversed the Council, on the grounds that there had been no evidence of change or mistake.

The Maryland Court of Appeals affirmed, on the ground that there had been no showing of change or mistake. Because of the result and the fact that there were other parties whose standing was not questioned, the Court did not pass on whether the United States was a proper party.

Staff: Edmund B. Clark (Land and Natural Resources Division)

Mines and Mining Claims; Administrative Law; Res Judicata Does Not Apply to Administrative Proceedings Where Secretary Exceeded His Jurisdiction. The Oil Shale Corporation v. Udall (D. Colo., Dec. 21, 1966) D.J. File 90-1-18-668. The vast deposits of oil shale in public land areas of Colorado, Utah and Wyoming had always been a potential source of petroleum supply. During World War I, when it was expected that an oil shortage would develop, numerous mineral claims were made by oil shale prospectors in these public land areas. Some of the claimants proceeded to obtain a patent. However, with the decline of interest in possible oil shale development brought about by the end of World War I and the discovery of new oil fields, most of the locators ceased to do assessment work or to take any active interest in their claims. The Department of the Interior then started numerous administrative proceedings for the purpose of having claims of this type declared invalid for failure to do assessment work.

In the early 1920's, a large number of such administrative decisions were handed down holding claims invalid. However, in Wilbur v. Krushnic, 280 U.S. 306 (1930), and in Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935), the Supreme Court held that failure to perform assessment work was not a ground upon which the validity of oil shale claims could be challenged. In the latter case, the Court said that "the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law." With this development, the Department of the Interior ceased instituting new proceedings but did not explicitly vacate the declarations of invalidity that had preceded the Supreme Court decision.

Recently, there has been a renewed interest in oil shale based upon extraction experiments which indicate that commercial development may be

possible within the near future. Various oil companies, for a number of years, have been purchasing old claims, including a large number that had been declared invalid for failure to do assessment work. When the Union Oil Company applied for a patent on some claims within the latter category, the Secretary refused to issue a patent. He concluded that an unappealed declaration of invalidity, under principles of res-judicata, conclusively determined the invalidity of the claims, even though it may have been decided in later litigation (in a different case) that failure to do assessment work was not a proper ground for declaring claims invalid. 71 I. D. 169.

Eight separate actions were filed in the United States District Court for the District of Colorado seeking judicial review of this decision. Four of these, including the captioned case, were consolidated for trial. On December 21, 1966, Judge Doyle handed down a decision revesing the Secretary. The Court held that the Supreme Court's decision in Ickes v. Virginia-Colorado Development must be interpreted as declaring that the Secretary was without jurisdiction to declare a claim null and void for failure to do assessment work and that, for this reason, all of the Secretary's early decisions based on that ground were void and could not be made the basis for rejection of present-day patent applications. The Court did not reach two of plaintiff's other contentions, i.e., that in 1935 the then Secretary of the Interior had overruled all prior decisions based on failure to do assessment work and that the granting of patents covering lands in this category after the Virginia - Colorado decision and statements made by the present Secretary's predecessors to the effect that the early decisions were nugatory created a rule upon which present-day purchasers could rely in acquiring mining claims.

It is expected that these test cases will eventually reach the Supreme Court.

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

* * *

TAX DIVISION

Acting Assistant Attorney General Richard C. Pugh

SPECIAL NOTICE

Documents Required by Department for Payment of Tax Refund Judgments. The instructions contained herein revise and consolidate those heretofore published in the Bulletin, Vol. 4, No. 21, Page 682.

An adverse judgment of a District Court is processed for payment only upon receipt, by the Commissioner of Internal Revenue, of the following documents:

1. Three copies (one certified) of the judgment.

2. When the suit is against the District Director three copies (one certified) of the certificate of probable cause (if it is not included in the judgment).

3. Three copies (one certified) of the mandate of the Court of Appeals where the judgment reverses the court below (this document is only required if reference to the mandate is not included in the judgment).

4. Three copies (one certified) of the cost bill itemizing the costs allowed by the court, Form A.O. 133.

Accordingly, when an adverse judgment become final, the United States Attorney should immediately obtain the above documents and forward them to the Tax Division. By arrangement with the Administrative Office of the United States Courts, the Clerk should furnish these papers without charge. Upon receipt thereof in the Tax Division, the papers will be transmitted to the Chief Counsel, Internal Revenue Service, with a request that payment be made promptly to avoid undue accumulation of statutory interest.

Civil tax cases now pending involve almost $500,000,000 and the potential interest liability in those cases where the taxpayer prevails is such that all concerned should feel impelled to cooperate fully in securing prompt payment.

CIVIL TAX MATTERS

District Court Decisions

Default Judgment; Failure of Taxpayers to Comply With Federal Rules Concerning Pretrial Discovery in Suit to Foreclose Tax Lien; Burdens of

Proof as to Validity of Taxas and Ownership of Property. United States v. Mayfield, et al. (S.D. Tex., Houston Div., January 18, 1967). The United States instituted this proceeding for the purpose of reducing to judgment assessments for federal wagering excise taxes and to foreclose the resulting lien on a fund of money found in a safety deposit box as a result of a raid by Internal Revenue Agents. Although the evidence established that the safety deposit box was in the name of taxpayer and his wife, the wife by way of intervention asserted that the fund constituted her separate property not subject to the husband's tax liability, because the money had been the subject of a gift to her by her husband prior to the creation of the tax debt. Because the taxpayer and his wife failed to appear for their depositions duly noticed by the Government and taxpayer failed to respond to interrogatories, the Government moved to strike the parties' pleadings and for the entry of default judgment under Rule 37(d), F.R.C.P. Further, these parties did not appear at the trial, although their attorney of record was present. The Court determined that the actions by taxpayer and his wife constituted a willful refusal to comply with the federal rules, and accordingly granted the Government's motion to strike and for entry of default judgment. Societe Internationale v. Rogers, 357 U.S. 197 (1958). Further, the Court ruled that by virtue of such action the Government was entitled to the relief sought because of the presumption as to the validity of the tax liability and the presumption that the fund of money constituted the community property of the taxpayer and his wife and was thus subject to the individual debts of the husband.

Staff: United States Attorney Morton L. Sussman; Assistant United States Attorney John H. Baumgarten (S.D. Tex.) and Joel P. Kay (Tax Division).

Federal Tax Liens; Relative Priority of State and Federal Tax Liens in Bankruptcy Proceedings; State Sales Tax Liens Which Attached Prior to Federal Tax Liens, but Were Then Indefinite as to Amount, Held Superior to Federal Tax Liens. In the Matter of Travis Bros. Body Works, Inc., Bankrupt (D. N.D., August 9, 1966). (CCH 66-2 U.S.T.C. Par. 9727). In this bankruptcy proceeding the State of North Dakota filed claims for sales tax deficiencies due from the bankrupt for four quarterly periods. The sales tax deficiencies were secured by liens which arose pursuant to statute, on the last day of the month following the close of the quarterly period. Since the bankrupt did not file returns until the fourth quarterly period involved, and since the State Commissioner of Taxation did not attempt to compute or estimate the tax, the amount of the sales tax due was not fixed at the time the statutory sales tax liens attached.

After the sales tax liens had attached, but before the amount due had been computed, federal tax liens arose by virtue of assessments for unpaid federal withholding taxes. The Government argued that the state had no choate lien until the amount of the sales tax due had been ascertained, so that the federal

tax liens should be accorded priority. After a hearing, the District Court held that the state's liens would be accorded priority on the basis of the time they attached to the property according to state law, and that the fact that the amount due was not known until later was of no consequence. The Court concluded that the strict rules of choateness posited in U.S. v. City of New Britain, 347 U.S. 81 (1954) did not apply in bankruptcy proceedings because "there is nothing in the Bankruptcy Act or in the Internal Revenue Code ... directly providing that perfected liens shall have priority over prior inchoate liens ... [quoting U.S. v. Sampsell, 153 F. 2d 731, 9th Cir., 1946]", so that all statutory liens valid against the trustee under Section 67 should be regarded with equal dignity and accorded priority on the basis of the time they attached pursuant to the statutes which created them.

The Government has filed a notice of appeal to the Eighth Circuit.

Staff: United States Attorney John O. Garaas; Assistant United States Attorney Richard V. Boulger

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