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in joint trial was rejected by court as speculation that jurors would disregard clear instructions of court in arriving at their verdict.

Rule 24(c)

While Rule 24(c) provides that an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict, excusing such juror on final day of trial but prior to submission of case to jury held not in violation of defendant's constitutional right of due process — Dirring v. U. S. — 199

Rule 41(c)

Admission of evidence obtained pursuant to state search warrant issued by municipal court judge required reversal of conviction, since affidavit of police officer in support of warrant and his oral testimony were insufficient to establish that probable cause existed to justify lawful search — U. S. v. Gillespie, Gillespie and Bennett — 200

Rule 41(e)

Government, which made an admittedly illegal search for and seizure of gambling memoranda and paraphernalia from taxpayer's apartment, held precluded by Fourth Amendment and the exclusionary rule embodied in Rule 41 from using such evidence in a civil assessment proceeding against taxpayer — U. S. v. Blank — 201

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FEDERAL RULES OF CRIMINAL PROCEDURE (CONTD.)

Rule 57(b)

Holding	Case	Page
Even though subpoena statutes and pertinent federal rules of criminal and civil procedure do not state that witness must remain in attendance until excused by court or grand jury, alien witness--who had been personally served with subpoena, who appeared before grand jury and testified, but who later failed to reappear pursuant to oral direction of grand jury foreman and who did not appear in person or by his attorney pursuant to order to show cause--was properly adjudged guilty of civil contempt.	<u>In re Germann</u>	203

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

SUBPOENAS DUCES TECUM -- TREASURY DISBURSING OFFICE

Frequently, United States Attorneys subpoena Directors of Disbursing Centers or Regional Disbursing Officers of the Treasury Department to produce records relating to the issuance and mailing of Treasury checks in various types of cases. In many cases the trial attorneys fail to consider the alternative of producing records under seal, pursuant to Rule 44, F.R.C.P., and often delay such requests until a few days prior to trial. We realize that there are instances when the court or opposing counsel will not agree to this alternative procedure. In such instances it is suggested that the subpoena be accompanied by a statement showing why records under seal are not acceptable.

The Treasury Department has requested that we obtain full cooperation of the United States Attorneys by:

1. Determining first whether or not an authenticated document will be accepted in lieu of the personal appearance of an officer.

2. Notifying the Disbursing Office at an early stage in the preparation of the case of the actual checks involved, even though a definite trial date is not known, will afford more time to locate the checks and make then available. (When records are authenticated under the Treasury seal, they must be forwarded from the field office to Washington, and then to the United States Attorney.)

3. Giving the witness as much advance notice as possible when personal appearance is necessary, and cancelling the witness immediately if his attendance is not necessary.

To illustrate its problems the Treasury Department summarized requests from U. S. Attorneys from September 1965 to August 1966 as follows:

	Cases
1. Requests for check records.	125
2. Records only requested in original notice.	78
3. Personal testimony requested in original notice to Disbursing Office.	47

		Cases
4.	Number of cases accepting documents after contact by Disbursing Officer.	27
5.	Personal appearances required after contact.	20
6.	Number of cases in which personal testimony was not needed after appearance in court.	6

Appropriation chargeable with Government-employee witness's travel expenses. Please remember that the Department of Justice pays travel and per diem of the Government-employee witness only when the witness's agency and its operations or responsibilities are not involved in the case.

Examples: (1) In a case involving forgery of a Government check, an employee of the Treasury Department who produces records and/or testifies is paid by his agency since the Secret Service (Treasury Department) is charged with investigating the case. See 35, Comp. Gen. 535 and 23 Comp. Gen. 658. (2) In a postal theft case, an employee of the Post Office who testifies on behalf of the Government is paid travel and per diem by the Post Office. (3) In the same case, an employee of the Treasury Department who produces check records and testifies as to Treasury procedures is paid from Treasury appropriation since his testimony involves its operations.

In those instances in which the Department of Justice is responsible for paying the Government-employee witness, it is suggested that the Marshal who served the subpoena issue the witness a Government Transportation Request, and that the Marshal of the trial district pay his per diem at the conclusion of the case to eliminate the reimbursement procedure.

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

DISTRICT COURT

SHERMAN ACT

INDICTMENT CHARGING VIOLATION OF SECTION 1 OF THE SHERMAN ACT FILED

United States v. L. G. Balfour Company, et al. (N. D. Ga., March 22, 1967, D. J. File 60-143-20).

On March 22, 1967, a grand jury in Atlanta, Georgia returned a one-count indictment charging a combination and conspiracy, beginning at least as early as 1962, to submit collusive and rigged prices, bids and quotations in the sale and attempted sale of class rings and graduation invitations and announcements to students in the State of Georgia, in violation of Section 1 of the Sherman Act.

Named as defendants were the following four companies and three individuals associated therewith, as indicated:

Josten's, Inc., Owatonna, Minnesota, Herbert R. Thompson, Decatur, Georgia and H. R. T., Inc., Decatur, Georgia;

L. G. Balfour Company, Attleboro, Massachusetts, Thad Wilkins, Atlanta, Georgia, and Ray Isenbarger, Attleboro, Massachusetts; and

Herff Jones Co., Indianapolis, Indiana.

Specifically named as a co-conspirator was Howard S. Canfield, a sales manager in the State of Georgia for Herff Jones Co., and a member of the Board of Directors of Herff Jones Co. within the period covered by the indictment.

In order to effectuate the conspiracy, the defendants and co-conspirators have held conversations and meetings wherein they agreed to submit collusive prices for the sale and attempted sale of class rings and graduation invitations and announcements. In order to avoid detection, the defendants and conspirators agreed they would not submit identical prices on class rings, but would maintain small but immaterial price differences.

Such sales and offers to sell were made at the Georgia Institute of Technology and The University of Georgia, in addition to other schools in the State of Georgia.

Herff Jones Co., Josten's, Inc., and L. G. Balfour manufacture and sell in excess of 75 per cent of the combined total of all college and high school class rings sold in the United States, and in excess of 90 per cent of all such class rings sold in the State of Georgia, the latter sales amounting to $1,400,000 in 1965. The same three corporate defendants are also among the principal manufacturers of graduation invitations and announcements in the United States and make substantial sales thereof in the State of Georgia.

H. R. T., Inc. has been a sales agent of Josten's, Inc. since 1966 when it succeeded to the rights of the agent's contract of defendant Herbert R. Thompson with Josten's, Inc.

Arraignment has been set for the middle of April.

Staff: Walter L. Devany, Leonard E. Dimare and Joseph A. Licari, Jr. (Antitrust Division)

ORGANIZATION CHARGED WITH VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

United States v. National Farmers' Organization (March 29, 1967, D.J. File 60-139-147).

On March 29, 1967, a complaint was filed in the United States District Court at Des Moines, Iowa charging the National Farmers' Organization with violating Section 2 of the Sherman Act by attempting to control the interstate production, sale and distribution of milk, in a 19 state area.

The complaint alleges that the NFO, which is an incorporated national association of farmers, is attempting to monopolize the interstate marketing of milk, in violation of Section 2 of the Sherman Act, through threats, intimidation and acts of violence toward non-member farmers, carriers, and processors in an effort to coerce these groups into withholding milk from the market during the current NFO milk holding action.

At the time the complaint was filed, a motion requesting the issuance of a temporary restraining order was also submitted. On March 30, 1967, a hearing on the motion for a temporary restraining order was held before Judge Stephenson, at which hearing the defendant was represented by counsel.

After listening to argument from both sides, Judge Stephenson entered the temporary restraining order, prohibiting the NFO, its officers, agents and members, from threatening, intimidating or committing acts of violence against non-member farmers, carriers or milk processors.

Staff: Edward R. Kenney and Hugh P. Morrison, Jr.
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

BANKING -- NATIONAL BANKING ACT

COMPTROLLER'S FINDING THAT PROPOSED BRANCH OF NATIONAL BANK WAS NOT IN SAME "VILLAGE" AS EXISTING STATE BANK SET ASIDE AS ARBITRARY.

American Bank & Trust Co. v. James J. Saxon, et al., (C. A. 6, No. 17140, February 28, 1967, D.J. File 145-3-696).

Dart National Bank of Mason, Michigan, applied to the Comptroller of the Currency for authorization to open a branch bank in the unincorporated village of Holt in Michigan. Under the relevant Federal and Michigan statutes, Dart could not open a branch in the same village that contained an existing branch of a state bank. As the plaintiff state bank operated a branch in Holt, it opposed the application. Thereafter, Dart amended its application so as to adopt a location across the street from that set out in its original application, on the theory that the new location was in a village separate from the village of Holt. The plaintiff state bank continued to oppose the application on the ground that Dart's proposed branch was still in the village of Holt. Under Michigan law, the question of whether an area is a "village" is primarily one of fact. The Comptroller found the proposed Dart branch was in a village different from Holt where the state bank branch was located, and accordingly authorized the establishment of the branch. The district court affirmed the Comptroller's determination after finding there was substantial evidence to support the Comptroller. The Court of Appeals reversed, holding the district court's findings were clearly erroneous and further holding that the Comptroller's determination of separate villages was arbitrary and unsupported by substantial evidence. In finding that the banks were in the same village, the Court placed great reliance upon a poll of area residents conducted by the plaintiff bank which indicated the existence of only one village rather than two as contended by the Comptroller.

The Court of Appeals' decision obviated the necessity of considering the issue raised by plaintiff of whether the Comptroller was required to hold a formal hearing in this type of case. However, in dicta, the Sixth Circuit noted there was no requirement of a formal hearing, and it would follow the decision of the Fourth Circuit in First National Bank of Smithfield,

North Carolina v. Saxon, 352 F. 2d 267, to the extent that it held that a formal hearing is not a prerequisite to the Comptroller's action.

Staff: David L. Rose (Civil Division)

GOVERNMENT EMPLOYEES

CIVIL SERVICE DISCHARGE SUSTAINED AGAINST ALLEGATION OF POLITICAL MOTIVATION; REGULATIONS DENYING CAREER EMPLOYEE RIGHT TO BUMP INTO EXCEPTED SERVICE HELD VALID.

Morrill v. Freeman (C.A. 6, No. 16,949, March 15, 1967, D.J. File 35-31-3).

Plaintiff, an employee of the Department of Agriculture with a permanent career appointment, was separated because of a reduction of force due to an administrative reorganization. However, plaintiff's job was placed in the excepted service and given to another, temporary employee. Plaintiff alleged that his discharge was politically motivated, and that under the regulations he was entitled to be assigned to the job in the excepted service which had been given to the temporary employee. The district court dismissed his complaint. The Court of Appeals affirmed in a brief order stating that there had been substantial compliance with the statutes and regulations, that the regulations were valid, and that the record supported the Civil Service Commission's decision that plaintiff's evidence was insufficient to establish political motivation.

Staff: Robert V. Zener (Civil Division)

MILITARY PERSONNEL

HEARING BEFORE BOARD OF INQUIRY TO DETERMINE WHETHER OFFICER SHOULD BE REMOVED FROM ACTIVE SERVICE, WAS NOT UNDER THE CIRCUMSTANCES RENDERED UNFAIR BY INTRODUCTION IN EVIDENCE OF EX PARTE STATEMENTS.

Brown v. Gamage (C.A.D.C., No. 20,020, March 30, 1967, D.J. File 145-14-479).

In the course of a hearing before an Air Force Board of Inquiry to determine whether an officer should be involuntarily discharged, the officer objected to the admission of ex parte written statements from four retired or inactive servicemen and from one active serviceman stationed abroad, on the ground that the statements were not subject to cross-examination.

The officer did not seek any Air Force assistance in taking their depositions nor did he offer any statements from them through direct contact. The Board determined that a discharge was necessary and directed the honorable discharge of the officer with retirement pay. In declaratory judgment proceedings, the district court held that the officer had not been given a fair and impartial hearing to which he was entitled under 10 U.S.C. 8792 because of the use of the ex parte statements, and the district court directed his reinstatement. The Court of Appeals for the District of Columbia reversed and remanded for dismissal of the complaint.

The Court of Appeals held that, under the circumstances, there was a fair hearing as required by 10 U.S.C. 8792. In reaching this conclusion, the Court of Appeals noted (1) that this was not a criminal trial but an administrative proceeding involving one of the military services; and (2) that the officer had procedural rights which he knowingly failed to exercise since he had been given the statements prior to the hearing and could have himself attempted to obtain the presence of the witnesses and, if unable, could have requested the Air Force to obtain their presence. The Court concluded that "under these circumstances we cannot agree that admission of their statements deprived him of a 'fair' hearing within the meaning of the Congressional enactment under which the Board of Inquiry acted."

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT -- ATTORNEYS' FEES

AWARD OF ATTORNEYS' FEES LIMITED TO TWENTY FIVE PER CENT OF PAST-DUE BENEFITS AWARDED TO DISABILITY CLAIMANT ALONE; BENEFITS PAYABLE TO DEPENDENTS MAY NOT BE CHARGED WITH FEES.

Gardner v. Raymond Hopkins (C.A. 7, No. 15,724, March 15, 1967, D.J. File 137-26-60).

In this case, claimant sought review in the district court of the Secretary's determination that he was no longer disabled. The district court reversed the Secretary's determination and ordered resumption of claimant's social security disability benefits; and as a result, benefits to his dependents were also resumed. The district court awarded an attorney's fee under Section 206(b) of the Social Security Act, holding that a pre-existing contingent fee agreement providing for a fee of 40 per cent of past-due benefits was unenforceable, since judgment for the claimant had been entered after July 30, 1965, the effective date of Section 206(b), 42 U.S.C. 406(b), of the Act. Also, the court interpreted the statute as limiting the allowance of fees solely to the past-due benefits of the insured wage earner and awarded the attorney a full 25 per cent of these benefits. On appeal the Seventh Circuit affirmed.

The Court of Appeals held that the language and legislative history of Section 206(b) indicated that it was intended to apply to all cases where judgment was entered after its effective date, and therefore the attorney's 40 per cent contingent fee contract was uneforceable.

With respect to the base upon which the fee was to be computed, the Court expressly declined to follow the decision of the Fourth Circuit denying rehearing in Redden v. Celebrezze and Lambert v. Celebrezze, 370 F. 2d 373, in which it was held that benefits payable to both the disability claimant and his dependents were chargeable with fees under Section 206(b). The Seventh Circuit limited the fee base to the past-due benefits received only by the primary claimant himself because "it more closely limits fees and such was the concern of Congress in enacting the statute." The court recognized that, while the statute limited the fee base to benefits "to which the claimant is entitled by reason of such judgment," dependents may be joined in the primary claimant's action, and thus technically might be regarded as "claimants." But the Court of Appeals believed that those who drafted the statute assumed that where only the primary claimant's entitlement was in dispute, only he would be the true "claimant," and only his recovery could be charged with a fee. Under the Seventh Circuit's view, it would only be in those circumstances where the eligibility of a dependent was in dispute that the dependent would be a "claimant" within the meaning of Section 206 (b)(1), and his benefits chargeable with fees. Finally, the Court of Appeals pointed out that since the work and skill required in representing a claimant with dependents were no greater than would be required in representing a claimant who was single, "it [is] unlikely that Congress intended that in a case like this the maximum fee should be more than twice as large as it would have been if Mr. Hopkins happened to be single."

Thus, the Seventh Circuit has adopted the position of the Secretary that Section 206(b)(1) of the Social Security Act permits the allowance of fees only out of benefits payable to the primary claimant (or any other claimant whose eligibility is actually litigated) and expressly rejects the Fourth Circuit's view that dependents, whose eligibility is not in dispute, may also be charged with fees. Appellant has filed a petition for rehearing en banc. Also, the same question is currently pending in a case in the Sixth Circuit.

Staff: William Kanter (Civil Division)

DISTRICT COURT MAY NOT AWARD ATTORNEYS' FEES FOR SERVICES PERFORMED BEFORE THE SECRETARY; SECRETARY HAS EXCLUSIVE AUTHORITY OVER FEES FOR ADMINISTRATIVE SERVICES.

Ethelle B. Robinson v. Gardner (C. A. 4, Nos. 10,407 and 10,546, March 7, 1967, D.J. File 137-68-166).

In a suit instituted in the district court to obtain review of a denial of social security disability benefits, the district court, on motion by the Secretary, remanded the case to the Secretary for the taking of further evidence. On remand the Secretary made an award of benefits. Claimant and her attorney then asked the district court to award a fee of 50 per cent of past-due benefits, in accordance with a contingent fee contract entered into by the parties. The supporting papers made it clear that the fee was to cover all services performed by the attorney both before the Secretary and the court. The district court undertook to award the attorney a fee for all of the attorney's services--including those performed before the Secretary--and enforced the 50 per cent fee contract, concluding that it was reasonable. Section 206(b) of the Social Security Act, which regulates and limits fees for court services to 25 per cent of past-due benefits, did not apply to this case because all court services were completed before July 30, 1965, the effective date of such section. After the Secretary had noted his appeal, the district court entered a second order in the case, directing the Secretary, among other things, to pay the attorney 25 per cent of claimant's past-due benefits and to deposit another 25 per cent of those benefits into the registry of the court.

On appeal the Fourth Circuit reversed both fee orders of the district court. With respect to the first order, the Court of Appeals held that Section 206(a) of the Act vests in the Secretary exclusive authority over fees for services performed in administrative proceedings. While the Court of Appeals acknowledged that awards of attorneys' fees by district courts under their inherent powers had been upheld in earlier Social Security cases, the Court emphasized that "[n]ever, however, were the attorney's efforts in the Department admitted in the calculation [of the fees]." The Court of Appeals vacated the district court's award of 50 per cent, and remanded the case for the district court "to restudy the amount reasonably needed to reimburse the attorney in this instance for his labor, when measured by the employment of his time, industry and ability, in the District Court." And while Section 206(b)(1) of the Act was not applicable to this case, the Fourth Circuit directed the district court to use the limitations of that provision as a guide in its determination of reasonableness of the fee. The Court made it clear, however, that "[i]n our estimation even 25% [the maximum permissible under the statute] is too much here." Further, the Court of Appeals suggested that the district court refrain from awarding a fee for services in court "until the Secretary has made his determination [as to fees for services before him]." As to the district court's second fee order, the Court agreed with the Secretary that it was impermissible for the district court to enter that order, since the filing of the notice of appeal had taken the case "out of the trial court's jurisdiction."

By this decision, the Fourth Circuit thus joined the First Circuit (Gardner v. Menendez, decided March 2, 1967), in holding that all fees for services performed before the Secretary are within the exclusive authority of the Secretary under Section 206(a) of the Act, and that the district court must respect that authority in determining a fee for services performed in court.

Staff: William Kanter (Civil Division)

SOCIAL SECURITY ACT -- DISABILITY

DENIAL OF BENEFITS TO FORMER COAL MINER SUFFERING FROM SILICOSIS SUSTAINED; AREA OF JOB AVAILABILITY INCLUDES ADJOINING STATE WHERE CLAIMANT HAD PREVIOUSLY WORKED.

Amos P. Collins v. Gardner (C. A. 6, No. 16752, February 15, 1967, D. J. File 137-30-141).

The Sixth Circuit affirmed a decision of the district court sustaining a denial of disability benefits to a former coal miner who suffered from second to third degree silicosis. The Court of Appeals stated that there was substantial evidence that claimant retained a residual capacity for substantial gainful employment at jobs existing in the general area in which he lives. The Court also found significant, in evaluating the question of whether jobs were available within the "general area," the fact that although claimant lived in Kentucky, he had worked in West Virginia (some distance from his home) for many years. This case is one of several recent *per curiam* decisions by the Sixth Circuit upholding the Secretary's denial of disability benefits.

Staff: Walter H. Fleischer (Civil Division)

DISABILITY CLAIMANT'S BENEFITS ARE LIMITED TO RETROACTIVE PERIOD OF TWELVE MONTHS PRIOR TO FILING OF HIS APPLICATION.

Wilfred Sangster v. Gardner (C. A. 6, March 22, 1967; D. J. File No. 137-38-41).

Plaintiff's application of May 20, 1967 for disability insurance benefits was denied September 20, 1960, and plaintiff sought no judicial review of that decision. On December 20, 1960, claimant filed a second application, which was denied administratively, but upon review the district court reversed the Secretary. The Secretary then paid benefits commencing twelve months prior to the date of the last application, or the month of December 1959, pursuant to the provisions of 42 U. S. C. 423(b). On plaintiff's petition,

the district court entered a supplemental order requiring the Secretary to pay benefits from an earlier date on the theory that, since both applications covered the same facts and circumstances, the subsequent grant of benefits carried into the period of the original application.

On appeal, the Court of Appeals reversed. It held that the denial of the first application was no longer subject to review; that under the second application benefits could not start earlier than December, 1959; and that the district court was without power to extend the twelve months' retroactive limitation on benefits in 42 U.S.C. 432(b) by determining that an earlier and unreviewed decision had been wrongly decided.

Staff: Frederick B. Abramson (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General John Doar

DISTRICT COURTS

SCHOOL DESEGREGATION

STATE OFFICIALS MUST BRING ABOUT PUBLIC SCHOOL DESEGREGATION; TUITION GRANT LAW HELD UNCONSTITUTIONAL; COURT ADOPTS DESEGREGATION PLAN.

Lee and United States v. Macon County Board of Education, (M. D. Ala., Civ. Action No. 604-E, March 22, 1967, D.J. File No. 144-100-2-1).

This was originally a private desegregation suit brought by Negro children against the school board of Macon County, Alabama. The Court, in 1963, made the United States a party and amicus curiae in order that the public interest in the administration of justice would be represented. After the Alabama State Board of Education had interfered with desegregation in Macon County by ordering the closing of the desegregated school, providing tuition grants for white students to attend a segregated private school, and bussing white children from the desegregated public school to a segregated one, the State Board and its members were added as defendants. A three-judge panel was then appointed and in July 1964 the Court entered a preliminary injunction enjoining the state defendants from interfering with desegregation, ordering them to promote and encourage the elimination of racial discrimination in the public schools of Alabama, and enjoining payments under Alabama's tuition grant law for attendance at segregated private schools.

In August, 1966 the United States intervened as a plaintiff, under Title IX of the Civil Rights Act of 1964, to attack a new tuition grant statute enacted after the 1964 decision invalidating the old statute. This aspect of the case was submitted on stipulation. In September and November 1966 the plaintiffs filed supplemental complaints against the statewide defendants. The case was heard in November.

The Court found that the State Board of Education, including its President, Governor Wallace, and its Secretary, the State Superintendent of Education, had continued to interfere with and discourage desegregation and had used their powers to promote segregation. The Court said: "Not only have these defendants, through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated

themselves and, certainly from the evidence in this case, have committed the powers and resources of their offices to the continuation of a dual public school system such as that condemned by Brown v. Board of Education, 347 U.S. 483 (1954)." The Court found that the State Board of Education possessed and exercised considerable statutory authority over local school boards in the areas of finance, school location, construction and consolidation, teachers, and transportation. The Board also directly controls state trade schools, junior colleges, and colleges. As to each such area the defendants exercised their control so as to promote segregation. For example, they recommended consolidation of inadequate Negro schools with other Negro schools even though there were closer and better white schools that could have absorbed the Negro students; they offered extra teacher units to promote teacher segregation; they financed overlapping white and Negro bus routes and routes used to bus Negro children past white schools to Negro schools miles away; they financed markedly inferior schools for Negroes; they maintained segregation in junior colleges, trade schools, and state colleges; and they interfered with local efforts to desegregate public schools. The Court also found that the tuition grant statute was an unconstitutional attempt to "circumvent the principles of Brown by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes." The Court held: "It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan -- not because of teachers' employment rights, but because students are entitled to a non-racial education, and assignment of teachers to students on the basis of race denies students that right."

The Court therefore entered a four-part order. First, it laid down specific rules for the State Board of Education to follow in its activities relating to school location, construction, and consolidation; teachers; transportation; financing; and trade schools, junior colleges, and state colleges. Second, it formulated "a uniform state-wide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate." The Court said in its opinion that the statewide defendants should implement it. Third, it ordered the State Board to keep records and make reports to the Court regarding the steps taken to desegregate and the progress in desegregation. Fourth, it enjoined the administration of the tuition grant law.

Since Alabama school boards "invariably" had chosen freedom of choice as the method for desegregation, the statewide desegregation plan is a freedom of choice plan. The Court said that it "may be only an interim plan," and that another plan would have to be devised if free choice failed to eliminate the dual system of public education based upon race.

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FEDERAL ESCAPE ACT

REVISION OF POLICY UNDER 18 U. S. C. 751; FEDERAL BUREAU OF INVESTIGATION TO HAVE INVESTIGATIVE RESPONSIBILITY FOR ALL ESCAPES OF FEDERAL PRISONERS.

Under previous policy, the FBI investigated the escape from confinement, prior to conviction, of only the person over whose offense the Bureau had original investigative responsibility. It did not pursue an escapee charged with an offense outside the Bureau's defined jurisdiction. Shortly after the Bail Reform Act of 1966 (Act of June 22, 1966, 80 Stat. 217) became effective, the Bureau was allocated the responsibility for the investigation of all instances of flight by persons released under the Act, regardless of the charged offense. The effective implementation of that allocation has prompted a revision of the Department's views on the investigation of flight by persons confined, rather than released, before trial and conviction.

It is now the Department's policy that in all instances of escape by Federal prisoners from custody, prior to conviction, the investigation will be conducted by the FBI. The United States Marshals and United States Attorneys are directed to notify the nearest FBI office in the event of an escape; in cases involving special circumstances it may be desirable also to communicate with the Federal investigative agency with original jurisdiction over the offense for which the escapee was charged.

COURTS OF APPEALS

OBSCENITY

STATUTE AUTHORIZING SEIZURE BY CUSTOMS BUREAU OF OBSCENE MAGAZINES SOUGHT TO BE IMPORTED (19 U. S. C. 1305) HELD CONSTITUTIONAL AND SEIZED MAGAZINES HELD TO BE OBSCENE.

United States of America v. Claimant (Central Magazine Sales, Ltd.) of 392 copies of a magazine entitled "Exclusive", 3600 copies of a magazine entitled "Review International", Vol. 6, and 1000 copies of a magazine entitled "International Nudist Sun", Vol. 16; United States of America v. Potomac News Co., claimant of 56 cartons containing 19,500 copies of a magazine entitled "Hellenic Sun". (C. A. 4,

Nos. 10,600 and 10,798, February 16, 1967, D.J. Files 54-35-62 and 54-35-64.)

In both cases, the claimants attacked the constitutionality of the governing statute, 19 U.S.C. 1305, on the ground that it imposes a prior restraint upon the dissemination of literature in violation of the First Amendment and that there was unreasonable delay in adjudicating the cases. The Court of Appeals affirmed the district court's decision in each case that the procedural safeguards summarized in Freedman v. State of Maryland, 380 U.S. 51 (1965) had been observed and that the statute is constitutional and was applied constitutionally in this case.

In the Hellenic Sun case, the Court held that where the magazines were entered on March 4, reached the Appraisers' warehouse on March 10, the United States Attorney on March 16, and a full trial was afforded on April 1, the Court rendered its opinion on April 5 and filed a final order on April 14, 1966, there was no unreasonable delay, particularly when the district court was required to determine a question of constitutional law. In the other case, the delay was somewhat longer, from February 3 until February 17, 1966, when the libels were filed, trial on March 9 and 10, and decision on April 4. However, after trial and before decision, the Supreme Court decided Mishkin, Ginzburg and Memoirs, which resulted in a request for permission to prepare and submit supplemental briefs. The Court said "Earlier adjudication could not reasonably have been expected" in view of the important and novel questions of constitutional law which were present. The Court also affirmed the district court's conclusion of obscenity, as reported at 253 F. Supp. 485 and 253 F. Supp. 498.

MAIL FRAUD

SEARCHES AND SEIZURES; RIGHT OF SBA EXAMINERS TO INSPECT RECORDS.

Ray v. United States (C.A. 5, March 23, 1967, D.J. File 105-33-90.)

Ray was the principal operator and stockholder of First Louisiana Investment Corporation, which was licensed by the Small Business Administration as a small business investment company. He was convicted for violations of the mail fraud statute, the indictment alleging a scheme to defraud the SBA of $450,000 by means of illegal transactions with other corporations controlled by Ray. On appeal, the principal issue was the legality of an inspection of records of First Louisiana and these other corporations.

Two SBA examiners, acting on information that Ray and his companies might be involved in prohibited transactions, went to the offices of First Louisiana to conduct an examination. Ray was absent and his clerk advised that the books and records were locked up. In a connected room, the examiners found records of the other companies dominated by Ray and examined them. Several days later, after reviewing the records of First Louisiana, the SBA examiners issued a subpoena for the production of these other records, which was not honored. The Government then brought an action against Ray and his SBIC, alleging a default in the discharge of its obligations to SBA and charging that funds had been wrongfully diverted to Ray. A preliminary injunction was granted and a receiver was appointed. The receiver took possession of the books and records and subsequently made them available to the grand jury which returned the indictment. The trial court held that the evidence used in obtaining the indictment and conviction was obtained by means independent of the examination in Ray's office.

In affirming the conviction, the Fifth Circuit noted that First Louisiana was subject by statute to examination by the SBA (15 U. S. C. 687(c)) and the examiners were in the valid exercise of their duties at the time of the examination. It also noted that the records of the other companies were commingled with the records of First Louisiana and recognized the argument that those other records were properly subject to search. The Court held that, aside from these considerations, it clearly appeared from the data procured by the lawful examination of First Louisiana's records that the other corporations were being used for the purpose of violating the law. This being so, there was reasonable cause for requiring the production of the other records. "As noted in Silverthorne Lumber Co. v. United States [251 U. S. 385], even if the facts disclosed by the records of the other corporations were first disclosed by an unlawful search, they may nevertheless be proved if made known from an independent source. Nardone v. United States, 308 U. S. 338."

Staff: United States Attorney Edward L. Shaheen;
Assistant United States Attorney Dosite H. J. Perkins
(W. D. La.); Michael R. Sonnenreich (Criminal Division)

INSANITY

GOVERNMENT'S RIGHT TO PSYCHIATRIC EXAMINATION OF DEFENDANT WHERE DEFENSE IS INSANITY; NECESSITY OF TWO-STAGE TRIAL WHERE JURY FIXES PUNISHMENT ON CONVICTION.

Pope v. United States (C. A. 8, February 13, 1967, D. J. File 29-100-327.)

A few days after graduation from college defendant robbed a bank and to prevent identification ordered three bank employees to lie prone on the floor after which he shot them to death, was convicted and sentenced to death under 18 U. S. C. 2113(c), which provides that a convicted defendant shall be "imprisoned not less than 10 years, or punished by death if the verdict of the jury shall so direct."

The defense at arraignment had moved under Rule 17b for subpoenas for two psychiatrists and a psychologist to establish the defense of insanity. The motion was granted and the fees for the examinations were paid by the United States. The Government moved for an order for a similar examination of the subject and the court denied the motion "at present." On trial, after Pope had taken the stand and after the defense had offered expert testimony as to his mental condition, the Government renewed its motion and the court granted it, denying defendant's motion that he be furnished a transcript or a recording of the Government's examination.

The appellant contended that the court had no power to order such an examination; that Pope was thereby compelled to testify "by hearsay at trial through the mouth of a hostile witness"; and that even when one is ordered to testify under an immunity statute he does so in court in the presence of his counsel. In this regard the appellant urged that whereas the defense's case was based on the fact that there was no rational motive for the crime, the Government psychiatrist's testimony tended to establish that Pope's motive was to acquire money to pay his debts in order that he could marry his fiancee.

In affirming the conviction the Court noted initially that there was evidence in the case in addition to the testimony of the prosecution psychiatrist tending to show Pope's monetary motive. The Court, relying on State v. Whitlow, 45 N. J. 3, 210 A 2d 763, stated that it found no constitutional violation or prejudicial error in the examination of the defendant by Government doctors and the use of their testimony, since the defense had raised the issue of insanity, had submitted to psychiatric examination by his own examiners and had, therefore, raised the issue for all purposes. The Court also held that no error occurred in the denial to the defense of the transcript of the Government's psychiatric testimony.

As noted above, 18 U. S. C. 2113(c) empowers the jury to fix the sentence of a convicted defendant at death. The defense contended that

it had been denied its right to present evidence as to mitigation and rehabilitation to the jury as the sentencing body. The Government successfully objected to testimony as to the defendant's mental illness and the type of treatment and its duration that he would be expected to need to effect a recovery. The Court also refused the defense permission to produce a letter written in July 1965 by the Deputy Attorney General of the United States to the Chairman of the House Committee for the District of Columbia, stating that "we favor abolition of the death penalty." The Court noted that the allocution problem could best be resolved if a two-state trial were used in cases where punishment was to be fixed by the jury. However, the Court held, after discussing United States v. Curry, 358 F. 2d 904 (C.A. 2, 1966) and Frady v. United States, 348 F. 2d 84 (C.A. D.C. 1965, en banc) cert. den. 382 U.S. 909, that the trial judge may order such a two-stage trial but that his failure to do so sua sponte was not an abuse of discretion or prejudicial error.

The Court's opinion also contains a useful summary of the test of mental responsibility in each of the eleven circuits.

DISTRICT COURTS

GRAND JURY

WITNESS WHO REFUSED TO APPEAR BEFORE GRAND JURY ON BASIS THAT GRAND JURY WAS A FISHING EXPEDITION AND WAS BEING USED IMPROPERLY ORDERED TO GO BEFORE GRAND JURY; COUNSEL NOT PERMITTED TO BE PRESENT WITH WITNESS BEFORE GRAND JURY AND WITNESS HELD IN CONTEMPT FOR REFUSAL TO APPEAR BEFORE GRAND JURY WITHOUT HIS ATTORNEY BEING PRESENT.

In re: Federal Grand Jury investigation concerning Joseph Migliazza, et al. (E.D. Pa., Misc. No. 3481, February 23, 1967 and March 1, 1967).

Joseph Scalleat filed a Motion to Quash a Grand Jury Subpoena served upon him on the basis that the grand jury was on a "fishing expedition" and that the grand jury was being used improperly to gather evidence to be used for trial on a pending indictment. The United States Attorney filed an affidavit outlining the nature of the investigation concerning racketeering in the Easton, Pennsylvania area and alleged that the grand jury had information that Scalleat was an "errand boy" for Cosa Nostra overlords Russell Buffalino and Thomas Lucchese, a/k/a "Three Finger Brown". The prosecutor's affidavit also indicated that the grand jury investigation concerning Scalleat was entirely distinct

from the pending indictment. Judge A. Leon Higginbotham, Jr., after hearing, denied Scalleat's Motion to Quash the subpoena and ordered Scalleat to appear before the grand jury.

After the witness Scalleat had been directed to appear before the grand jury he appeared and refused to testify unless his lawyer were present with him in the grand jury room. After hearing, Judge Higginbotham held that the witness had the right to claim the Fifth Amendment and to consult with an attorney outside the grand jury room but he did not have a constitutional right to have counsel physically present in the grand jury room. The Judge ordered the witness to go into the grand jury room alone for the purpose of being questioned by the grand jury and the witness refused. The Judge held the witness in contempt and placed him in the custody of the Attorney General until such time as he purged himself of his contempt. Scalleat thereupon requested bail in order to take an appeal to the United States Court of Appeals for the Third Circuit, which request was refused. Scalleat took an immediate appeal to the Third Circuit in an attempt to obtain bail pending an appeal on the merits. After oral argument in the Court of Appeals that Court also refused to grant bail (No. 16, 497 - C. A. 3). The witness spent the night in jail and then immediately decided to purge himself of his contempt by appearing before the grand jury without his attorney. After spending an entire day before the grand jury, Judge Higginbotham released the witness from the custody of the Attorney General.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern III

UNITED STATES ATTORNEYS NOMINATED

The nomination of James P. Rielly as United States Attorney for the Southern District of Iowa has been submitted to the Senate for confirmation.

ASSISTANTS APPOINTED

Illinois, Northern - JOHN L. CONLON, ESQ.; Georgetown University, LL. B., and formerly State's Attorney.

New Mexico - JACK L. LOVE, ESQ.; University of New Mexico, LL. B., and formerly Assistant D. A., Assistant United States Attorney, and in private practice.

South Carolina (Western) - WILLIAM B. LONG, ESQ.; University of South Carolina, LL. B., and formerly in private practice.

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

UNLICENSED EXPORTATION OF ARMS AND MUNITIONS

CONSPIRACY TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE AND TO BEGIN MILITARY EXPEDITION AGAINST FRIENDLY NATION; ATTEMPT TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE.

United States v. Rolando Masferrer Rojas, et al (S. D. Fla., March 17, 1967) D.J. File 146-1-95-27.

On January 2, 1967, Bureau of Customs agents arrested Rolando Masferrer Rojas and seventy-five other individuals at Marathon, Florida, and charged them with conspiring to export arms and munitions without having obtained a license as required by 22 U. S. C. 1934. At the time of the arrests, Customs agents seized a boat and a large supply of weapons and munitions. On February 27, 1967, a grand jury in the Southern District of Florida returned a two-count indictment against Masferrer and five others who were arrested at Marathon, charging them with conspiring to launch a military expedition from the United States against the Republic of Haiti in violation of 18 U.S.C. 960 and to export arms and munitions in violation of 22 U.S.C. 1934. It also charged them with attempting to export arms and munitions from the United States without a State Department license in violation of 22 U.S.C. 1934. Also named as a defendant in the conspiracy count was Mitchell Livingston Wer Bell, III, who was not among those arrested at Marathon. The complaint against the individuals arrested at Marathon but not indicted was dismissed on motion of the Government.

Four of the defendants were arraigned on March 17, 1967, and entered "not guilty" pleas. The indictment against Wer Bell was dismissed on March 23, 1967 on the motion of the Government. The other two defendants are scheduled for arraignment on March 31, 1967. The defendants have been granted 40 days for filing motions, and the trial date has been set for November 6, 1967.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Lloyd G. Bates (S.D. Fla.); and James P. Morris (Internal Security Division)

ESPIONAGE

CONSPIRACY TO COMMIT ESPIONAGE AND TO ACT AS AGENT FOR FOREIGN GOVERNMENT WITHOUT REGISTERING.

United States v. William Henry Whalen (E. D. Va., March 1, 1967) D. J. File 146-7-79-412.

On March 1, 1967, William Henry Whalen, a retired Army lieutenant colonel, was sentenced to 15 years imprisonment on his plea of guilty to a charge of conspiring to commit espionage on behalf of the USSR and conspiring to act as an agent for a foreign government without registering with the Secretary of State.

Initially, a Federal Grand Jury had returned a three-count indictment charging Whalen with violations of Sections 794(c), 371 and 951 of Title 18, United States Code. However, after involved argument on his pretrial motions, Whalen entered a plea of guilty to an Information filed by the United States Attorney charging a violation of Section 793(g) of Title 18, United States Code and to the second count of the indictment which charged a conspiracy to violate Section 951. Thereafter, the Government dismissed Counts 1 and 3 of the original indictment.

Staff: United States Attorney C. Vernon Spratley (E. D. Va.); Brandon Alvey and Lee M. Schepps (Internal Security Division)

SUBVERSIVE ACTIVITIES CONTROL ACT

REGISTRATION REQUIREMENTS AS TO COMMUNIST PARTY VIOLATE PRIVILEGE OF OFFICERS AND MEMBERS AGAINST SELF-INCRIMINATION.

Communist Party of the United States v. United States (C. A. D. C., March 3, 1967) D. J. File 146-7-51-566.

In 1961 the Supreme Court affirmed the judgment of the Court of Appeals which had affirmed the order of the Subversive Activities Control Board requiring the Communist Party to register under the Act as a "Communist-action organization", but reserved passing upon the issue of self-incrimination on the ground it was premature. The Party did not register and it was indicted in 1961 for failure to register. A conviction under the Act was reversed by the Court of Appeals on the ground that registration by the officers would incriminate them. Communist Party v. United States, 118 U.S. App. D.C. 61, 331 F. 2d 807, cert. denied, 377 U.S. 807, but remanded the case for a new trial on the issue of wilfulness if the Government should ask a new trial, suggesting that under the regulations some "other person" could register the Party. A second indictment was returned in 1965 and the Party was convicted on both indictments.

On March 3, 1967, the Court (Prettyman, Senior Circuit Judge and Danaher and McGowan, Circuit Judges) reversed. The majority opinion (McGowan,

Circuit Judge) relied largely on Albertson v. Subversive Activities Control Board, 382 U.S. 70, which held unconstitutional the requirement of the Act that the individual members register with the Attorney General if the Party itself did not. The opinion said that the filling out and filing of the registration forms required by the Attorney General's regulations might involve the officers in an admission of a crucial element of a crime, citing Scales v. United States, 367 U.S. 203, a conviction under the membership clause of the Smith Act. The Court said that the Act included simultaneously the disclosure of records and a criminal prohibition in an "area permeated by criminal statutes", that the Act compelled the only persons with authority to compile and file a list of members to incriminate themselves, and that the application of the Fifth Amendment was not to be limited by theories of artificial legal personality, referring to United States v. White, 322 U.S. 694, and cases requiring corporate officers to produce records. In a separate concurring opinion Senior Circuit Judge Prettyman said, referring to the "other person" provision of the regulations (at the second trial two FBI informants testified they would have been willing to register the organization) that it would compel the officer to incriminate himself by giving the information to the "volunteer".

Staff: The appeal was argued by Kevin T. Maroney (Internal Security). With him on the brief were David Bress (U.S. Attorney, District of Columbia) and George B. Searls (Internal Security)

NEUTRALITY LAWS

STATUTE ENACTED IN 1917 TO PROHIBIT CONSPIRACIES WITHIN UNITED STATES TO INJURE OR DESTROY PUBLIC PROPERTY IN FOREIGN COUNTRIES WITH WHICH UNITED STATES IS AT PEACE NOT VOIDED BY DOCTRINE OF DESUETUDE.

United States v. Dunbier and Elliott, Doc. No. 66 Cr. 944, (S.D.N.Y., March 10, 1967, D.J. File 71-125-1).

On November 21, 1966 Rolf Dunbier and Jay Aubrey Elliott were indicted under Section 956 of Title 18, United States Code, for conspiring within the United States to injure and destroy a railroad bridge over the Kaleya River within the Republic of Zambia. The indictment was the first brought under the section which was designed to punish acts of interference with the foreign relations of the United States and was passed with the Neutrality Legislation of 1917.

In his motion to dismiss, Elliott attacked the constitutionality of Section 956 on its face and as applied. He argued that the words "at peace" as used in the statute were impermissibly vague, that Congress did not have the power to prohibit agreements within the United States to destroy property without the

United States, that in light of recent events in Cuba, North Korea, North Vietnam, etc., Section 956 was being unlawfully and discriminately applied to him, and that the law, unused since its passage, was void for desuetude. All of these arguments were rejected by Judge Irving Ben Cooper.

The Court initially disagreed with the contention that the words "at peace" were unconstitutionally vague, but pointed out that in any event, as applied to the instant case, there was no vagueness since no matter how the term "peace" was defined, the United States and Zambia were at peace.

Turning to the argument that Congress could not prohibit a conspiracy to do an act outside the border of the United States, the Court observed that if consummated, the conspiracy would have disrupted the economy of Zambia and that it was inconceivable that such an act, conceived in America by Americans, would not have seriously affected United States relations with Zambia. The prosecution of the conspirators, the Court concluded, was "well within the legitimate interests of the United States Government."

As to the remaining arguments, the Court pointed out that there was no showing that the prosecution was motivated by any evil or unlawful intent or that there was discrimination among a class of persons in similar circumstances; accordingly, there was no prohibited selective application. Finally, the Court held that the doctrine of desuetude did not void Section 956. The Court made clear that the purposes of the statute were as vital today as when passed.

Staff: United States Attorney, Robert M. Morgenthau; Assistant United States Attorneys Stephen E. Kaufman and Frank M. Tuerkheimer; James P. Morris (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

EMINENT DOMAIN

INTERVENTION; ASSIGNMENT OF CLAIMS; LANDOWNERS WHO PURCHASED LAND SUBSEQUENT TO IMPOSITION OF EASEMENT BY UNITED STATES BUT WHO WERE OWNERS AT TIME OF FILING OF DECLARATION OF TAKING WERE NOT ENTITLED TO INTERVENE IN CONDEMNATION SUIT OR MAKE CLAIM AGAINST CONDEMNATION AWARD.

Toles v. United States, 371 F. 2d 784 (C. A. 10, January 11, 1967, D. J. File 33-32-199-34.)

The Government took, by physical possession, an easement across the subject property to build and maintain a cable line in connection with a missile system for Walker Air Force Base. Appellants purchased the subject lands by warranty deeds in 1961 and 1962. In 1964, the Government filed the complaint and declaration of taking to confirm the taking and determine just compensation. Thereafter, appellants' deed having been found by the Government, it moved to dismiss as against them and to name as defendants appellants' grantors, who were the record owners of the subject property at the time of the physical taking. Appellants moved to intervene, on the grounds that they had an interest in seeing that the grantors prosecuted the claim for compensation with vigor, pursuant to Rule 24(a)(2), F. R. Civ. P. , and that they were entitled to make a claim against the condemnation award pursuant to Rule 24(a)(3).

The grantors and the Government agreed between themselves as to the amount of compensation and, on the Government's motion, the district court denied appellants' motion to intervene and other supplemental relief. The Court of Appeals affirmed, holding that appellants' motion to intervene in the prosecution of the condemnation suit pursuant to Rule 24(a)(2), F. R. Civ. P. , was precisely contrary to both the decision of United States v. Dow, 357 U. S. 17 (1958), and the purpose of the so-called Anti-assignment Act, and that such intervention was equally foreclosed since it would complicate or hamper the Government's conduct of the condemnation proceedings.

The Court of Appeals pointed out that the allowance of intervention for the purpose of bolstering inadequate representation is restricted to cases where the proposed intervenor has an "interest," which means a

specific legal or equitable interest in the claim and appellants, because of the Anti-assignment Act, had none as against the Government.

In regard to the question with relation to appellants' claim against the condemnation award pursuant to Rule 24(a)(3), F. R. Civ. P., the Court of Appeals pointed out that, although the Anti-assignment Act does not render the assignment void as between the parties, since the warranty deeds in question made no reference to a condemnation award, the deeds could not be construed as an assignment of the award. Hence, the award was not a chose in which appellants had an interest. The Court of Appeals concluded by pointing out that appellants' claim against their grantors was not dependent upon the original proceedings and that, as an independent claim, the court lacked jurisdiction since there was not complete diversity between the parties.

Staff: Robert M. Perry (Land and Natural Resources Division).

PUBLIC LANDS

SCRIP SELECTION; NO PROPERTY RIGHT IN FLOATING SCRIP; ADMINISTRATIVE LAW AND PROCEDURE.

John A. Shaw v. Stewart L. Udall (D. Ore., January 13, 1967, D. J. File 90-1-4-102.)

Plaintiff, the holder of scrip entitling him to select 160 acres of public land, brought suit for review of the Secretary's decision rejecting application. Plaintiff holds a Valentine special certificate for 40 acres, a Gerard special certificate for 80 acres, and a Porterfield warrant for 40 acres. The authenticity and validity of the scrip are not questioned. Plaintiff selected 160 acres in Lincoln County, Oregon, and was informed by officials of Bureau of Land Management at that time that the 160 acres selected were not practical for continued timber management by BLM. However, his application for patent thereafter was denied by BLM on the basis of the opinion of the Acting Chief of the Special Section of that Bureau that the lands should be administered under an intensive forest management program and that the loss of that tract would disrupt that program.

Plaintiff appealed the decision and at the same time filed an affidavit in which he committed himself to enter a cutting program consistent with a sustained yield program in effect by the Bureau. In addition, during the course of the initial appeal, the Department of the Interior had offered the exchange of the particular tract with a third party and to

allow harvesting thereon in return for other private lands. That offer, however, was not accepted.

The decision of the Acting Chief of the Special Section of BLM was affirmed by the Acting Secretary of the Interior, who found that the land was unsuitable for disposal by scrip location and that the refusal to classify the land as suitable was not based on an error of fact or judgment but was entirely proper. A motion for reconsideration was denied and the Assistant Secretary emphasized the provisions of the Taylor Grazing Act, which authorized the Secretary in his discretion to examine and classify lands which are proper for acquisition in satisfying outstanding scrip rights.

In an action in the District Court to set aside the Secretary's decision, the Court adopted the defendant's position that classification for disposal of public lands is a matter committed by law to agency discretion and thus exempted from judicial review. In addition, the Court concluded that the action is, in fact, one against the United States and it has not consented to be sued. This conclusion was made by the Court, notwithstanding decisions in Adams v. Witmer, 271 F. 2d 29, and Coleman v. United States, 363 F. 2d 190, because the Court held that "floating scrip rights" are not property rights in specific property.

As to the merits, the Court, in treating the case as a review of the Secretary's decision under the Administrative Procedure Act, found that the Secretary's determination that the lands were more valuable or suitable for any other use than grazing correctly determined that they were not available and proper for scrip selection. The Court determined that this construction is entirely consistent with the conservation purposes of the Taylor Grazing Act, Carl v. Udall, 309 F. 2d 653, and the Secretary's decision was supported by substantial evidence.

Staff: Assistant United States Attorney Jack G. Collins (D. Ore.).

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURT OF APPEALS - CRIMINAL CASES

MANDAMUS

QUESTION OF ABUSE OF DISCRETION BY DISTRICT COURT IN ORDERING GOVERNMENT TO TURN OVER, BY WAY OF BILL OF PARTICULARS, NAMES OF CERTAIN INFORMANTS WHO WERE PROSPECTIVE WITNESSES IN CRIMINAL CASE.

Hon. Hubert L. Will, Judge, U.S. District Court v. United States (Sup. Ct. No. 918, certiorari granted March 13, 1967; D.J. File 5-23-4628).

This mandamus proceeding grew out of an indictment for income tax violations against one Horwitz, who was granted an extensive bill of particulars by Judge Will of the Northern District of Illinois. One item which the Government refused to furnish, in the face of the Judge's order, was the names of third-party informants--not participants in the alleged offense--to whom the defendant had made oral statements. The Government urged that there was always a danger that such informants would be tampered with if their identities were revealed. Petitioner, noting that the Government had not shown any specific danger in this case, declined to change his order, and the Government brought a mandamus proceeding in the Seventh Circuit. That Court granted the writ without opinion--directing petitioner to vacate his order--on October 4, 1966. Petitioner then applied to the Supreme Court, which has granted certiorari.

Staff: United States Attorney Edward V. Hanrahan;
Assistant United States Attorneys John P. Lulinski,
Lawrence J. Weiner, Richard J. Schultz and
Robert A. Galbraith (N. D. Ill.)

SUPPRESSION OF EVIDENCE

JURISDICTION OF DISTRICT COURT OVER PROCEEDING TO SUPPRESS EVIDENCE AT SOME FUTURE CRIMINAL PROCEEDING; RETURN OF COPIES MADE BY IRS AGENTS; APPEALABILITY.

Jack Goodman v. United States, et al. (C.A. 9, November 18, 1966, D.J. File 5-12-5075).

Goodman's complaint, filed against the United States, the United States Attorney and four IRS officials, alleged that the agents had obtained his records by misrepresentations, and prayed that the records and all copies made by the agents be returned to him and that the evidence be suppressed in any future criminal proceeding (IRS had not yet decided to recommend prosecution). All original records were returned to Goodman either before, or shortly after, the filing of the complaint. The Government moved to dismiss on the ground that the court had no jurisdiction to consider a proceeding in which the only real relief sought was suppression of evidence in a possible future criminal case. The district court denied the motion and ordered a hearing on the merits, but the court refused to direct IRS to obey a subpoena directing production of its records of the investigation of Goodman. After a lengthy hearing the court found that Goodman had not been deceived and denied the relief requested in the complaint.

The Ninth Circuit did not discuss the question of the district court's jurisdiction. It held the district court's order appealable because it sought, not only suppression of evidence, but return of the copies made by IRS. The case was remanded for further proceedings because the record did not support the district court's action in quashing the subpoena for production of IRS records.

If this action be regarded as an independent equitable proceeding, it is arguable that the prayer for a "return" of copies made by the agents is insufficient to sustain the jurisdiction of the district court on the ground that the only apparent purpose for such "return" was to ensure suppression of the evidence should criminal proceedings ever be instituted against Goodman. Eastus v. Bradshaw, 94 F. 2d 788 (C.A. 5); Centracchio v. Garrity, 198 F. 2d 382 (C.A. 1); Benes v. Canary, 224 F. 2d 470 (C.A. 6). On the other hand, if the action be regarded as a motion under Rule 41(e), Federal Rules of Criminal Procedure, it is questionable whether it is appealable since it did not seek solely the return of property. DiBella v. United States, 369 U.S. 121, 131-132. In view of the fact that the statute of limitations on any possible criminal prosecution of Goodman has over a year to run and there has as yet been no impairment of investigative or prosecutorial functions, the Solicitor General has decided against a petition for certiorari at this juncture.

Staff: Assistant United States Attorney Dzintra I. Janavs (S.D. Cal.), John M. Brant, Meyer Rothwacks and Joseph M. Howard (Tax Division).

DISTRICT COURTS - CRIMINAL CASES

STATUTE OF LIMITATIONS

STATUTE OF LIMITATIONS HELD TO BAR PROSECUTION FOR CRIMES AGAINST THE REVENUE INVOLVING FALSE RETURNS FILED AFTER STATUTORY DUE DATE BUT WITHIN PERIOD OF GRANTED EXTENSION OF TIME WHERE INDICTMENT WAS RETURNED WITHIN SIX YEARS OF FILING BUT MORE THAN SIX YEARS AFTER STATUTORY DUE DATE.

United States v. Habig and Schroering (S.D. Ind., No. IP 66-Cr-138, January 23, 1967, D.J. File 5-26S-1093).

Defendants were indicted for crimes against the revenue involving the filing of false returns. The indictment was returned more than six years after the statutory due date for the filing of the returns but within six years of the actual filing dates, time extensions for the filing having been granted by the District Director. Defendants moved to dismiss certain counts, arguing that, under Section 6531 of the Code, the "rules of Section 6513 shall be applicable"; that the latter section provides that any return filed before the prescribed last day for filing shall be considered as filed "on such last day"; and that the last day for filing "shall be determined without regard to any extension of time granted the taxpayer * * * ". The Government argued that to adopt this argument would be to produce an absurd result, i.e., that the statute of limitations began to run before any offense was committed; that Section 6513(a) applies only to early returns and has no application to a case like this where the returns are filed late; and that in this case the last date prescribed for filing is irrelevant. The District Court dismissed the counts in question, following Hull v. United States, 356 F. 2d 919 (C.A. 5), and disagreeing with United States v. Hensley, 257 F. Supp. 987 (D. New Mex.).

The Solicitor General has authorized a direct appeal to the Supreme Court.

Staff: Stanley P. Gimbel (Tax Division)

DISTRICT COURT - CIVIL CASES

WAIVER OF STATUTE OF LIMITATIONS

TAXPAYER'S TYPEWRITTEN STATEMENT ATTACHED TO FORM 656, OFFER IN COMPROMISE, STATED THAT IT DID NOT WAIVE ANY

DEFENSES, INCLUDING THAT AFFORDED BY THE STATUTE OF LIMITATIONS AND THEREFORE WAS INCONSISTENT WITH THE WAIVER REGARDING THE STATUTE OF LIMITATIONS CONTAINED IN FORM 656 AND RENDERED SAID WAIVER VOID.

United States v. Harris Trust & Savings Bank, et al. (N.D. Ill., No. 64 C 1051, February 17, 1967, D.J. File 5-23-4260), (67-1 U.S.T.C., ¶12,456).

An offer was submitted by the Harris Bank on August 3, 1960 to compromise taxes assessed against the estate for which it was the executor. This offer was rejected and the Government commenced suit for collection on June 16, 1964. If the agreement to the suspension of the running of the statute of limitations contained in Item 6 of Form 656, Offer in Compromise, submitted by the executor were to be held effective, the Government's suit was timely. However, in the offer submitted to the Government the words "See Attached Statement" were typed next to Item 5 of the Form 656, which states: "5. The following facts and reasons are submitted as grounds for acceptance of this offer: ____________________". The attached statement, as relevant, stated:

> This statement is made to detail the factual background under which this Offer is made, and show why it should be accepted:
>
> * * *
>
> (b) The assessment of Federal Estate Tax is presently unenforceable under the statutes because of lapse of time, and
>
> * * *
>
> The Taxpayer does not by this Offer admit the validity of the assessment in this case, or waive any defense thereto, including any statute of limitations or other restriction upon assessment or collection of the challenged tax.

The defendants moved to dismiss the Government's complaint asserting that it was barred by the six year statute of limitations on collection. Section 6502(a) of the Internal Revenue Code of 1954. Defendants contended that the typewritten portions of the Offer constituted

a refusal to agree to the suspending of the running of statute of limitations while the offer was under consideration and that, being typewritten, they overrode the printed form. H&B Machine Co. v. United States, 11 F. Supp. 48 (Ct. Cl. 1935). The Government answered that the defendants had failed to properly draw attention to their refusal to agree to the suspending of statute's running. Item 5 of Form 656 relates to reasons why the offer should be accepted. As Item 6, the statute of limitations provision, was left unmarked on the form, the Government contended that it would be a great administrative burden to examine all attachments to offers in compromise for terms which might affect the Government's rights under the statute of limitations. In addition, the Government contended that the typewritten statement was not in fact contrary to the waiver provisions of Form 656. It argued that the typewritten statement was susceptible to an interpretation whereby it would only constitute a retention of such defenses as the defendants possessed at the time the offer was made and not a modification of the terms of Form 656 which suspend the running of the statute of limitations while the offer is under consideration and for one year thereafter.

The Court, treating the defendants' motion as one for summary judgment, found for the defendants. An appeal is under consideration.

Staff: United States Attorney Edward V. Hanrahan and Assistant United States Attorney Richard G. Schultz (N.D. Ill.); Thomas H. Boerschinger (Tax Division)

QUIET TITLE

FEDERAL TAX LIENS DID NOT ATTACH TO PROCEEDS FROM SALE OF REAL ESTATE REALIZED BY THE STATE OF CALIFORNIA IN SATISFACTION OF PRIOR CITY AND COUNTY AD VALOREM TAXES.

Publix Title Co. v. United States (S.D. Cal., No. 64-865-S, January 4, 1967; D.J. File 5-12-4696.) 67-1 U.S.T.C., ¶9291.

On August 12, 1955, one of the partners in the taxpayer-partnership purchased the real estate in question, the property at that time being subject to liens for unpaid county and city ad valorem property taxes for the years 1952 through 1955. On June 30, 1953, the property was "sold" by operation of law to the State for delinquent taxes pursuant to Section 3436 of the Revenue and Taxation Code of

California. On July 1, 1958, the property was deeded to the State pursuant to Section 3511 of the Revenue and Taxation Code and on February 23, 1960, the property was sold at public auction by the Los Angeles County Tax Collector to the predecessors in title of the plaintiff of this proceeding for the sum of $10,600. At the time of the auction the redemption price was $2,966.28, leaving a surplus in excess of $7,600 which was placed in the general fund and distributed to other State agencies.

The plaintiffs initiated this action to quiet title to the property involved and the United States impleaded the local taxing authorities as defendants seeking to foreclose against the surplus. The federal tax liens in question were assessed in 1955 and 1956 and notices thereof also filed in the same years. The Court held that the deeding of the property to the State in 1958 extinguished the federal tax liens from said property as well as all other interests therein, except that the former owner had a right of redemption which was extinguished by his failure to redeem prior to the sale to plaintiffs in 1960. The Court further held that the federal tax liens did not attach to the surplus realized by the State. No appeal of this matter is contemplated inasmuch as (1) the action taken by the State was effective to extinguish the junior federal tax liens from the property under the rationale of United States v. Brosnan, 363 U.S. 237; and (2) under California law the taxpayer had no right to the surplus realized from the sale by the State, thereby preventing the federal liens from attaching to the surplus monies.

Staff: United States Attorney William M. Byrne, Jr.; Assistant United States Attorneys Loyal E. Keir and Arthur M. Greenwald (C.D. Calif.)

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