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DEPARTMENT OF JUSTICE

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BULLETIN

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Vol. 15 February 17, 1967 No. 4

NEW APPOINTMENTS--DEPARTMENT

First Assistant, Civil Division - Carl Eardley

Mr. Eardley was born September 1, 1905 in Salt Lake City, is a graduate of Stanford University and the Stanford Law School. He began his Department of Justice career in 1935 as an Assistant United States Attorney in Los Angeles. He moved to Washington three years later as an attorney in the Claims Division, now known as the Civil Division and has been with the Division ever since, except for four years during World War II when he served in the army. He has been Second Assistant since 1961. He succeeds J. William Doolittle, who resigned to become General Counsel for the Air Force, as First Assistant. Mr. Eardley is married and has three children.

Second Assistant, Civil Division - Irving Jaffe

Mr. Jaffe was born in New York City on August 20, 1913. He was graduated from the College of the City of New York and the Fordham University School of Law. He joined the Department of Justice in 1942 and served with the Board of Immigration Appeals, the Civil Division and the Office of Alien Property before leaving to practice law privately in Washington, D. C. in 1949. In 1950, he re-joined the Office of Alien Property and in 1961 moved to the Civil Division. Since 1963, he has headed the Division's Court of Claims Section. Mr. Jaffe is married and has two children.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Oil Dealers Charged With Violation of Section 1 of Sherman Act. United States v. Fuel Oil Dealers' Division of the Central Montgomery County Chamber of Commerce, et al. (E.D. Pa.) D.J. File 60-57-182. On January 26, 1967, a grand jury in Philadelphia, Pennsylvania, returned a one count indictment charging violation of Section 1 of the Sherman Act in the sale and delivery of Grade No. 2 fuel oil used for commercial and residential heating purposes. Named as defendants were the Fuel Oil Dealers' Division of the Central Montgomery County Chamber of Commerce and the following fuel oil dealers who operate in the Norristown, Pennsylvania, area: Flad Fuel Co., Inc. and Robert G. Flad; Jay Gress, Inc. and Edwin Hein; Marchese Fuels, Inc. and Joseph C. Marchese; Old Comfort Co., Inc. and Edward J. Garra; James A. Stimmler, Inc. and James D. Stimmler; George White Heat Company and George White; Jack M. Gosin; Charles McGlashen; Michael S. Panczak; Alfonso Santangelo.

The indictment charged that beginning in 1954 and continuing up to and including the date of the return of the indictment, defendants and co-conspirators engaged in a combination and conspiracy consisting of a continuing agreement, understanding, and concert of action to: (a) Raise, fix, stabilize and maintain retail prices and discounts for fuel oil in the trading area; (b) Refuse to sell fuel oil to any customer of any defendant or co-conspirator fuel oil dealer listed with the Fuel Oil Dealers' Division as delinquent in payment of his account; and (c) Raise, fix, stabilize and maintain prices for burner service contracts in the trading area.

The indictment alleged that during 1965, members of the Fuel Oil Dealers' Division in the trading area sold approximately 35 million gallons with a retail value of approximately $5 million. The trading area was defined as Norristown, Pennsylvania, and that area within a 12-mile radius of Norristown.

Staff: Morton M. Fine and Raymond D. Cauley (Antitrust Division)

District Court Rules in Favor Of Government on case Remanded by Supreme Court. United States v. National Dairy Products Corporation. (W.D. Mo.) D.J. File 60-139-84. On June 20, 1966, the Supreme Court in a per curiam opinion (384 U.S. 833) sent back this case to the District Court for reconsideration in the light of Dennis v. United States, 384 U.S. 855 (1966). Defendant had appealed from a conviction on 13 counts of a 15-count indictment for violations of Section 1 of the Sherman Act and Section 3 of the Robinson-Patman Act for price fixing and the sale of milk at unreasonably low prices for the purpose of destroying competition. The Court of Appeals for the Eighth Circuit had previously affirmed the conviction on all 13 counts (350 F. 2d 321).

The Court, after having had the benefit of six post mandate briefs from each party, and of a full day of oral arguments, issued a memorandum opinion on January 10, 1967, denying defendant's post mandate motion for a new trial.

One of the grounds of assignment of error was the use at trial by Government counsel of portions of the grand jury transcript to refresh the recollection of seven witnesses, four of whom were officials of National and the rest of whom were officials or former officials of co-conspirator dairy companies. The second assignment of error was that as to 30 non-refreshment trial witnesses, defendant had demonstrated a particularized need under Dennis by the alleged fact that all such witnesses were, for various alleged reasons, hostile and adverse to defendant's interest. At trial, defendant had moved for production of only the portions of the transcripts of testimony used to refresh and designated related portions. On each of these assignments of error, the opinion held that defendant had failed to demonstrate a "particularized need" under Dennis.

National argued that Dennis meant that any time the Government used a grand jury transcript at trial, even if only to refresh a witness hostile to the Government, a "particularized need" occurred, which entitled defendant to inspect the transcripts; that safeguards, such as in this instance the district judge reading in camera all related portions of the refreshment witnesses' testimony before the refreshment questions were asked, did not avoid the thrust of Dennis; that this refreshment procedure, which was permitted by Socony-Vacuum, died with what it described as the "landmark" Dennis decision; and that the Supreme Court mandate to the district court was in effect a command to grant defendant's motion for a new trial and was a courtesy by the Supreme Court, rather than a mandate to apply Dennis fully.

The opinion rejected all of these arguments, as well as the defense argument that Dennis established new standards that rest on a constitutional base. The opinion stated (p. 9) that Dennis did not establish new principles or standards different from those long established by the earlier Supreme Court cases; that Dennis applied existing standards to the particular factual situation presented by that case; and that Dennis in no way held that motions for production or showings of "particularized need" are no longer required. [p. 32]

The opinion distinguished the factual situations of National and Dennis, and pointed out that defendant had not at trial established a particularized need for production of the grand jury transcripts; and pointed out that the Eighth Circuit had already decided that "use of the grand jury testimony was limited to the stated purpose of refreshment, in strict conformity with the [trial] court's instructions" (p. 12, citing the Court of Appeals, 350 F. 2d at 331). The opinion distinguished National and Dennis on the ground that Dennis involved an impeachment situation whereas "National Dairy, on its facts,

involved a radically different factual situation; a refreshment, not an impeachment situation, was presented" (p.27). The court's opinion stated (pp. 27-28) that at the time of trial, National never even intimated that it desired or could show any "particularized need", including a need for the impeachment of any of the 7 refreshment witnesses; that it asserted no claim that inconsistencies might exist between the grand jury and trial testimony of any of the 7 witnesses; and that the only requests ever made by National were (1) that it be permitted to inspect the grand jury testimony that was in fact disclosed for refreshment purposes only, and (2) to see the other portions of the transcript that related to the same subject matter that had been examined by the trial judge in camera.

The opinion also stated that the case was not one where the charge could not be proved on the basis of evidence exclusive of the testimony given by the refreshment witnesses involved; that the guilt or innocence of the defendants did not turn on the testimony of those witnesses; that such testimony was corroborated by numerous other witnesses and by voluminous documentary evidence; and that if such testimony had been disregarded entirely on a motion to set aside the verdict for insufficiency of the other evidence, a fair appraisal of the record would have required that such motion be promptly denied. [p. 42]

The opinion further stated that "Dennis did not suggest that it was overruling any earlier Supreme Court case" nor that "it intended to eliminate judicial supervision of the established trial procedures that have long regulated the production and subsequent disclosure of grand jury transcripts for impeachment use" (p. 33): that significantly all members of the Supreme Court in Pittsburgh Plate Glass were in agreement that grand jury transcripts must be treated specially and that something more than the ordinary policy considerations of secrecy versus disclosure must be considered when a grand jury transcript is the particular document that the defense wants produced for its ultimate examination and use for impeachment purposes (p. 31);

The opinion stated (pp. 39-40) that Dennis' comment that "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact" and its comment that "exceptions to this are justifiable only by the clearest and most compelling considerations" (384 U.S. 873) must be read in contest; that defendant's arguments attempted to push those comments into statements of constitutional axioms; and that Dennis did not even intimate that the price that the Government must pay for using grand jury transcripts in an attempt to refresh the recollection of a single witness is delivery of the entire grand jury transcript to the defense for its inspection (pp. 40-41).

The opinion rejected defendant's basic argument in regard to Socony-Vacuum, and stated that if the Supreme Court intended to overrule Socony-Vacuum in Dennis it would have expressly said so; that there was no occasion

for Dennis to do anything except cite Socony-Vacuum with approval because the principles there applied and those applied in Dennis are entirely consistent; and that the two cases, on their respective facts, simply applied different facets of consistent principle to entirely different factual situations (p. 43).

The opinion further held that in its postmandate review of the court's trial rulings, "which included re-examination of the grand jury and trial testimony of every witness involved," the court was convinced every ruling was "fair and proper and that the defendant has no just claim that it suffered any prejudice by any of those rulings."

Staff: James E. Mann, Robert L. Eisen, Raymond P. Hernacki, Thomas S. Howard and David J. Berman (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURT OF APPEALS

AGRICULTURE-POULTRY PRODUCTS INSPECTION ACT

Secretary of Agriculture's Regulation Prohibiting Use of Term "Chicken Soup" for Product Which Has Less Than 2% Chicken Sustained. The Borden Co. v. Freeman (C. A. 3, No. 10166, affirming 256 F. Supp. 592, December 29, 1966). D.J. File 106-48-99. The Poultry Products Inspection Act (21 U.S.C. 451 et seq.) gives the Secretary of Agriculture exclusive jurisdiction to prevent false and deceptive labeling of poultry and poultry products. All food products containing poultry meat are poultry products under the Act unless exempted by the Secretary. The Secretary, following the rule-making procedure laid out by the Administrative Procedure Act, promulgated regulations establishing standards of identity for, inter alia, dehydrated poultry soup mixes labeled with the unqualified "kind name," of chicken soup. In separate regulations, the Secretary provided that poultry soup mixes not containing at least two percent (2%) poultry meat in the ready-to-serve article were falsely and misleadingly labeled if sold as "chicken soup," but that such soup mixes were exempt from classification as poultry products if they were labeled properly as "chicken flavored" soup. These regulations were challenged by the Borden Company which manufactures and sells, under the "Wyler" brand name and a "chicken soup" label, two types of dehydrated soup mixes which do not contain two percent chicken meat on a ready-to-serve basis.

The district court held that the Act authorized the Secretary to establish general standards of identity for poultry food products as well as authorizing him, in its terms, to prevent false, deceptive, or misleading labeling of these products. The court rejected Borden's argument that it was entitled to an adjudicatory hearing and that the regulations were not supported by substantial evidence, and found that its scope of review was limited to that laid down by the Administrative Procedure Act for review of administrative rule-making, i.e., whether the regulations were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Applying this test the court concluded that there was ample evidence that labeling soup mixes with minimal meat content as chicken soup was misleading to the consumers. Finally, the court held that the conditional exemption from the PPIA was:

> 'a sensible exercise of judgment' by the Secretary; for it provides for the best possible workable compromise between the policies of (1) insuring against the use of false or misleading labels and (2) allowing the Secretary to divest himself of jurisdiction over products whose poultry content is minimal.

The Court of Appeals affirmed the decision on the "well-reasoned opinion" of the District Court.

Staff: Alan S. Rosenthal, Nancy Ann Wynstra (Civil Division)

APPELLATE PRACTICE

When Findings of Fact Are Challenged on Appeal, Record on Appeal Must Contain Portions of Transcript Relevant to Those Findings. Kelley v. Dunne (C. A. 1, No. 6786, December 14, 1966). D. J. File 145-5-2519. In an appeal which challenged various findings of the district court, appellant reproduced as the record on appeal only a small portion of the transcript. Noting that appellant "has violated one of our basic requirements," the First Circuit ruled that it "cannot pass upon the correctness of findings when only a small portion of the transcript is made available," and affirmed the decision below.

Staff: United States Attorney Paul F. Markham; Assistant United States Attorney Edward J. Lee (D. Mass.)

FEDERAL TORT CLAIMS ACT - FLOODS

Immunity of United States From Liability for Damages Resulting From Floods or Flood Waters Under 33 U. S. C. 702c Is Absolute Defense Where Plaintiff Alleges Damages Caused by Flooding Through Negligence of United States in Construction, Maintenance, and Operation of Flood Control Project. Herbert F. Parks, d/b/a Parks Manufacturing Co. v. United States (C. A. 2, No. 30, 834, December 20, 1966). D. J. File 57-50-323. This action was commenced under the Federal Tort Claims Act to recover from the United States for damage to plaintiffs' property caused by flooding allegedly through the negligence of the United States in the construction, operation, and maintenance of the Herkimer Flood Control Project in and near Herkimer, New York. The district court granted the Government's motion to dismiss on the ground that 33 U.S.C. 702c, which provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," was an absolute defense.

On appeal, the Court of Appeals affirmed in a per curiam opinion. Appellant argued that since the "flooding" in this case was due to the impeding of run-off or ordinary waters and the backing-up of such waters on his land through the negligence of the United States, section 702c was not applicable, maintaining that the immunity provided by the statute was limited to floods which were natural in origin as opposed to those which were "man-made." The Court rejected this argument on the basis of the broad language in section 702c and the decisions in National Mfg. Co. v. United States, 210 F. 2d 263 (C. A. 8), certiorai denied, 347 U.S. 967, and Stover v. United States, 332 F. 2d 204 (C. A. 9), certiorari denied, 379 U.S. 922. Also, the Court distinguished the recent decision in Peterson v. United States, 367 F. 2d 271 (C. A. 9), discussed below, on the ground that that case involved conduct of Air Force personnel wholly unrelated to any Act of Congress authorizing expenditures for flood control.

Staff: Kathryn H. Baldwin (Civil Division)

Where Alleged Negligence of United States Which Causes Damage From or by Flood Waters Is "Wholly Unrelated" to Any Flood Control Project Authorized by Congress, Immunity From Liability in 33 U.S.C. 702c Is Not Applicable. Donald A. Peterson and Louise J. Peterson v. United States (C. A. 9, No. 20,238, October 5, 1966, rehearing denied December 13, 1966). D.J. File 61-6-18. This action was commenced under the Federal Tort Claims Act to recover damages for injury to and loss of vessels and equipment allegedly through the negligent dynamiting by employees of the United States Air Force of an ice jam which had formed in the Chena River within the boundaries of Ladd Air Force Base near Fairbanks, Alaska. Plaintiffs alleged that such dynamiting disrupted the normal and natural breakup and melting of ice in the river, causing a large accumulation of ice and an immense volume of water to be discharged down stream, proximately resulting in damage to their property. The Government asserted affirmative defenses, among others, of immunity from liability under 33 U.S.C. 702c, which provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," and the privilege of public necessity in protecting the air base and the city of Fairbanks. Finding that the damage was caused by flood waters resulting from unusual climatic conditions, and ruling that section 702c applies to all floods and flood waters which result in whole or in part from unusual or extraordinary climatic conditions, the district court held that section 702c provided the Government with a complete legal defense.

On appeal, the Court of Appeals vacated and set aside the judgment and remanded for reconsideration and redetermination of the liability of the Government under the issues framed in respect to the claim of the appellants

under the Federal Tort Claims Act and any affirmative defense not disposed of. The Court held that the district court erred in its application of section 702c to this case. It interpreted section 702c as being an integral part of the Government's flood control program, and held that the decision to dynamite the ice jam was "wholly unrelated" to any act of Congress authorizing expenditures of federal funds for flood control. The Court rejected the Government's reliance on National Mfg. Co. v. United States, 210 F.2d 263 (C.A. 8), certiorari denied, 347 U.S. 967; Clark v. United States, 218 F.2d 443 (C.A. 9); and Stover v. United States, 332 F.2d 204 (C.A. 9), certiorari denied, 379 U.S. 922, by stating simply that those cases involved different facts. In view of the interlocutory nature of the decision, no petition for certiorari is being sought.

Staff: Kathryn H. Baldwin (Civil Division)

WORKMEN'S COMPENSATION REMEDIES

Workmen's Compensation Is Exclusive Remedy for Nonappropriated Fund Employees Injured in Course of Employment Through Alleged Negligence of Government. Dolin v. United States (No. 17,056, C.A. 6, January 27, 1967). D.J. File 157-58-198. The widow of an employee of an Army Officers Club brought this Federal Tort Claims Act suit against the United States for its alleged negligence in hiring an ex-convict with a record of assaults with deadly weapons, to work in the Officers Club. This ex-convict was alleged to have killed her husband, his supervisor, with a butcher knife in the Officers Club following an argument. It was conceded that both men were in the course of their employment at that nonappropriated fund instrumentality at the time of the homicide. The district court granted the Government's motion to dismiss on the ground that the complaint came within the "assault" exception of the Tort Claims Act, 28 U.S.C. 2680(h).

In affirming, the Sixth Circuit found it unnecessary to decide that point, and ruled instead that the workmen's compensation remedy provided employees of nonappropriated fund activities by 5 U.S.C. 150K-1 (incorporating the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq.) was exclusive for employees or their survivors injured or killed in the course of their employment.

Staff: Harvey L. Zuckman (Civil Division)

FEDERAL UNEMPLOYMENT COMPENSATION ACT

United States Held Indispensable Party to Suit to Review Denial by State Agency of Unemployment Compensation Benefits to Former Federal Employee. Constantopoulos v. New Hampshire Department of Employment Security, et al. (N.H.S.Ct., No. 5483, October 31, 1966). D.J. File 83-47-3.

The Secretary of Labor is authorized by the Federal Unemployment Compensation Act to enter into an agreement with a State, or with the agency administering the unemployment compensation law of a State, for the State to "pay, as agent of the United States" unemployment compensation to former Federal employees. 5 U.S.C. 8502(a). The agreement must provide "that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the compensation law of the State" if his Federal service and wages "had been included as employment and wages under that State law." 5 U.S.C. 8502(b). The Federal Government must reimburse the State for compensation payments made as a result of the agreement. 5 U.S.C. 8505.

Plaintiff, a former employee of the Government's Portsmouth Naval Shipyard, was denied unemployment compensation by the New Hampshire Department of Employment Security. He brought an action for review of the denial, naming the State agency and the United States as parties. The Government moved for dismissal of the action as against it as an unconsented suit. The State Supreme Court affirmed the denial of benefits on the merits; it then went on to hold that the United States not only was a proper party but was indispensable to this suit. The Court pointed out that under the statute the State's decision is "subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent" (5 U.S.C. 8502(d)); and, under State law, the "last employing unit or employer" is an essential party to an action for review. Accordingly, the Court held the United States, as the last employer, an essential party.

Staff: Morton Hollander and Edward Berlin (Civil Division)

POLITICAL QUESTION AND UNCONSENTED SUIT

Courts Without Jurisdiction to Entertain Suit by Army Private to Have War in Viet-Nam Declared Illegal and for Injunction Against His Being Required to Serve in That Area. Robert Luftig v. McNamara (No. 20,129, C.A.D.C., February 6, 1967). D.J. File 145-15-102. Without challenging the lawfulness of his induction into the Army or otherwise seeking release from military service, Private Luftig brought suit against Secretary of Defense McNamara and others for a judgment declaring the war in Viet-Nam illegal and an order enjoining his transfer to Viet-Nam for military duty. The district court dismissed the suit for want of jurisdiction and the Court of Appeals affirmed that dismissal.

The District of Columbia Circuit held that the action was both an unconsented suit against the United States and presented a political question beyond the court's jurisdiction. In particular, the Court of Appeals stated:

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.

Staff: Richard S. Salzman (Civil Division)

SOCIAL SECURITY ACT - DISABILITY BENEFITS

District Court's Award of Disability Benefits Reversed; Secretary's Original Denial Upheld by Emphasizing Claimant's Failure to Seek Employment. Pole Campbell v. Gardner (No. 16,320, C.A. 6, January 16, 1967). D.J. File 137-30-161. The district court had overturned the Secretary's denial of disability benefits to this former coal miner who suffered psychogenic impairments. The Sixth Circuit reversed, upholding the denial of benefits on a record which "would permit the hearing examiner to reach almost any conclusion." The Court placed particular emphasis on the fact that the claimant "has made no effort to obtain employment and has failed or refused to accept the services of the Kentucky State Rehabilitation Service," holding that -

> Where a claimant *** has failed to make an effort to obtain employment, it seems obvious that a finding of non-disability can be supported on less evidence than where a claimant has attempted unsuccessfully to obtain employment, or, having found employment, has been unable to carry it through. [Sanders v. Celebrezze, 225 F. Supp. 836, 842 (D. Minn.).]

Staff: Florence Wagman Roisman (Civil Division)

Denial of Benefits to Epileptic Claimant Sustained. Clyde W. King, Jr. v. Gardner. (No. 16608, C.A. 6, January 5, 1967). D.J. File 137-70-118. The Sixth Circuit affirmed the denial of Social Security disability benefits to a 38-year-old man who suffered epileptic seizures at apparently six to eight week intervals. After noting claimant's employment by various employers while suffering from this condition, the Court recognized that his

condition reduced his employability to some degree. However, the Court ruled that having epilepsy was not disabling as a matter of law and concluded that regardless of its view, the decision as to the existence of a disability was for the Secretary, and the Secretary could permissibly weigh the evidence of the claimant's "own work record against his testimony that he would generally lose his job when his illness was discovered."

Staff: United States Attorney John H. Reddy; Assistant United States Attorney John A. Cary (E.D. Tenn.)

WALSH-HEALEY PUBLIC CONTRACTS ACT

Act applies to Contract Between Management Contractor of AEC Installation and Coal Supplier; Supplier Who Contracts to Furnish Coal to Government From Own Subsidiary's Mine Is Liable Under Act for Labor Standards of Independent Mines From Which It Obtains Coal to Fulfill Government Contract. United States v. Davison Fuel and Dock Company (No. 10,567, C.A. 4, January 6, 1967). D.J. File 219715-319. The Walsh-Healey Act, 41 U.S.C. 35-45, prescribes labor standards for work performed under Government contracts by employees of the contractor. In this case the Department of Labor imposed on Davison Fuel and Dock Company liability for the difference between the wages paid by various independent mining companies and the Walsh-Healey minimum wage. Davison had obtained coal from these companies, intermingled it with its own coal (which it mined in accordance with the wage standards of the Act) and used coal from this stock to fulfill a contract with National Lead Company, which was engaged in managing an AEC facility at Fernald, Ohio. The district court sustained the administrative ruling and rejected Davison's contentions (1) that its contract with National Lead Company was not a contract to which the Government was a party--a prerequisite of Walsh-Healey coverage, and (2) in any event, the Act applies only to employees of prime contractors and does not cover employees of sub-contractors, such as the companies from which Davison purchased coal.

The Court of Appeals upheld imposition of Walsh-Healey liability on Davison. It held that National Lead was the purchasing agent of the AEC in buying coal from Davison, and that the AEC was thus a party to the contract. The Court pointed out that Government funds were used, and that title to the coal passed directly from Davison to the Government as purchaser. The Court acknowledged that its decision "may appear to be a conflict" with the Sixth Circuit's decision in United States v. P & D Coal Mining Co., 358 F.2d 619. There the United States, suing on an identical form of coal purchase contract, was held subject to pre-judgment interest on a counterclaim (despite the Government's immunity from such interest under the Tucker Act), on the ground that the United States was liable as an

assignee of National Lead, rather than as a party to the original contract. The Fourth Circuit stated that the conflict was partially explained by the "divergence of relevant policies and difference in the contexts" between the two cases.

The Court sustained imposition of liability on Davison for wage underpayments by its suppliers, on the basis of the Department of Labor's "substitute manufacturer" regulations. These regulations provide that a contractor who undertakes to manufacture goods for the Government may not avoid responsibility for maintenance of labor standards in the performance of the contract by shifting the work to others. The Court held that these regulations are within the Secretary of Labor's authority under the Act. In addition, it held that even if Davison were a "regular dealer" (the Act requires Government supply contracts to be with either "manufacturers" or "regular dealers"), it entered into this contract as a manufacturer and was therefore bound to maintain the labor standards of the Act in connection with the manufacture of goods supplied under the contract. The Court distinguished the decision of the First Circuit in United States v. New England Coal and Coke Co., 318 F. 2d 138--which held that the Walsh-Healey Act did not cover employees of companies supplying coal to the prime contractor--on the ground that there the prime contractor was not only a "regular dealer," but also contracted with the Government as such.

Staff: Robert V. Zener (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

MENTAL COMPETENCY

Mental Competency Statutes; Return of Defendants From Mental Institution as Competent for Trial, With Competency Contingent on Continued Use of Psychotropic Drugs. In recent months increasing numbers of defendants, committed to the custody of the Attorney General under 18 U.S.C. 4246 until found mentally competent for trial, have been returned from the Medical Center for Federal Prisoners, Springfield, Missouri, as competent for trial with maintenance of their mental competency contingent on continued usage of psychotropic drugs. Some courts have held that a defendant cannot be considered competent under such circumstances and have ordered the defendant returned to the custody of the Attorney General as mentally incompetent for trial. Other courts have held that the question must be decided on an individual case basis with respect to reaction of the patient under medication.

It is the present view of the Criminal Division that in certain cases such maintenance medication can render a defendant mentally competent for trial. However, in such cases a full hearing should be held regarding the patient's mental status under medication. The statute, 18 U.S.C. 4246, does not specifically require that a hearing be held when the defendant is returned as competent for trial; however where the defendant's competency is predicated on use of maintenance medication the court should be requested to hold a hearing to insure the defendant's competency. Where additional psychiatric examination appears necessary the Criminal Division will support the request for independent psychiatric examination for the purpose of determining the legal question of the effect of such maintenance medication on rendering the defendant competent for trial purposes.

The Division is greatly interested in the experiences of all United States Attorneys in such cases as well as their comments in detail on the question.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

NATURALIZATION

Supreme Court Upholds Denial of Petition for Naturalization of Alien Who Concealed Membership in Hungarian Communist Party. Kalman J. Berenyi v. INS (Supreme Court No. 66, January 23, 1967) D.J. File 38-36-1166. Petitioner is a Hungarian national who entered the United States in 1956 and filed a petition for naturalization in 1962 in the United States District Court for the District of Massachusetts. At the final hearing on his petition for naturalization, the Government produced two witnesses whose testimony indicated that petitioner became a member of the Hungarian Communist Party in 1945 and remained an active member for several years thereafter. While admitting that he had attended Communist Party meetings in Hungary, petitioner in his testimony denied that he had been a Party member. Petitioner's wife testified that he had not been a Party member and four other witnesses testified that in Hungary and in the United States petitioner expressed strong opposition to the Communist Party. After hearing this testimony, the District Court concluded that petitioner had been a Communist Party member, that he had testified falsely to facilitate his naturalization and that because of the provisions of 8 U.S.C. 1101(f) (6) he could not meet the character qualification for naturalization. The District Court denied the petition for naturalization (239 F. Supp. 725) and the denial was upheld on appeal by the First Circuit (352 F. 2d 71). The Supreme Court granted certiorari (384 U.S. 903).

Petitioner urged the Supreme Court to reject as clearly erroneous the factual conclusion about his Party membership reached by the District Judge and accepted by the Court of Appeals. The Supreme Court refused to do this upon the basis of its prior holdings that it could not undertake to review concurrent findings of fact by the two courts below in the absence of a very obvious and exceptional showing of error.

Petitioner also contended that his Party membership should not be a basis for the denial of his petition because the Government failed to establish that his participation in the Party amounted to a "meaningful association". The Supreme Court found no relevance in this contention pointing out that the denial of citizenship was predicated on petitioner's failure to tell the truth and not his membership in the Communist Party. Assuming that an alien may be denied citizenship on the statutory ground of Party membership only when "meaningful association" is shown, the Court noted that the questioning of petitioner was not limited to "meaningful association" but covered a much

broader field of inquiry including any connection, directly or indirectly, petitioner may have had with the Communist Party. In the Court's opinion the broader inquiry was material and relevant and said that the Government is entitled to know of any facts that might bear on petitioner's statutory eligibility for naturalization so that it might pursue leads and make further investigation if doubts are raised. Being unable to say that the District Court erred in finding petitioner had failed to tell the truth, the decision of the Court of Appeals was affirmed.

The Chief Justice and Justice Brennan joined in a dissent by Justice Douglas who was of the opinion that the finding of the District Court that petitioner had been a member of the Communist Party was clearly erroneous and therefore there was no basis to deny the petition on the ground that petitioner lied when he denied membership in the Communist Party.

Staff: Solicitor General Thurgood Marshall;
Assistant Attorney General Fred M. Vinson, Jr. (Crim. Div.);
Assistant to the Solicitor General Robert S. Rifkind;
Beatrice Rosenberg and Ronald L. Gainer (Crim. Div.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Coast Guard Merchant Marine Screening Program: Coast Guard May Refuse to Process Incomplete Application for Specially Validated Merchant Mariner's Document Where Applicant Fails to Answer Subsequent Interrogatories Concerning His Past Membership and Activities in Communist Party and Other Proscribed Organizations. Herbert Schneider v. E. J. Roland, Commandant, U.S. Coast Guard (W.D. Wash., Civil No. 6553) D. J. File 146-1-82-295. Schneider applied for special validation of his mariner's papers pursuant to the Magnuson Act, 50 U.S.C. 191 and Coast Guard regulations, 33 C.F.R. §121.01 et seq., to qualify for employment on American merchant vessels of 100 gross tons or over. When Schneider disclosed that he had once been a member of "several" organizations on the Attorney General's List, but failed to name the organizations or to furnish specific details, the Commandant requested Schneider to supply the information under oath in answer to written interrogatories. Under Coast Guard regulations no further action could be taken on his application until his answers to the interrogatories were received. Schneider declined to answer stating that the interrogatories violated his constitutional rights.

Thereafter, Schneider sued for a judgment declaring the Commandant's acts unconstitutional and a court order directing validation of his mariner's papers.

On January 23, 1967 a three-judge District Court, Jertberg, Circuit Judge, Lindberg and Beeks, District Judges, held the Commandant's action to be authorized by statute and Coast Guard regulations and constitutionally permissible. The Court rejected Schneider's contention that the Magnuson Act did not authorize a Merchant Marine screening program and held that the vital governmental interest served by the program in preventing injury to vessels, ports, harbors, and waterfront facilities through sabotage and other subversive acts outweighed any indirect infringement on Schneider's constitutional freedoms of speech, belief and association. The Court also stated that the extent to which Schneider subscribes to the principles of the Communist Party and other organizations dedicated to the overthrow of the Government by force and violence, as reflected by his membership and activities in such organizations, "must be regarded as a highly relevant line of inquiry in determining whether his presence aboard merchant vessels would be inimical to the security of the United States." The Court concluded that Schneider was not privileged to refuse to answer the Commandant's interrogatories, and held

that until he provides "the raw materials for . . . a decision," he is not entitled either to a formal denial or to other definitive action on his application.

Staff: United States Attorney Eugene G. Cushing, Assistant United States Attorney Gerald W. Hess, (W. D. Wash.), and Garvin L. Oliver (Internal Security Division).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS
State Court Decisions

Federal Tax Liens: Priority: Standing of United States to Assert Taxpayer's Homestead Exemption. Edling Electric, Inc. v. Peterson, et al. (7th Judicial District Ct., Wadena County, Minnesota) CCH 67-1 U. S. T. C. 9164. The United States intervened in this mechanics' lien foreclosure action to foreclose its federal tax liens, some of which had affixed to both Erwin and Dixie Peterson's joint interest in an 80-acre tract, and some of which had affixed only to Erwin's undivided one-half interest. The mechanics' lienors who were parties to the suit had liens only upon a 40-acre improved portion of the tract. There were also judgment creditors and local tax lienors whose claims were limited to Erwin's undivided one-half interest in the eighty acres.

Prior to suit the Petersons had fled the jurisdiction because of an indictment for fraud returned against Erwin by a Minneapolis grand jury. In Minnesota the homestead exemption will protect a debtor's dwelling and land from seizure and sale to satisfy debts, except mechanics' liens. However, if the homestead claimant ceases to occupy the premises for more than six consecutive months, the exemption is lost unless within the six-month period a homestead claim is filed. The Petersons attempted to file such an exemption from their refuge in Hawaii, which if valid would have insulated their property from all claims except those of the mechanics' lienors and the United States.

When the Petersons defaulted in this case the United States attempted to assert their homestead exemption in order to have priority over the judgment and tax lienors. In a decision which averted a veritable nightmare of circular priorities, the Court ruled that as a factual matter the Petersons had not timely filed for their exemption within the required six months of abandonment. In a dictum it was indicated that in Minnesota only the land owner can assert the homestead exemption. Erroneous awards of counsel's fees and priority to state and local taxes were negated by passage of the Federal Tax Lien Act of 1966.

Staff: United States Attorney Patrick J. Foley; Assistant United States Attorney Floyd E. Boline (D. Minn.); and James H. Jeffries, III (Tax Division).

District Court Decision

Illegally Seized Evidence: Assessment of Tax Held Inadmissible in Civil Action by Government to Reduce Assessment to Judgment Where Assessment Predicated Entirely on Evidence Seized from Taxpayer in Violation of Fourth Amendment. United States v. Joseph A. Chase, (D. C., Dec. 20, 1966) (CCH 67-1 U. S. T. C. Par. 15,733). The United States brought suit to reduce to judgment a jeopardy assessment made against taxpayer on November 4, 1957. At the trial, defendant objected to the admissibility of the assessment on the ground that it was based upon illegally seized evidence in violation of his Fourth Amendment rights. This defense stemmed from a raid conducted by state police on October 27, 1957, on the home of one Nannie Compton, defendant's girl friend. Various indicia of gambling operations were seized from the premises, and Compton and the defendant were arrested and charged with violating the lottery laws of Virginia. Upon learning of the raid through newspaper articles, agents of the Internal Revenue Service, with the permission of the state authorities, examined the gambling paraphernalia seized, including number slips, and subsequently made joint jeopardy assessments of wagering excise and occupational taxes, including fraud penalties, against Compton and the defendant. Defendant was tried and convicted of willful failure to file excise tax returns for the same periods covered by the jeopardy assessment, in violation of Section 7203 of the 1954 Code and for failure to purchase and pay for a $50 wagering stamp tax in violation of Section 4411. During the criminal trial, the Court denied defendant's motion to suppress as evidence the gambling paraphernalia seized by the state police. While defendant's appeal was pending in the Fourth Circuit, the Supreme Court decided Elkins v. United States, 364 U. S. 206, holding that evidence illegally obtained by state officers was inadmissible in a federal prosecution. In view of the Elkins decision, the United States Attorney filed a motion to reverse the conviction on the ground that the evidence had been illegally seized by the state police and was therefore inadmissible, which motion was granted.

It may be noted that subsequently, in Tri-Pharmacy, Inc. v. United States, 203 Va. 723, 127 S. E. 2d 89, a forfeiture case, instituted by the Commonwealth of Virginia, in which the United States intervened asserting priority to the property because of its lien for taxes assessed against taxpayer Chase, the Supreme Court of Virginia held that the search warrant and the search and seizure made upon its authority were in all respects valid and that the results of the search were admissible in evidence in the state trial court to show that a lottery was conducted by taxpayer Chase. In so ruling, the Virginia Supreme Court held that the decision of the United States Supreme Court in Mapp v. Ohio, 367 U. S. 643, was inapplicable. See Ker v. California, 374 U. S. 23.

In the instant civil action to reduce the jeopardy assessment to judgment pursuant to Section 7403 of the 1954 Code, the Government sought to prove its case by introducing assessment records. In so doing, the Government acknowledged that the assessment was predicated entirely on evidence seized from taxpayer in violation of the Fourth Amendment. Taxpayer sought to have it excluded on this ground. The Government took the position that the illegally seized evidence could not affect the validity of the assessment, but only the amount of the tax due, and that the appropriate time for contesting the amount due would be upon the presentation of the defendant's defense. Relying upon decisions of the Second Circuit in United States v. Lease, 346 F. 2d 696, and United States v. O'Connor, 291 F. 2d 520, to the effect that where the Government seeks the aid of the courts in enforcing an assessment in any form, it opens the assessment to judicial scrutiny in all respects, the Court rejected this argument. Holding that the prohibition against the admissibility of illegally seized evidence in a criminal proceeding was equally applicable to a civil proceeding, the court then refused to allow the Government to introduce the assessment into evidence.

The Solicitor General has not as yet made any determination regarding appeal.

Staff: United States Attorney David G. Bress; Thomas R. Manning and Levon Kasarjian, Jr. (Tax Division).

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