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# UNITED STATES ATTORNEYS
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Assistant Attorney General Donald F. Turner

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United States v. Beatrice Foods Co., et al. (D. Mont., Cr. 345, May 5, 1967; DJ File 60-139-154).

On May 5, 1967, Judge W. J. Jameson handed down an opinion denying motions to dismiss of Wilcoxson's, Inc. and Harold Wilcoxson, two of 17 defendants in this case, which involved a conspiracy to fix prices on nonfluid dairy products in Montana (indictment filed November 18, 1966).

Wilcoxson and his company had moved to dismiss on the ground, among others, that the interstate commerce allegations were insufficient to state an offense. The court found that allegations of substantial purchases by Montana dairies of nonfluid dairy product ingredients and packaging materials from out of state suppliers were sufficient.

Harold Wilcoxson also moved on the ground that he had obtained personal immunity through testimony given in connection with returning his corporation's documents pursuant to subpoena duces tecum. He argued that although the subpoena was addressed to the corporation, the Marshal's return showed that it was served on him as president, and further, that his testimony before the grand jury provided leads to evidence that might incriminate him under the link in the chain test.

Judge Jameson held that on the face of the present record, it appeared that Wilcoxson's testimony was "auxiliary to the production of documents" and "would not form a 'link in the chain of evidence' against him." However, the court ruled that the motion could be reopened if Wilcoxson could show at trial or before that his testimony was such a link. By way of dictum the court warned that under Curcio v. United States, 354 U.S. 118, 123 (1957), the Government could not require a witness producing corporate documents to explain or account for their nonproduction without granting immunity.

Staff: Lyle L. Jones, Marquis L. Smith, Robert J. Staaland Shirley Z. Johnson (Antitrust Division).

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# CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

## COURTS OF APPEALS

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SALARY OF FEDERAL EMPLOYEE MAY NOT BE GARNISHED TO EFFECTUATE CHAPTER 13 WAGE EARNER PLAN.

United States v. Krakover (C.A. 10, No. 8786; May 2, 1967; DJ File 145-3-774).

The United States appealed from a referee's order, affirmed by district court, directing the Treasury Department to pay certain sums out of one of its employee's future earnings to a trustee appointed to administer a wage earner plan under Chapter 13 of the Bankruptcy Act. The Court of Appeals reversed the order on the ground that the general language of Section 658(2) of the Act, 11 U.S.C. 1058(2), which provides that the bankruptcy court may, during the period of extension, "issue such orders as may be requisite to effectuate the provisions of the plan, including orders directed to any employer of the debtor," did not waive the United States' immunity from suit, and that the salary of a Federal employee could not, therefore, be garnished. The Court observed that its conclusion did not deprive Federal employees of the benefits of Chapter 13 since the compulsion required to effect the payment to the trustee of a part of the wages as earned could still be exercised against the debtor himself.

Staff: Florence W. Roisman (Civil Division)

### FEDERAL TORT CLAIMS ACT

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United States v. Harl Cole (C.A. 5, No. 23,564; May 2, 1967; DJ File 157-19-191).

Prior to the Supreme Court's decision in United States v. Demko, 385 U.S. 149, the District Court for the Northern District of Georgia had awarded Tort Claims Act damages to plaintiff, a federal prisoner injured while performing assigned prison work. Plaintiff was confined in a prison on an Air Force base, but was assigned work on the base outside the prison area. The district court had rejected the Government's argument that the

compensation benefits available under 18 U.S.C. 4126 to prisoners injured in "any work activity in connection with the maintenance or operation of the institution where confined" furnished the prisoners' exclusive remedy against the United States. In reversing that decision on the authority of Demko, the Fifth Circuit also held in effect that the compensation was exclusive where the prisoner was injured while working outside the confines of the prison camp itself, though still on the Air Force base.

Staff: Richard S. Salzman (Civil Division)

THIRD-PARTY CLAIM FOR INDEMNITY UNDER TORT CLAIMS ACT PRECLUDED WHERE PLAINTIFF'S INJURIES ARE COMPENSABLE UNDER COMPENSATION ACT.

Wien Alaska Airlines, Inc. v. United States (C.A. 9, No. 21,004; April 6, 1967; DJ File 157-6-142).

A Federal Aviation Agency employee in the course of his employment was killed when a Wien Alaska aircraft, in which he was a passenger, crashed. His administratrix brought a wrongful death action in the state court, alleging that the airline's negligence caused his death. The airline then impleaded another FAA employee whom it claimed was responsible for the crash, seeking full indemnity from him if it was held liable to the administratrix. The cause was removed to the federal court where Wien Alaska added the United States as a third-party defendant. The Government moved for summary judgment for the reason that, since its deceased employee was insured under the Federal Employees' Compensation Act, and since Section 7(b) of the Act, 5 U.S.C. 757(b), barred any tort claim by his administratrix against the United States, the United States could not be held liable to the airline for any part of her claim against it.

The district court granted summary judgment and dismissed the airline's third-party action against the United States on the authority of the Ninth Circuit's decision in United Air Lines, Inc. v. Wiener, 335 F. 2d 379. On appeal, the airline asked the Ninth Circuit to overrule its earlier Wiener decision. The Court of Appeals, however, affirmed the district court's decision on the authority of Wiener, ruling once again "that a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured." The airline has filed a petition for rehearing en banc.

Staff: United States Attorney Richard L. McVeigh and Assistant United States Attorney Marvin S. Frankel (D. Alaska)

## GOVERNMENT EMPLOYEES

### POST OFFICE REGULATION FORBIDDING "MOONLIGHTING" IN STATE OR LOCAL GOVERNMENTAL JOBS INVALIDATED.

Mortimer W. Coakley v. Postmaster of Boston (C.A. 1, No. 6758; March 16, 1967; DJ File 145-5-2860).

Plaintiff, a postal employee, was discharged from his position in the Boston post office because, in violation of a postal regulation, he also worked as a full-time fireman for the Boston Housing Authority. The same regulation permitted him, had he so desired, to work full-time for a private employer in addition to holding his post office job. The Court of Appeals held that the regulation, which is based upon a general Civil Service regulation followed throughout the executive branch ( 5 C.F.R. 734.202-.203), was invalid, because in the Court's view there was no rational basis for prohibiting "moonlighting" for state or local governments while permitting it for private employers. The First Circuit stated that it was not passing on the reasonableness of a regulation forbidding all moonlighting, should one be promulgated.

Staff: United States Attorney Paul F. Markham and Assistant United States Attorney Thomas P. O'Conner (D. Mass.)

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# CIVIL RIGHTS DIVISION

Assistant Attorney General John Doar

## COURT OF APPEALS

### CONSPIRACY AGAINST RIGHTS OF CITIZENS

CONSPIRACY TO INTERFERE WITH ANY CITIZEN OF UNITED STATES PARTICIPATING IN MARCH AND ASSEMBLY PROTESTING DENIAL OF RIGHT TO REGISTER TO VOTE IN FEDERAL ELECTIONS VIOLATES 18 U.S.C. §241, NOTWITHSTANDING THAT NO STATE OFFICIALS WERE INVOLVED IN CONSPIRACY.

Wilkins, et al. v. United States (C.A. 5, No. 23289; April 27, 1967; DJ File 144-2-470).

Appellants were convicted of violating 18 U.S.C. 241 after a jury trial in the District Court for the Middle District of Alabama, and sentenced to the maximum term of 10 years in prison. One of the acts of the conspirators was the killing of Mrs. Viola Liuzzo while she was returning to Selma, Alabama, after the 1965 march from Selma to Montgomery which was carried out to protest racial discrimination in the voting registration process. The march had been authorized by an order of the District Court (Johnson, J.) in Williams v. Wallace, 240 F. Supp. 100, and the indictment charged a conspiracy to interfere with the right to participate in the march as authorized by the court order.

As recognized by the Court, the principal question in the case was whether or not the indictment alleged the violation in 18 U.S.C. 241, which criminally punishes conspiracies to interfere with the exercise of rights secured by the Constitution or laws of the United States. The Court of Appeals unanimously held that it did, relying principally on United States v. Cruikshank, 92 U.S. 542 (1875). The Court held that the right to participate in this march was "an attribute of national citizenship" implicit in the Constitution wholly apart from the Fourteenth Amendment. That was so, said the Court, because the march was "an assembly for the purpose of protesting" "denial of the right to register to vote in federal elections" and it was a privilege of national citizenship to assemble about such a distinctly "federal" matter.

While the Court indicated its view (contrary to an alternative argument of the Government) that not every indictment charging a conspiracy to interfere with a federal court order would be within Section 241 regardless of the

nature of the order, here the court order was based upon an underlying federal right. And the order "described [the] times, places, and the nature of the federally guaranteed rights to be exercised. It thus fully informed the defendants of the offenses charged against them and limited the bounds within which the prosecution had to operate".

Staff: Assistant Attorney General John Doar, St. John Barrett, David L. Norman, Alan G. Marer, Louis M. Kauder, Alvin Hirshen, Owen Fiss (Civil Rights Division); United States Attorney Ben Hardeman and Assistant United States Attorney James O. Sentell (M. D. Ala.)

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# CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## INDICTMENTS UNDER BAIL-JUMPING STATUTE

In a recent bail-jumping case prosecuted under 18 U.S.C. 3146 (under the recent Bail Reform Act, 18 U.S.C. 3146 has been modified and redesignated as 18 U.S.C. 3150), Arnold Romano v. United States, No. 1282, O.T. 1966, the indictment alleged that the defendant jumped bail while under a charge of a felony. Petitioner argued that the statute was invalid on its face in that, where a defendant was under a charge of a felony at the time he incurred a bail forfeiture, the fact of the felony charge would be an element of the offense and would therefore he brought to the attention of the jury to the prejudice of the accused. In support of this argument, petitioner referred to the present bail-jumping statute (18 U.S.C. 3150) which, he believed, did not make the degree of the crime--i.e., felony or misdemeanor--an element of the offense, but rather, as in other recidivist legislation, merely a factor to be considered upon sentencing. (Under the provisions of both 18 U.S.C. 3146 and 18 U.S.C. 3150, the crime of bail-jumping is a misdemeanor if the defendant jumped bail while a material witness, or while under a charge of a misdemeanor, and a felony when the defendant has jumped bail while under a charge of a felony.)

It is our opinion that under both 18 U.S.C. 3146 and its present successor, 18 U.S.C. 3150, the degree of the crime is not an element of the offense--that the degree should be considered only upon sentencing. Therefore, in order to avoid needless problems which might arise, the indictment need not, and should not, allege either the degree, or the nature, of the crime under which the defendant was charged when he incurred a forfeiture. A mere allegation that the defendant was charged with a "crime" or "offense" would satisfy the requirements of the statute.

This, of course, would not limit the nature of the proof to establish the fact of the underlying crime. Thus, if the defendant refuses to stipulate to the fact of the underlying crime, it might prove necessary to enter a felony indictment into evidence as proof. And in cases where intent is at issue, it might be necessary to show the severity and opprobrium of the underlying crime to establish motivation on the part of the defendant to intentionally jump bail. But in any event, the degree and nature of the underlying crime ought not to be alleged in the indictment.

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## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

### UNITED STATES ATTORNEY CONFIRMED

The nomination of James P. Rielly as United States Attorney for the Southern District of Iowa has been confirmed by the Senate.

Mr. Rielly was born November 23, 1931 at Rock Valley, Iowa, is married and has five children. He attended Westmar College, LeMars, Iowa from 1950 to 1953 where he received his B. A. Degree. He also attended the University of Iowa Law School, Iowa City, Iowa from 1955 to 1958 where he received his J. D. Degree. Mr. Rielly was admitted to the Iowa Bar in 1958. He served in the United States Army from 1953 to 1955, was a partner in several private law firms in Oskaloosa from 1958 to 1967, and, until his appointment as United States Attorney, was a Legal Representative with the Iowa Highway Commission, Ames, Iowa.

### ASSISTANTS APPOINTED

Illinois, Northern - CHARLES BOYLE, ESQ.; Loyola University, J. D. and formerly in private practice.

Illinois, Southern - FRANK VIOLANTI, ESQ.; Fordham University, LL. B., and formerly attorney with FTC, the Department of Justice, and in private practice.

Maryland - ALAN LIPSON, ESQ.; University of Maryland, LL. B., and formerly Assistant State's Attorney, and in private practice.

New York, Eastern - STUART GOLDBERG, ESQ.; Cornell University LL. B.

New York, Southern - DAVID PAGET, ESQ.; New York University, LL. B., and formerly in private practice.

New York, Southern - JAMES ZIRIN, ESQ.; University of Michigan, J. D., and formerly in private practice.

Pennsylvania, Eastern - AUSTIN HOGAN, ESQ.; Yale University, LL. B., and formerly in private practice.

Tennessee, Middle - CARLTON PETWAY, ESQ.; North Carolina

College, LL.B., and formerly Assistant Public Defender, an attorney with the U. S. Department of Labor, and in private practice.

Texas, Western - RALPH HARRIS, ESQ.; State Methodist University, LL.B., and formerly law clerk to U. S. District Judge and in private practice.

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# IMMIGRATION AND NATURALIZATION SERVICE

## Commissioner Raymond F. Farrell

## NATURALIZATION

### NATURALIZATION DENIED BECAUSE OF FALSE TESTIMONY ON MATTER NOT MATERIAL TO ELIGIBILITY FOR NATURALIZATION

United States v. Haniatakis (C.A. 3, No. 15,765; April 28, 1967; D.J. file 38-64-1283).

The above action involved an appeal by the United States from a grant of naturalization by the District Court for the Western District of Pennsylvania. Appellee is a Greek national who has resided in the United States since 1956. On June 9, 1964 she applied for naturalization in her maiden name and testified before a naturalization examiner that she was unmarried. An investigation by the Immigration and Naturalization Service revealed her testimony to be false in that she had been married on May 18, 1964 to a Greek seaman who had been arrested for illegal entry and returned voluntarily to Greece. The investigation also disclosed that she had testified falsely as to her places of residence in the United States. When faced with her false testimony she explained that she had testified falsely out of fear that her naturalization would be delayed for 5 years if her marriage had been disclosed. The naturalization examiner recommended to the District Court that her petition for naturalization be denied under 8 U.S.C. 1427(a)(3) for lack of good moral character because she had testified falsely to obtain naturalization and was precluded from establishing good moral character under the provisions of 8 U.S.C. 1101(f)(6). The District Court granted the petition for naturalization after having concluded that petitioner's false testimony did not demonstrate the absence of good moral character since her misrepresentations were not material and the facts concealed would not have been a bar to her naturalization.

The Court of Appeals disagreed with the lower court relying primarily on the decision by the Supreme Court in Berenyi v. District Director, 385 U.S. 630 (1967). The Court of Appeals stated that denial of naturalization in cases of this nature is based on the practical ground that a false answer to a query which on its face appears innocuous may effectively cut off a line of inquiry which might have revealed further facts bearing on the petitioner's eligibility for citizenship. The Court further stated that having asked a question which it deems significant to determine the qualifications of one seeking citizenship, the Government is entitled to full disclosure. The judgment of the District Court was reversed.

Staff: United States Attorney Gustave Diamond and Assistant United States Attorney Thomas A. Daley (W.D. Pa.); Luke E. White (Immigration and Naturalization Service).

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# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## COURT OF APPEALS

### APPEALS

ORDER DISMISSING PRE-INDICTMENT SUIT TO SUPPRESS EVIDENCE HELD NOT APPEALABLE.

John P. Parrish, et al. v. United States, et al. (C. A. 4, No. 10,905; April 19, 1967; DJ File 5-79-1257).

Taxpayer, invoking the district court's equitable powers and Rule 41(e), F. R. Crim. P., filed an action to enjoin any use of evidence obtained by Internal Revenue agents through an examination of taxpayer's records and asked that all Government-made photostats of the records be destroyed by court order, on the alleged ground that taxpayer was led to believe that it was a purely civil tax investigation, and because he allegedly gave no permission to make photostats. The district court dismissed the action without an evidentiary hearing, as a matter of discretion and without prejudice to taxpayer's right to seek the same relief after indictment. The Court of Appeals unanimously held that the order of dismissal was not appealable. The majority opinionagreedthat the order was unappealable unless the action was "solely for return of property" (see DiBella v. United States, 369 U. S. 121, 131-132) but then added that even if this action could be so regarded, the appeal should be dismissed because taxpayer was indicted while this appeal was pending, and was free to request suppression in the actual criminal proceedings. Judge Boreman reached the same result, although he felt that appealability could not be affected by subsequent events, stating that it was "perfectly obvious" that this proceeding was not "solely for the return of property," since taxpayer sought injunctive relief, and sought the destruction, rather than the return, of the copies. Compare Goodman v. United States, 369 F. 2d 166 (C. A. 9), where taxpayer sought injunctive relief and the return of copies, and the Court (ignoring the word "solely" in DiBella, supra) held that a similar dismissal order (entered, however, after an evidentiary hearing and findings of fact) was appealable.

Staff: United States Attorney C. Vernon Sprately (E. D. Va); Joseph M. Howard and John M. Brant (Tax Division).

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