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UNITED STATES ATTORNEYS
BULLETIN

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NEW APPOINTMENTS - DEPARTMENT

The nomination of Deputy Attorney General Ramsey Clark as Attorney General was confirmed by the Senate and he took his oath of office on Friday, March 10, 1967.

NEW APPOINTMENTS - UNITED STATES ATTORNEYS

The nominations of the following new appointees as United States Attorneys have been confirmed by the Senate:

Arizona - Edward E. Davis

Mr. Davis was born July 9, 1930 at Tucson, Arizona, is married and has three children. He attended the University of Arizona from 1948 to 1952 and from 1954 to 1958 when he received his LL.B. degree. He was admitted to the Bar of the State of Arizona in 1958. He served in the United States Army from 1952 to 1954 as a Second Lieutenant. In 1958-1959 Mr. Davis was Deputy Attorney for Maricopa County, Arizona; and from 1959 to 1962, he was Attorney for the Arizona State Industrial Commission. From 1962 up until his appointment as United States Attorney, Mr. Davis was Administrative Assistant to Senator Carl Hayden.

California, Central - William M. Byrne, Jr.

Mr. Byrne was born September 3, 1930 at Los Angeles, California, and is unmarried. He attended the University of Southern California from 1948 to 1953 when he received a B.S. degree in Business Administration; and from 1953 to 1956 when he received his LL.B. degree. He was admitted to the Bar of the State of California in 1956. From 1956 to 1958 he served in the United States Air Force as a First Lieutenant. He was an Assistant United States Attorney for the Southern District of California from 1958 to 1960, and from 1960 up until his appointment as United States Attorney he was a partner in a private law firm in Los Angeles.

Massachusetts - Paul F. Markham

Mr. Markham was born May 22, 1930 at Lowell, Massachusetts, is married and has five children. He attended Georgetown University, Washington, D. C. from 1948 to 1949; Villanova University, Villanova,

Pa. from 1949 to 1951 and from 1954 to 1955 when he received a B.S. degree. He attended Boston University, Boston, Mass. from 1955 to 1958 when he received his LL.B. degree. He was admitted to the Bar of the State of Massachusetts in 1958. From 1951 to 1954 he served in the United States Coast Guard. He was engaged in the private practice of law in Boston, Waltham and Medford, Mass. from 1958 to 1963, and served as an Attorney-Advisor in the Small Business Administration, Boston, Mass. in 1963. From 1963 to 1966 he was an Assistant United States Attorney in the District of Massachusetts. Since July 8, 1966 he has served as Court-appointed United States Attorney for that District.

Rhode Island - Edward P. Gallogly

Mr. Gallogly was born August 28, 1919 at Providence, R.I., is married and has 11 children. He attended Providence College from 1939 to 1942 when he received a Ph. B. degree. He attended Boston University, Boston, Mass. from 1946 to 1949 when he received his LL.B. degree. He was admitted to the Bar of the State of Rhode Island in 1949. He served in the United States Naval Reserve as a Lieutenant from 1943 to 1946. From 1950 to 1952, he was an Associate Attorney in a private law firm in Providence, and from 1951 to 1954, he served as Law Clerk to Judge Robert E. Quinn, Court of Military Appeals. From 1960 to 1964 he was Lieutenant Governor of Rhode Island, and from 1960 up until his appointment as United States Attorney he served as a State Senator. From 1954 up to the time of his appointment, he was a law partner in a private law firm in Providence.

NEW APPOINTMENTS - ASSISTANT UNITED STATES ATTORNEYS

The following new Assistants have been appointed in the past two weeks:

District of Columbia - ALBERT W. OVERBY, JR.; New York University, LL.B., and formerly an attorney with AEC.

Minnesota - JONATHAN E. CUDD; University of Minnesota, LL.B., and formerly an attorney in the Minnesota Attorney General's Office and Assistant United States Attorney for the District of Minnesota.

Michigan, Eastern - KENNETH G. McINTYRE; University of Kansas, LL.B., and formerly an attorney with the Civil Rights Division.

Virginia, Eastern - MICHAEL MORCHOWER; T.C. Williams School of Law, LL.B., and formerly a Special Agent with the FBI.

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ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 3, Vol. 15 dated February 3, 1967:

MEMOS	DATED	DISTRIBUTIONS	SUBJECT
505	1/30/67	U.S. Attorneys	Procedure to be followed in Tort Claims Act Cases in which Public Law 89-506 - amending Federal Tort Claims Act is applicable.

ORDERS	DATED	DISTRIBUTION	SUBJECT
374-67	1/20/67	U.S. Attys. & Marshals	Relating to vesting of unclaimed property.
375-67	1/23/67	U.S. Attys. & Marshals	Notification of consular officers upon arrest of foreign nationals.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

CLAYTON ACT

Supreme Court Directs Divestiture and Grants Intervention in District Court Proceedings. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., (Nos. 4, 5 and 24, Supreme Court, O. T. 1966) D. J. File 60-0-37-158. In 1964, the Supreme Court sustained the Government's contention that the acquisition of Pacific Northwest Pipeline Co. by El Paso Natural Gas Co. violated Section 7 of the Clayton Act and directed divestiture without delay. United States v. El Paso Natural Gas Co., 376 U. S. 651, 662.

On February 27, 1967, the Court decided that the State of California, Southern California Edison Company and Cascade Natural Gas Corporation had been improperly denied intervention of right in the district court proceedings which followed the Court's 1964 decision. The effect of this decision is to invalidate a decree of divestiture which had been entered by the district court pursuant to the stipulation of El Paso and the Government. The Court again remanded the case to the district court with directions that an order of divestiture be entered without delay conforming to certain guidelines which it laid down and with a further direction that a different district judge be assigned to hear the case. Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented.

Appellants' claims for intervention of right were governed by Rule 24, F. R. Civ. P., which, subsequent to the district court's ruling on the petitions, was amended. The Court held California and Southern California Edison had a right to intervene under former F. R. Civ. P. 24(a)(3), which authorized intervention by persons "adversely affected" by a disposition of property under the control of the Court. It construed this rule as not being limited exclusively to those who have an interest in the property. Emphasizing that protection of California consumer interests had been "at the heart of the controversy" on the merits of the Government's Section 7 suit, the Court found that California and Edison were so situated geographically as to be "adversely affected" by a merger that reduces the competitive factor in natural gas available to Californians." It further held that Cascade should be permitted to intervene under Rule 24(a)(2) as amended in 1966, which permits intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the deposition of the action may impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by private parties."

The Court did not question the Attorney General's authority to settle litigation either before or after it considers it. It held, however, that the Department of Justice could not by stipulation or otherwise "circumscribe the power of the courts to see that our mandate is carried out." In its view, the stipulated decree in this case failed to carry out the mandate because it did not "at once" restore Pacific Northwest or a new company as a competitor for El Paso in the California market. Instead, it accomplished, the Court found, a division of reserves and markets between El Paso and the new company under which El Paso would receive the Southern California area. The district judge was removed because of his stated predisposition for such a division.

The Court's guidelines indicate that the following must be done on remand: (1) The new company's gas reserves must be no less in relation to existing reserves than the proportion Pacific Northwest had prior to the merger; and new reserves developed in the San Juan Basin by the merged company must be equitably divided, after hearings and "meticulous findings." (2) No changes should be made in the pre-merger contracts which Pacific Northwest had with El Paso until they are negotiated with El Paso by the new company under the requirements of the Natural Gas Act. (3) The district court must give serious consideration to appellants' contentions that the new company, rather than El Paso should receive the proceeds from sale of the stock of West Coast Transmission Company (an asset originally owned by Pacific Northwest) and that El Paso should somehow pay compensation for its use of the tax losses carryovers which Pacific Northwest brought to the merger. (4) All of the new company's stock must be disposed of "with all convenient speed" and conditions must be imposed to prevent El Paso from acquiring a controlling interest in the new company. Outright sale of the new company's assets or stock must be considered as a possible alternative to a spin-off. The Court found that under the stipulated decree El Paso might dominate or control the new company. It noted that El Paso could remain beneficial owner of the new company's stock for three years after transfer of the assets, which would not take place until after regulatory approvals were obtained and that although the stock would be voted by the chief executive of the new company, he might act in El Paso's interest. It also noted that although no El Paso officer, director, or owner of more than 0.5% of El Paso's stock may purchase the new company's stock, these limitations might be avoided by the families of these persons or by a combination of El Paso's small stockholders.

Staff: Daniel M. Friedman, Richard A. Posner (Solicitor General's Office) Milton J. Grossman (Antitrust Division)

Merger of Paper Companies Held Violation of Section 7 of Clayton Act. United States v. Kimberly - Clark Corporation (N. D. Calif.) D. J. File 60-0-37-570. On February 17, 1967, Judge Alfonso J. Zirpoli ruled, in San Francisco, that the acquisition by Kimberly-Clark of Blake, Moffitt & Towne violated Section 7 of the Clayton Act, in that it may substantially lessen competition in the distribution and sale through paper merchants of printing and fine paper, sanitary paper products, coarse paper and paper products, and printing and fine and coarse paper combined, in both the United States as a whole and the six western states of California, Oregon, Washington, Idaho, Nevada and Arizona.

Kimberly-Clark is the fourth largest corporation in the United States engaged primarily in the manufacture of paper; the fourth largest manufacturer of printing and fine papers in this country, accounting for about 7 1/2% of total production; the largest manufacturer in the world of sanitary paper products; and a substantial manufacturer of certain coarse paper products.

On June 30, 1961, Kimberly-Clark acquired Blake, Moffitt & Towne, which was the operator of a chain of more than 30 paper merchant wholesale establishments in the six western states, at which it sold both printing and fine paper and coarse paper and paper products, including sanitary paper products. Its share of total paper merchant sales of various paper product classes in its six state market ranged from about 12 1/2% to more than 18%, and nationally, from about 1. 8% to about 2. 7%. BMT was, at the time of the acquisition, the largest paper merchant chain in its trading area not owned by a paper manufacturer.

At the time of the acquisition, there were several other substantial paper merchant acquisitions by other paper manufacturers. In the period 1957-1964, five large paper manufacturers, including Kimberly-Clark, acquired 21 companies operating more than 150 paper merchant establishments which accounted for more than 12% of all paper merchant sales. There were several other smaller acquisitions as well.

Relying on the Philadelphia National Bank case, the Court held that the cluster of products and services offered by paper merchants so distinguishes them from other kinds of wholesale establishments that the measurement of the market foreclosed by the acquisition should be paper merchants. This was based on essentially uncontroverted testimony of witnesses from paper manufacturers, paper merchants, and paper purchasers, such as printers, describing the range of products and services offered by paper merchants and their importance in the distribution and sale of paper and paper products. Testimony from those sources also established the product lines in which the effects of the acquisition were measured: printing and fine paper, which

includes the range of papers the primary purpose of which is to be printed or written on; coarse paper and paper products, which includes a range of papers designed for all other uses; sanitary paper products, a subclassification of coarse paper products which includes papers designed for personal sanitary use; and printing and fine and coarse paper combined, which measures essentially the entire range of products sold by paper merchants.

The parties agreed upon a national market, based on the fact that manufacturers located throughout the country were capable of supplying BMT with at least a portion of its paper purchases. The Court found a western submarket as well, consisting of the six state area in which BMT operated, based on evidence of industry recognition, freight rates, regional producers and competitive patterns, service and convenience factors, and Kimberly-Clark's own statements, programs, and business practices.

Documents obtained from Kimberly-Clark in pre-trial discovery indicated that it purchased BMT to assure itself a market for its papers, particularly the coated publication papers which it planned to manufacture at a mill that it was building at Anderson, California. It also sought to capture BMT before it was acquired by another mill--a reason which other manufacturers claimed motivated their acquisitions as well. After the acquisition, BMT's purchases from Kimberly-Clark increased sharply; virtually every type of paper which Kimberly-Clark manufactured was sold in increasing quantities through BMT. BMT's purchases from Kimberly-Clark increased by 258% from 1961, the year of the acquisition, to 1963.

Relying on the market shares of the parties to the acquisition, the industry-wide trend of similar acquisitions, Kimberly-Clark's express and implied purposes in acquiring BMT, and its actions since the acquisition, the Court ruled "the proof in this case far exceeds the showing that the merger may substantially lessen competition in the distribution and sale through paper merchants of each of the four categories of paper products, as described herein, in the six western state area, as defined herein, and in the United States."

Staff: James J. Coyle, Mary P. Clark, L. David Cole, James E. Figenshaw and Julius Tolton (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

ADMINISTRATIVE LAW

Enforcement Directed of Subpoenas Issued by Federal Maritime Commission During Investigation of Waterfront Terminal Operators: Court Must Look With More Circumspection on Motion for Stays of Administrative Subpoenas Pending Appeal. Federal Maritime Commission v. New York Terminal Conference, et al. (C. A. 2, No. 31015, February 15, 1967) D. J. File 61-51-4603. The Federal Maritime Commission brought this proceeding to obtain compliance with subpoenas duces tecum issued in the course of an investigation to determine whether the truck loading and unloading rates of water-front terminal operators of the New York Terminal Conference (and an independent operator) were so unreasonably high as to violate Sections 15, 16 or 17 of the Shipping Act of 1966. The New York Terminal Conference resisted enforcement of the subpoenas on the ground that the Commission had no power to regulate the rates of terminal operators, and that the investigation was therefore beyond the Commission's authority. The district court granted the Commission's petition for enforcement, and the Second Circuit affirmed.

The Second Circuit held that the subpoenas were "firmly grounded on Section 15 of the Shipping Act of 1966," which in providing for the filing and approval of conference agreements and the grant of immunity from the antitrust laws, authorizes the Commission, after notice and hearing, to set aside a conference agreement which it finds operates to the detriment of the commerce of the United States or is contrary to the public interest. Accordingly, the Court ruled, the Commission was authorized to subpoena books and records concerning costs, not only of members of the conference, but also of persons not themselves subject to regulation under that Section.

The Court also noted that the terminal operators' resistance to the subpoenas delayed the underlying administrative proceedings for eight months and that similar delays had occurred in other cases involving the enforcement of subpoenas of the Maritime Commission. Accordingly, the Court commended the district court for declining to grant a stay pending appeal, and indicated that it would in the future "look on motions for stays of administrative subpoenas pending appeal with even more circumspection than in the past."

Staff: David L. Rose and Howard J. Kashner (Civil Division)

ADMIRALTY

United States as Shipowner Owes No Duty of Care to Person Attempting to Board Seaplane for Purpose Inimical to Interests of United States. Ryder v. United States (C. A. 4, No. 10,745, February 6, 1967) D. J. File 157-79-523. Libellant, a member of a boating party, brought this action for injuries suffered when she fell from the yacht on which she was a passenger while attempting to board a moored Navy seaplane, after the sailors aboard the plane had offered to cook dinner for her and her companions in exchange for beer. The district court held that the Government was not liable since libellant "was attempting to board the seaplane for a purpose 'inimical' to and 'inconsistent with' the legitimate interests of the Navy as owner of the plane", and under the circumstances the injury did not result from the breach of any duty owed her by the owner. The court further found that even if there was a breach of duty, libellant's conduct at the time was of such a nature that it should bar recovery. The Court of Appeals affirmed in a per curiam opinion.

Staff: Edward Berlin (Civil Division)

MILITARY DISCHARGE

Serviceman Must Exhaust Administrative Remedy Before Board of Correction of Military Records Prior to Seeking Judicial Review of His Involuntary Retirement. Nelson v. Miller, et al. (C.A. 3, No. 16,069, February 13, 1967). D. J. File 145-6-810. Nelson, a Naval electronics technician, sued to enjoin the Navy from discharging him from the Navy for the "convenience of the government . . . other good and sufficient reasons," alleging that the discharge, though "honorable", would irreparably injure his employment prospects by in effect stigmatizing him as a homosexual for civilian employment and reenlistment purposes. The district court refused to enjoin defendant from discharging him, but retained jurisdiction for final adjudication after a final hearing. The Third Circuit affirmed.

The Third Circuit declined to adopt the rule that district courts lacked jurisdiction and may not interfere with or consider the propriety of a military discharge before the serviceman has invoked and exhausted his post-discharge administrative remedies. See McCurdy v. Zuckert, 359 F. 2d 491 (C. A. 5), certiorari denied 35 U.S.L.W. 3139. Instead, it chose to follow the more flexible rule of the D. C. Circuit "that when the post-discharge remedy had not been exhausted the court should retain jurisdiction but defer decision unless the party invoking the court's jurisdiction can demonstrate 'special circumstances.'" See Sohm v. Fowler, 365 F. 2d 915 (C. A. D. C.). The Court held that there were no "special circumstances" which would call into operation "the exercise of the District Court's remedial powers," since Nelson would receive an honorable

discharge, he had an adequate post-discharge administrative remedy, and the interim injury to him would not be excessive.

Staff: David L. Rose and Howard J. Kashner (Civil Division)

PERISHABLE AGRICULTURAL COMMODITIES ACT

In Imposing Employment Restrictions, Perishable Agricultural Commodities Act Does Not Excessively Encroach Upon Bankruptcy Act, But Is Reasonable Regulation of Highly Competitive Industry; Constitutionality of Provisions Imposing Employment Restrictions Upheld. Zwick v. Freeman, (C.A. 2, No. 30344, February 14, 1967) D.J. File 107-51-17. The Perishable Agicultural Commodities Act prohibits employment for a minimum period of one year within that industry of persons "responsibly connected" with a merchant who is or has been found to be in "flagrant or repeated" violation of the Act. 7 U.S.C. 499h(b). The petitioners in this case were members of a partnership, a licensed commission merchant, which had failed to pay sums due upon 295 transactions and subsequently filed a petition in bankruptcy which was approved and confirmed by the referee in bankruptcy. This petition was then filed to obtain judicial review of the administrative finding that members of the bankrupt partnership had engaged in repeated and flagrant violations and would therefore be subjected to the employment restrictions. The Second Circuit found no merit in any of the contentions and dismissed the petition for review.

The Court found (1) 295 violations over a period of months were a repeated and flagrant violation of the Act since petitioners were aware of their financial condition and that every additional transaction consummated was likely to result in another violation of the Act; (2) The imposition of sanctions prohibiting the members of the partnership from being employed in the commodities industry under the Perishable Agricultural Commodities Act after the confirmation of the plan of arrangement under the Bankruptcy Act was not an unconscionable encroachment upon the Bankruptcy Act "in the light of the purposes of the Commodities Act and the clearly recognized need to have financially responsible persons as licensees or employees of licensees under that Act."

The Court also upheld the constitutionality of 499(h)(b) of the Act, which imposes employment restrictions on persons allowed to work in the industry. It held (1) this provision was not a violation of the Fifth Amendment right to earn a livelihood since the "constitution does not guarantee an unrestricted privilege to engage in business", but a reasonable regulation of the industry, citing Birkenfield v. United States, 369 F. 2d 491 (C.A. 3); (2) there was no violation of the Eighth Amendment since "one who is denied the right to employment in one limited industry for a period of one or two years cannot be considered to have been cruelly or unusually punished"; and (3) the Act was not a bill of

attainder since it does not specifically describe petitioners but prohibits a course of conduct.

Staff: Morton Hollander (Civil Division)
Neil Brooks, Robert Duncan, Daphne M. Anderson, (Attorneys, Department of Agriculture)

RIVERS & HARBORS ACT

Those Responsible for Negligent Sinking of Vessel in Navigable Waters of United States Are Not Liable to Government for Its Removal. United States v. Moran Towing & Transportation Co.; United States v. Bethlehem Steel Co. (C.A. 4, Nos. 9867, 9868, February 10, 1967). D. J. File 62-35-114. In 1962, Bethlehem Steel Company decided to dispose of an outmoded floating drydock which was 360 feet long, 100 feet wide, and 45 feet high, and had a capacity of 9400 tons. It hired Moran Towing to tow the drydock out to sea from its Baltimore shipyard and sink it beyond the thousand fathom curve. Some 11 hours after the tow began, the drydock began to list to port and the tugboat captain decided to return to Baltimore harbor. The list became more severe on the return trip, and the drydock finally grounded in 21 feet of water outside the main ship channel of the harbor. The Government directed Bethlehem to remove the wreck, which was a menace to navigation because chunks of it were breaking off and because the waters in which it sat were traveled by small craft. Bethlehem, in turn, notified the Government that it was abandoning the drydock.

Thereafter, claiming that the drydock was an obstruction to navigation created by respondents in violation of § 10 of the Rivers & Harbors Act of 1899, 33 U.S.C. 403, the Government brought this suit to compel respondents to remove it. Bethlehem and Moran defended on the ground that the drydock was a "vessel or other craft" within the meaning of §15 of the Act, 33 U.S.C. 409, and under that section they were not personally liable for its removal. After a trial, the district court (Judge R. Thomsen presiding) found that the drydock was not a "vessel or other craft" and that its sinking was a violation of § 10 of the Act. Accordingly, the court ordered respondents to remove the drydock from the harbor or pay the Government the reasonable costs of doing so. The court alternatively held that if the drydock were a "vessel or other craft," respondents would nevertheless be liable for removal because after the drydock began to list, Bethlehem "deliberately decided to sink the dock in the harbor." The Government subsequently removed the drydock at a cost of $163,000.

Over a vigorous dissent by Judge Sobeloff, the Court of Appeals for the Fourth Circuit reversed. Writing for himself and Judge Boreman, Chief Judge Haynsworth held that the drydock was a vessel under §15 and that it had been

negligently (not intentionally) sunk. He then held, in agreement with United States v. Bethlehem Steel Co., 319 F. 2d 512 (C.A. 9), certiorari denied, 375 U.S. 966, and United States v. Zubik, 295 F. 2d 53 (C.A. 3), that the owner who has abandoned his negligently-sunk vessel is not liable in personam for its removal.

In dissenting, Judge Sobeloff agreed that the drydock was a vessel and that it had sunk as the result of respondents' negligence in failing to inspect it properly before the tow commenced. But, he stated, "I cannot accept the view that Congress meant to bestow a beneficence on careless owners by nullifying the statutorily declared obligation of such persons to remove obstructions caused by them." He agreed, instead, with the recent decision in United States v. Cargill, Inc., 367 F. 2d 971 (C.A. 5), certiorari granted sub nom. Wyandotte Transportation Co. v. United States, _____ U.S. _____ (Oct. Term, 1966, No. 839), and Judge Browning's dissent in United States v. Bethlehem Steel Co., supra, 319 F. 2d 512 (C.A. 9), that those who negligently sink vessels are responsible for their removal.

It is expected that the Government will file a petition for a writ of certiorari in this case, for, among other reasons, the identical issue is to be briefed and argued in the Wyandotte Transportation Co. case, supra, now pending before the Supreme Court.

Staff: Martin Jacobs (Civil Division).

DISTRICT COURT PROCEEDING

CIVIL SERVICE RETIREMENT ACT

Employment in Relief Projects Not Creditable for Retirement Purposes. David Adelstein, et al. v. John W. Macy, Jr., et al. (E.D. N.Y., Civil Action No. 65-C-1086). D.J. File 35-52-18. Plaintiffs sought to require that their employment as project workers with the Civil Works Administration, the Temporary Emergency Relief Administration, and the Works Project Administration be credited as federal employment for retirement purposes under the Civil Service Retirement Act. The Court denied relief on the basis that the consistent rulings of the expertise agency in the field, the Civil Service Commission, should be accepted. The Commission had ruled that persons employed in relief projects did not fulfill the requirement of federal employment for credit under the Retirement Act because federal employment contemplates that a person shall have been "(1) engaged in the performance of federal functions under authority of an Act of Congress or an Executive Order; (2) appointed or employed (not merely assigned to a task as a relief beneficiary) by a federal

officer within his competence and capacity as such; and (3) so employed under the supervision and direction of a federal officer."

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney Peter H. Ruvolo (E.D. N.Y.); William P. Arnold (Civil Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Exhaustion of Administrative Remedies; Conscientious Objector Assigned to Perform Civilian Work in Lieu of Induction. United States v. David LeRoy Daniels (C.A. 9, January 17, 1967). The defendant was ordered to report to his local board for instructions to proceed to the assigned place of employment. He failed to report to the local board. At his trial he claimed that his I-O classification was invalid and he attempted to offer evidence in support thereof. The Government, relying primarily on Bjorson v. United States, 272 F. 2d 244 (C.A. 9, 1959), cert. denied 362 U.S. 949, objected on the ground that since defendant did not report to the local board he did not comply with all the prescribed steps in the selective process, and could not, therefore, collaterally attack his classification.

The Court of Appeals for the Ninth Circuit, sitting en banc, reversed and remanded. It held that its ruling in Bjorson insofar as it dealt with the exhaustion of administrative remedies question was wrong. The Court concluded that a conscientious objector who is ordered to perform civilian work "has reached the 'brink' in the selective process without going through the formality of reporting to the board or to the civilian employer." Such a registrant has no further remedy before the local board, and although it is possible that the civilian employer might reject the registrant, he could easily be reassigned to another employer. Neither the rejection nor the reassignment would have anything to do with the selective process. Bjorson was not overruled in toto "because in that case the court also went to the merits, holding that the classification was not invalid. More than likely this is why the Supreme Court denied certiorari."

Staff: United States Attorney John K. Van De Kamp;
Assistant United States Attorney Robert M. Talcott
(S. D. Calif.)

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 2. Purpose and Construction.

RULE 7(c). The Indictment and the Information; Nature and Contents.

Federal Rules of Criminal Procedure are intended to provide for just determination of every criminal proceeding and allegations made in one count of indictment may properly be incorporated by reference in other counts.

Test of sufficiency is whether indictment informs defendant of what charges he must meet and protects him against double jeopardy.

United States v. Richman, 369 F. 2d 465 (C.A. 7, 1966).

Defendant was convicted by a jury upon each of 21 counts charging his use of mails in a scheme to defraud. On appeal he questioned, inter alia, the sufficiency of the counts of the indictment.

Count 1 charged him generally with a scheme to defraud through solicitation of advertisements in a labor union newspaper, purportedly located and published in Indiana, by wilful, false representations. Under the scheme he prepared solicitations in Chicago and mailed them in bulk to an Indianapolis answering service. Answers received were remailed unopened to him in Chicago by the service. The first count specifically charged that, on a specific date, he caused two parcels to be delivered to the service, and two other counts similarly charged "sending solicitation parcels to the Service." All three counts incorporated the phrase "for the purpose of executing aforesaid scheme". Defendant alleged these counts were deficient since he was not charged with "knowingly" causing the items to be delivered by mail.

The remaining counts charged placing solicitations in the mails, again referring to count one, but did not contain the words "to be sent or delivered by the Post Office Department", as contained in 18 U. S. C. 1341.

In sustaining the sufficiency of the indictment, the Court stated that, while an indictment must contain all the elements of the offense charged, it is not insufficient for imperfections of form which are not prejudicial. The test is whether the indictment informs defendant of the charges against him and protects him against double jeopardy. Exact statutory words need not be used. The words incorporated by reference "for the purpose of executing the scheme" were sufficient to charge "knowledge".

Moreover, counts charging deposit "in the United States Mails" by reference to Count 1 were sufficient. The exact words "to be sent or delivered by the Post Office Department" appearing in the law were not required.

Judgment affirmed.

RULE 8(a). Joinder of Offenses and of Defendants; Joinder of Offenses.

RULE 14. Relief from Prejudicial Joinder.

While joinder in indictment of murder (first and second degree), two robberies, and one assault with dangerous weapon was permissible under Rule 8, denial of motion for separate trials of offenses stemming from two separate robberies occurring at different times and places was held prejudicial error under Rule 14.

Gregory v. United States, 369 F. 2d 185 (C. A. D. C., 1966).

In a 5-count indictment defendant was charged with first degree murder, second degree murder, two robberies, and one assault with a dangerous weapon. After the court denied his motion for separate trials of the offenses stemming from the two robberies, he was found by the jury to be the person who committed all the crimes and was convicted on all counts.

The appellate court made its own study of the record and the majority opinion concluded that the weight of errors disclosed by the record compelled reversal.

It found, inter alia, that severance of trials of offenses stemming from the two robberies should have been granted because evidence with respect to two robberies would cumulate in jurors' minds and tend to prove defendant was guilty of both.

Reversed.

RULE 11. Pleas.

Crime of interstate transportation of forged securities requires fraudulent intent and knowledge that securities are forged; hence, acceptance of qualified plea of guilty to such offense did not satisfy mandatory requirements of Rule 11.

Hulsey v. United States, 369 F. 2d 284 (C. A. 5, 1966).

Defendant while in state custody was charged with violation of 18 U. S. C. 2314. When brought before the district court the judge permitted him to waive appointment of counsel, execute a written waiver of indictment, and enter a plea of guilty. The plea was accepted, notwithstanding the fact that, after pleading guilty to endorsing a check, defendant added: "I don't remember anything about whether it was forged or not. At that time I had been drinking very heavily and I can't account too well for my behavior at that time." His motion to vacate the sentence filed 14 months later, was denied without a hearing.

In reversing, the appellate court stated that, although no formal ritual need be observed when a guilty plea is entered, the trial court has an affirmative duty to inform the defendant fully so that he understands the nature of the charge and the consequences of his plea, and the duty is even more exacting if an accused elects to enter the plea without advice of counsel.

Moreover, in an offense such as the one here involved (which requires (1) transportation in interstate commerce of (2) a forged security with (3) fraudulent intent and (4) knowledge that the security was forged) when the accused persisted in entering a plea of guilty but at the same time qualified it by disclaiming any knowledge of whether the check was forged, the trial court should have refused to accept the plea and set the case for trial.

Judgment reversed.

RULE 15(a). Depositions; When taken.

Motion to require Government to produce "prospective witness" to allow defendant to take deposition denied.

United States v. Packham, No. 22, 186, W. D. Mo.

Defendant indicted on a charge of first degree murder moved under Rule 15(a) for an order permitting the defense to take the deposition of a Government witness on the ground that (1) the testimony of the witness was material, (2) the witness might be unavailable at the trial, and (3) the defendant was entitled to preserve the testimony by deposition under Rule 15(a).

The prosecution contested the motion on the grounds that (1) the witness was a Government witness who would be available and called to testify at the trial, (2) the motion was an attempt to obtain discovery, and (3) Rule 15(a) does not authorize discovery and the circumstances alleged were not sufficient to invoke the provisions of Rule 15(a) for the preservation of testimony.

The motion was denied. The District Judge held that "the only discretion vested in the court was to determine the necessity for a deposition to preserve testimony". No such necessity was found.

RULE 44. Right to and Assignment of Counsel.

Defendant, a state prisoner, whose petition for motion to vacate federal conviction on grounds he had not been adequately informed of his right to counsel under Rule 44 prior to receipt of guilty plea, denied, held entitled to coram nobis relief.

United States v. Mathis, 369 F. 2d 43 (C.A. 4, 1966).

In 1961 a plea of guilty to falsifying Army voucher was accepted by the court and defendant was sentenced to a prison term of one year and one day. Sentence was suspended and he was placed on probation on the special condition that he make restitution. While the court had asked him if he wanted a lawyer and he indicated he would like to have legal assistance, the court had not informed him that he was entitled to free, court-appointed counsel if he so desired.

In June 1962 a warrant was issued for his arrest as a parole violator, but before it was served he was taken into state custody on a charge of a state crime and a federal detainer was then lodged with state officials. In February 1963 he was convicted of the state offense.

While serving this sentence petitioner filed two motions. The first was denied and appeal therefrom was denied as frivolous. The second to vacate the federal sentence, alleging that the plea of guilty was not voluntary and waiver of counsel was invalid, was denied without a hearing on the basis he was not "in custody under sentence of a court established by Act of Congress", as required, was sustained on appeal. Thereupon, he petitioned for writ of coram nobis raising the same contentions he had previously raised under 2255, which was denied by the lower court solely because he was suffering no "present restraint or imposition from conviction". 246 F. Supp. 116, 122.

Since the United States conceded that the conviction should be set aside on the ground of inadequacy of waiver of counsel, the appellate tribunal, although expressing no opinion on the voluntariness of the guilty plea, determined that the coram nobis remedy was available to challenge the conviction and sentence to be served in the future.

In reaching this conclusion the Court cited, inter alia, the decision of the Supreme Court in United States v. Morgan, 346 U. S. 502, which held that the district court had power to grant coram nobis under 28 U. S. C. 1651; and that the enactment of section 2255 did not bar granting of a coram nobis writ.

The appellate court concluded that defendant had demonstrated a sufficient "present adverse effect" to entitle him to relief. The consequences of a denial would be that, after serving the state sentence, he would be taken into federal custody, there to await outcome of a probation revocation hearing, probable service of unexpired sentence, etc. Only then would relief under 2255 be available.

"* * * the failure to inform the defendant adequately of his right to court-appointed counsel, as Rule 44 commands, clearly calls for the writ 'to achieve justice'".

Reversed.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Denial of Discretionary Relief By Board of Immigration Appeals Upheld. Jose Edmund Santos v. INS and Jose Roberto Murillos v. INS (C. A. 9, Nos. 20,707 and 20,708, February 28, 1967) D. J. Files 39-11-600 and 39-11-601.

The above cases involved petitions for review of deportation orders for two natives and citizens of El Salvador who had entered as visitors and remained beyond the period of their authorized stay. Both petitioners had sought relief from deportation by applications under 8 U. S. C. 1255 which permits, under certain conditions, the adjustment of an alien's status from a visitor to that of a permanent resident. In their deportation proceedings a special inquiry officer had granted their applications but on appeal by the Immigration and Naturalization Service the Board of Immigration Appeals reversed the special inquiry officer and ordered the petitioners deported if they failed to leave voluntarily.

In the present proceedings, petitioners contended that the Board of Immigration Appeals had abused its discretion in denying their applications for relief from deportation. Petitioners admitted that adjustment of status under 8 U. S. C. 1255 was a matter of grace but asserted that in their cases the Board abused its discretion because it "inexplicably departed from established policies". Petitioners relied on a prior decision by the Board in which the Board stated that it was not necessary for an applicant for relief under 8 U. S. C. 1255 to demonstrate special equities as a prerequisite to a favorable exercise of discretion. After review of other decisions of the Board on applications for 8 U. S. C. 1255 relief, the Court concluded that the Board never had an "established policy" making irrelevant the absence of special equities. The Court then stated that the mere fact that petitioners were treated differently from other aliens similarily situated would not per se constitute an abuse of discretion. The Court went on to say that the Board must have the freedom to modify existing requirements or fashion new ones provided only that some rational basis exists for such change. The Court affirmed the decisions of the Board.

Staff: United States Attorney Cecil F. Poole; Assistant U. S. Attorney Charles Elmer Collett (N. D. Cal.)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

Automatic Data Processing - Forms 899 - Transcripts

The Internal Revenue Service has advised that the changeover to automatic data processing has now reached a stage where we can anticipate receiving in the near future printouts of computer transcripts in lieu of Form 899's for the more current tax years.

The Chief, Special Procedures Section, in each district office, has been designated as the focal point for the securing of data required by the Office of the Chief Counsel and the Department of Justice. Attorneys in this Department will, of course, continue to work through the Office of the Chief Counsel.

Instead of requesting an 899 when seeking information regarding the status of an account, we should now request merely a transcript of the account, specifying the tax years and the type of tax. The Special Procedures Section will then forward a computer printout as to the more recent years and a Form 899 as to the older years.

Printed cards explaining the automatic data processing transaction codes are being made available to all attorneys and to the U.S. Attorneys' Offices. A relatively non-technical description of the pertinent aspects of the automatic data processing system is in the process of preparation and will be made available upon completion.

Civil Tax Matters

Appellate Decisions

Internal Revenue Summons; Appraiser's Valuation Report on Estate Assets Must Be Produced by Attorney-Executor; No Attorney-Client or Work-Product Privilege. United States v. McKay (C.A. 5, February 3, 1967). In reversing a district court order denying enforcement of a Section 7604(a) summons, the Court of Appeals said the report was clearly relevant to valuation of the asset for estate tax purposes; and that while it also doubted the applicability of the work-product rule of Hickman v. Taylor, 329 U.S. 495, the report in question was, at any rate, not the work product of the attorney-executor who procured it with a view to future tax litigation.

Staff: John P. Burke, Joseph M. Howard (Tax Division)

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