# United States Attorneys Bulletin

*Published by Executive Office for United States Attorneys*
*Department of Justice, Washington, D.C.*

VOL. 15 JULY 7, 1967 NO. 14

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 15 July 7, 1967 No. 14

# TABLE OF CONTENTS

## ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

## MEMOS & ORDERS

The following Memoranda and Orders applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 7, Vol. 15 dated March 31, 1967:

| MEMOS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 508 | 3-28-67 | U.S. Attys. and Marshals | Annual Review of Positions |
| 509 | 4-5-67 | U.S. Marshals | Prisoner Coordination Office |
| 510 | 4-10-67 | U.S. Marshals | Prisoner Coordination Procedures and Articles |
| 511 | 4-10-67 | U.S. Attorneys | Admissibility of Hearsay Evidence at Preliminary Hearings |
| 513 | 4-12-67 | U.S. Marshals | Notice of Arrest and Seizure |
| 514 | 4-25-67 | U.S. Attys. and Marshals | Delegation of Authority to Director of Bureau of Prisons as to Disposition of Unclaimed Property |
| 515 | 4-25-67 | U.S. Attys. and Marshals | Relating to Vesting of Unclaimed Property |

| MEMOS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 516 | 4-26-67 | U.S. Attorneys | Analysis of Public Law 89-654, an Act "To Make it a Criminal Offense to Steal, Embezzle, or Otherwise Take Property From a Pipeline, and for Other Purposes." |
| 517 | 5-2-67 | U.S. Attorneys | Prosecution of Certain Violations of Mail Fraud Statute. |
| 521 | 5-16-67 | U.S. Attorneys | Proposed Legislation Permitting U.S. to Appeal from Granting of Pretrial Suppression Motion. |
| 522 | 6-5-67 | U.S. Attys. & Marshals | Revised Procedural Guide for Incurring Expenses. |
| 523 | 6-6-67 | U.S. Attys. & Marshals | Revised Certificate of Membership-Civil Service Retirement System. |
| 524 | 6-8-67 | U.S. Attys. & Marshals | Delegating Certain Authority with Respect to Personnel and Administrative Matters. |

| ORDERS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 376-67 | 4-17-67 | U.S. Attys. & Marshals | Prescribing Regulations under Foreign Agents Registration Act of 1938, as Amended. |

| ORDERS | DATED | DISTRIBUTION | SUBJECT |
|---|---|---|---|
| 377-67 | 4-28-67 | U.S. Attys. & Marshals | Settlement Authority --Change in Amounts - Authority to Compromise and Close Civil Claims and Responsibility for Judgments, Fines, Penalties, and Forfeitures. |
| 378-67 | 5-29-67 | U.S. Attys. & Marshals | Redelegation of Authority by Assistant Attorney General in Charge of Tax Division to Compromise and Close Civil Claims & Responsibility for Judgments, Fines, Penalties, and Forfeitures. |

* * *

# ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

## SUPREME COURT

### CLAYTON ACT

SUPREME COURT REVERSES DISTRICT COURT.

United States v. Continental Oil Co., et al. (No. 450-O. T. 1966; May 29, 1967; D.J. File 60-0-37-299).

The Supreme Court, in a per curiam opinion, on May 29, 1967, vacated the judgment of the District Court dismissing, after trial, the Government's §7 complaint and remanded "for further consideration in light of United States v. Pabst Brewing Co., 384 U.S. 546." This marked the second time the Supreme Court reversed a judgment against the Government in this case, having set aside a summary judgment in 1964 (377 U.S. 161).

The major issue presented on the appeal was geographical market definition. Although we urged the State of New Mexico as the market in which the merger would tend to substantially lessen competition, the Court insisted upon measuring the competitive effect in the total area where the two merging firms competed -- i.e. New Mexico plus parts of Arizona and Texas. In that market, the Court found that Malco had a 4% share and Continental 2.2%, and that therefore the merger could result in only an insubstantial lessening of competition or likelihood thereof. In the New Mexico market urged by the Government, however, Continental was the third largest, with 12.61%, Malco was fifth largest, with 11.70%, and their combined total of 24.37% made Continental the largest seller.

The United States' jurisdictional statement urged that the District Court erred in refusing to treat New Mexico as a relevant market, citing Pabst, supra, for the proposition that a merger violates §7 if it may substantially lessen competition in any significant geographic area where the merging companies compete. In addition, we argued that with New Mexico as the relevant market, the record established clear violations of §7 both because of absolute concentration and because Malco would be removed as a substantial (19%) supplier to independent and discount gasoline distributors. The defendants submitted no opposing document to the Court.

Since we cited Pabst as establishing that New Mexico is a relevant market the Court's reversal for further consideration in the light of Pabst apparently resolves that question in our favor. However, on remand defendant has moved for "judgment on the record."

Staff: Robert Hummel, Jerry Pruzansky and Lawrence W. Somerville (Antitrust Division)

DISTRICT COURT

SHERMAN ACT

CONSENT JUDGMENT ENTERED.

United States v. Blue Chip Stamp Co., et al. (C. D. Calif.; April 28, 1967; D. J. File 60-418-3).

On December 26, 1963, the United States filed a complaint against Blue Chip Stamp Company, eight retail food chains, and one retail drug chain charging them with violating Sections 1 and 2 of the Sherman Act. The offenses charged were that defendant retailers and co-conspirators jointly organized and operated Blue Chip Stamp Company for the purpose and with the effect of restricting competition among defendant retailers and co-conspirators, boycotting competing stamp companies, and monopolizing and attempting to monopolize the trading stamp business in California and in the Los Angeles area.

On April 28, 1967, a stipulation and proposed consent decree, signed by representatives of all defendants and the United States, were lodged with the Court. Under terms of the judgment the retailer defendants are enjoined from seeking to restrain or monopolize the trading stamp business in California and are ordered to relinquish control of Blue Chip. Blue Chip will continue to offer a generally available trading stamp program in California and ownership of the company will be more widely dispersed than formerly.

Blue Chip is ordered to present to the Court within 60 days following the entry of the final judgment a plan for its reorganization, whereby the stock of the company is to be reclassified and redistributed so that the present shareholders, in return for their shares, will be allocated 45 per cent of the reorganized company. Ten per cent of the stock of the reorganized company is to be available to management and 45 per cent to users other than the present shareholders. The stock of each retailer defendant is to be deposited in a separate trust for ten years with voting power vested in separate trustees

satisfactory to the plaintiff or the court. For a period of ten years the judgment also forbids the nine retailer defendants from having any common officer, director or employee with Blue Chip or from voting for Blue Chip officials.

If reorganization cannot be completed within a reasonable period, the judgment requires Blue Chip to sell all of its assets within fifteen months to a purchaser which would agree to continue in the trading stamp business in California for a reasonable period of time and to redeem outstanding Blue Chip stamps.

Within thirty months after the purchase or reorganization of Blue Chip, the new firm is required to sell one-third of Blue Chip's total assets. All of the assets thus sold must be in Southern California. The judgment forbids the present and the future Blue Chip companies from refusing service to any firm because another company in the same locality already has the stamps, because the firm is using another brand of trading stamps, or because of the rates at which a firm dispenses stamps. In addition to Blue Chip Stamp Company, the nine retailer defendants covered by the judgment are: Alexander's Markets; Lucky Stores, Inc.; Market Basket; Purity Stores, Inc.; Ralph's Grocery Company; Safeway Stores, Incorporated; Thriftimart, Inc.; Thrifty Drug Stores Co., Inc.; and Von's Grocery Co.

Judge Warren J. Ferguson ordered a hearing on June 5, 1967, to determine whether the proposed judgment should be signed and entered. At the hearing, representatives of four other stamp companies, a representative of a group of service stations, and a representative of one non-defendant stockholder in Blue Chip, opposed entry of the decree. They argued that the stock interest of defendant retailers in Blue Chip should be eliminated or reduced more drastically and that the divestiture should be accomplished more quickly. Gordon B. Spivack, Director of Operations, the defendants, the State of California, and intervenors representing other grocery interests, urged that the decree be entered.

Judge Ferguson commented that this is an unusually complicated antitrust case and that it appeared impossible to satisfy fully all conflicting interests. He indicated that he did not believe it a function of the Court to destroy Blue Chip, since the independent grocers feel an imperative need for a viable stamp company. He further said that the decree opens the door to another stamp company in California and removes numerous restrictions upon the operation of the trading stamp business in the area. He concluded that the decree is in the best interest of all and signed it.

Two other proposed consent judgments were lodged with the Court in this case. The Department of Justice withdrew its consent to the first proposed consent judgment, following receipt of numerous complaints during the waiting period provided by the stipulation. The second proposed decree, after being lodged on October 28, 1966, was opposed by two defendants, the State of California, the California Grocers Association, Certified Grocers, and S&H Stamp Company. After a three-day hearing, commencing December 13, 1966, the Court refused to sign the second decree. The Court then made several suggestions for further revision of the proposed decree. The third decree was drafted in line with the Judge's comments.

Staff: Gordon B. Spivack, Stanley E. Disney, Lawrence W. Somerville and John D. Gaffey (Antitrust Division)

* * *

# CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

## COURTS OF APPEALS

### AGRICULTURAL ADJUSTMENT ACT

CONSTITUTIONALITY OF PROVISIONS OF AGRICULTURAL ADJUSTMENT ACT AND DEPARTMENTAL REGULATIONS PERMITTING SECRETARY OF AGRICULTURE TO REQUIRE EXPORTER OF WHEAT TO PURCHASE EXPORT CERTIFICATE UPHELD; CHARGE FOR CERTIFICATE IS REGULATION OF COMMERCE AND NOT TAX ON EXPORTS.

Shirley Moon v. Orville Freeman, Secretary of Agriculture, et al. (C. A. 9, No. 21,008; May 25, 1967; D. J. File 106-81-110).

In this case, appellant was a wheat farmer required by the Secretary of Agriculture, pursuant to the Agricultural Adjustment Act, to purchase certificates for wheat he exported to Rotterdam. The Secretary's action was taken pursuant to the 1964-1965 program of subsidies and acreage allotments, whereby exporters were required to buy certificates so as to make American wheat competitive with the world price. Purchasers of these certificates would receive refunds from the Secretary insofar as there were fluctuations in the world price which warranted such refund.

Appellant, pursuant to this program, was required to pay a net of $168.52 in connection with his shipment of wheat to Rotterdam. Contending that this charge was a tax on exports in violation of Article I, §9, Cl. 5 of the United States Constitution ["No tax or duty shall be laid on articles exported from any State"], appellant instituted suit to recover the funds paid to the Secretary. The district court granted the Secretary's motion for summary judgment, on the ground that the export certificate requirement was a legitimate exercise of the Commerce Power, and was properly enforced.

On appeal the Ninth Circuit affirmed. After reviewing the debates of the framers of the Constitution on the Export Clause, and the judicial decisions construing both it and the Commerce Clause, the Court of Appeals concluded that Congress, in the exercise of its power to regulate commerce, could under the circumstances exact a monetary charge in connection with the export of wheat without offending the Export Clause. Applying the test of Rodgers v. United States, 138 F. 2d 992 (C. A. 6), the Court of Appeals concluded that the raising of revenues was obviously not the purpose of the charges, but that the purpose of the program was to regulate commerce;

therefore the exaction was not a tax in the constitutional sense, and was a proper exercise of the Commerce Power.

Staff: Acting Assistant Attorney General Carl Eardley (Civil Division)

## ATOMIC ENERGY ACT

DECISION OF ATOMIC ENERGY COMMISSION PATENT COMPENSATION BOARD REVERSED; INVENTOR OF DEVICE USED IN BUILDING ATOMIC WEAPONS NOT PRECLUDED FROM COMPENSATION BY SHOP RIGHTS DOCTRINE.

Hobbs v. Atomic Energy Commission (C. A. 5, No. 20840; April 7, 1967; D. J. File 27-6385).

Hobbs was hired in 1943 by Kellex Corporation, a Government contractor, to work half-time as a consultant at Oak Ridge, Tennessee. While on this job, he invented two valves which were utilized at Oak Ridge and later at other facilities for the production of nuclear material. As soon as Hobbs started the job, he was presented with a patent waiver form by Kellex, but refused to sign. Throughout his employment, he made it plain to Kellex and the Government that he would not waive any patent rights.

The Atomic Energy Act of 1946 prohibited patents on discoveries useful solely in the production of fissionable material, revoked existing patents, and authorized the Commission to take inventions or patents in this field. Inventors affected are entitled to just compensation. Hobbs' claim for just compensation was denied by the Patent Compensation Board of the AEC, on the ground that the Government had obtained "shop rights" to the Hobbs valves. The "shop rights" doctrine holds that an employer has an implied non-exclusive, royalty-free license on any inventions which an employee makes and reduces to practice on his employer's time.

On direct appeal, the Court of Appeals reversed and remanded to the Atomic Energy Commission. The Court of Appeals held first that the shop rights doctrine is not a complete defense to a claim for compensation under the Atomic Energy Act. Shop rights give only a license in the employer; the employee retains all other rights in the invention subject only to his employer's license. However, under the Atomic Energy Act, all rights to inventions such as the Hobbs' valves were taken. Therefore, the Court reasoned, Hobbs would be entitled to compensation even if the shop rights doctrine were applicable, although he would be entitled only to the value of the invention after subtracting any shop rights which the Government would have obtained independently of the Atomic Energy Act.

The Court of Appeals went on to hold that, under the facts of this case, the Government did not have shop rights to Hobbs' valves. The Court initially pointed out that Hobbs had continually refused to waive patent rights. While the Court stated that it did not mean to imply that "an inventor may unilaterally deprive his employer of shop rights," the Court apparently concluded that Hobbs had initially agreed with Kellex that there would be no shop rights and that Hobbs' later actions confirmed this original understanding. In any event, the Court also concluded that shop rights in favor of the Government could not arise because Hobbs was employed by a contractor rather than by the Government itself. The fact that the contract was cost-plus, that the project was a Government project, and that the invention was reduced to practice with the aid of the employees and equipment of another cost-plus contractor, were all deemed irrelevant by the Court, which held that an employer-employee relationship is necessary to the existence of shop rights. Furthermore, the Court concluded that the Atomic Energy Act, by directing the AEC to set the amount of compensation in light of "the extent to which, if any, such patent was developed through Federally financed research," exhibited an intent to give some compensation to inventors employed by Government contractors--the federal contribution to the invention to be recognized by reduction in the compensation rather than by denying compensation altogether under the shop rights doctrine. The Court concluded by observing that in this case it did not find that any "research" was involved. The Court stated that research "involves the notion of lengthy, complex technical investigation." Here, the invention occurred to Hobbs suddenly one night in a hotel room, and was reduced to practice quickly without exhaustive experimentation. This, the Court concluded, was not research, and thus the Commission could not reduce Hobbs' compensation through application of the "Federally financed" clause.

Staff: Robert V. Zener (Civil Division)

## MILITARY PERSONNEL

### COURTS LACK JURISDICTION TO ENJOIN MILITARY COURT-MARTIAL OR TO ENJOIN OPERATION OF MILITARY ORDER.

Captain Dale E. Noyd v. Robert S. McNamara, et al. (C.A. 10, No. 9440; March 16, 1967; D.J. File 145-15-115).

Appellant, plaintiff below, was a trained fighter pilot with eleven years service as a regular Air Force officer. He applied under Air Force Regulation 35-24 to resign or to be assigned to non-combat related duties upon the ground that he had recently become a selective conscientious objector--i.e., he objected to participation in the conflict in Southeast Asia but did not object to participation in all wars. The Secretary of the Air Force denied the application. Plaintiff sued in the district court for declaratory and injunctive

relief, claiming that his beliefs were religiously based under the test of United States v. Seeger, 380 U.S. 163 (1965), and that the Air Force had unconstitutionally discriminated against his beliefs which he classified as ethical humanism. Plaintiff also claimed that the Air Force had failed to follow the procedures established in its own regulation and that these procedures were unconstitutional for lack of procedural due process. Plaintiff alleged that he would refuse to continue flying any combat aircraft and that this refusal would subject him to a court-martial. The district court dismissed for lack of jurisdiction.

The Court of Appeals affirmed. The Court adopted our arguments that a court cannot enjoin a prospective court-martial because the remedies available under the military justice procedures have not been exhausted and that the court cannot review the validity of military duty assignments. The Court of Appeals specifically held that Dombrowski v. Pfister, 380 U.S. 479, did not entitle plaintiff to an injunction restraining court-martial proceedings. The Court also noted that the procedures under which Noyd's application as a conscientious objector were processed "must be geared to meet the imperative needs of mobilization and national vigilance" and that the executive department had wide discretion in the formation, application and interpretation of regulations dealing with resignations from the military service. On June 2, 1967, the Supreme Court denied appellant's application for a stay of the Tenth Circuit's mandate pending application for a writ of certiorari. The Tenth Circuit's decision reaffirms the settled doctrine that the courts will not interfere with the internal management of the military services and that before any constitutional issues may be raised in the civil courts, military personnel must show that they have exhausted remedies in the military courts.

Staff: C. Westbrook Murphy (Civil Division)

## RAILWAY LABOR ACT

DISTRICT COURT LACKED JURISDICTION TO REVIEW CERTIFICATION OF UNION BY NATIONAL MEDIATION BOARD; SINCE CERTIFIED UNION WAS PROPERLY CHOSEN, INJUNCTION SHOULD BE GRANTED TO COMPEL EMPLOYER TO BARGAIN WITH UNION.

Aeronautical Radio, Inc. v. National Mediation Board, et. al.(C. A. D. C., No. 20128); International Brotherhood of Teamsters, etc. v. Aeronautical Radio, Inc. (C. A. D. C., No. 20251; June 2, 1967; D.J. File 145-135-12).

In this case the National Mediation Board on petition of the Teamsters Union conducted an election for the purpose of determining which union, if any would represent a craft of 400 employees of the Company (Aeronautical Radio, Inc.). The ballots used in the election, in addition to giving the

voter a choice between the Teamsters, a competing union, or "Any Other Organization or Individual," provided that "[i]f less than a majority of the employees cast valid ballots, no representative will be certified." The count of the ballots showed that 221 of the employees voted for one or the other of the competing unions and that 179 of the employees voted against having any union by failing to cast valid ballots for a collective bargaining representative. Of the 221 voting for collective bargaining representation, 147 voted for the Teamsters and 74 voted for the competing union. Since a majority of the employees voted for collective bargaining representation and since a majority of those chose the Teamsters, the Board certified the Teamsters as bargaining representatives of the employees.

The Company sought judicial review of the Board's action in the District Court, contending that the Board had failed to perform adequately its duty to investigate the dispute under the Railway Labor Act. The Company argued that in certifying the Teamsters Union, which was not the choice of a majority of all 400 employees and which received fewer votes than the "no union" choice, the Board acted in excess of its authority. The Teamsters Union intervened and filed a counterclaim against the Company, seeking a mandatory injunction to compel the Company to bargain with it. The district court dismissed the Company's action for lack of jurisdiction, but at the same time denied the Union the injunctive relief sought because the majority of all employees (including those not voting) had not voted for the Teamsters. Both parties appealed.

On appeal, the District of Columbia Circuit affirmed the dismissal of the Company's complaint, and reversed the denial of injunctive relief sought by the Union. The Court of Appeals held that the Board's proceedings satisfied its statutory duty to investigate; it further held that the Board's determination that it may certify the union receiving the highest number of votes so long as a majority of the employees voted for some union, was a reasonable one and not made in excess of its authority. Thus, since under settled principles (Switchmen's Union v. Board, 320 U.S. 297; Railway Clerks v. Employees Assn., 380 U.S. 650) no review of the Board's proceedings may be had except where there was a showing that the Board had acted in excess of its authority or that it acted in a fashion contrary to a specific prohibition of the Act, the Court of Appeals agreed with the District Court that it lacked jurisdiction to entertain the Company's complaint.

With respect to the Union's quest for injunctive relief, the Court held that such relief must be granted where the Union has been chosen--in accordance with the procedure adopted by the Board--by a majority of those voting (as long as a majority of the employees vote for some collective bargaining representative).

Thus, the District of Columbia Circuit has once again reaffirmed the long-settled doctrine that the courts have no jurisdiction to review the acts of the National Mediation Board when it proceeds within its statutory authority. And its holding makes it clear that a Union certified under procedures adopted by the Board under its authority, may obtain injunctive relief, regardless of the fact that a majority of employees in the unit did not choose that Union; the critical factor is whether a majority of employees voted for some representation and, if so, whether a majority of those voting chose the Union seeking relief.

Staff: John C. Eldridge (Civil Division)

## SOCIAL SECURITY ACT -- ATTORNEYS' FEES

DISTRICT COURT MUST DETERMINE REASONABLE FEE; PRACTICE OF ROUTINE APPROVAL BY COURT OF CONTRACTUAL ARRANGEMENTS ENTERED INTO BY CLAIMANTS AND THEIR ATTORNEYS REJECTED.

McKittrick v. Gardner (C. A. 4, No. 11,192; May 30, 1967; D.J. File 137-68-181) and Crouch v. Gardner (C. A. 4, No. 11,214; May 30, 1967; D.J. File 137-67-63).

In both of these cases, the district courts awarded attorneys' fees on the basis of fee agreements entered into by the claimants and their attorneys, and without any explicit determination of the reasonableness of the fees. In the Crouch case, the district court had stated that where a claimant and his attorney had entered into an agreement for payment of a fee which did not exceed 25 per cent of past-due benefits, such agreement would be routinely approved by the court.

The Court of Appeals, on motions by the Secretary, vacated the fee awards in these cases on the authority of Redden v. Celebrezze, 370 F. 2d 373, in which the Court had directed the district courts to determine a reasonable fee, and to avoid routine approval of the statutory maximum permissible under Section 206(b)(1) of the Social Security Act in all cases.

In the course of its opinion the Fourth Circuit made it clear that the district courts need not hold evidentiary hearings on the matter of fees, but that the court may be assisted by materials submitted by the attorney, and that the Secretary "should be afforded an opportunity to be heard". The Court further emphasized that by vacating the fee awards in these cases it was not attempting to determine whether the sums awarded were reasonable, but was directing that the district court's "discretion must be exercised in each case, without automatic or unquestioning acceptance of contractual arrangements."

Thus, the Fourth Circuit has once again restated quite unequivocally that the duty of the district court, under Section 206(b) of the Social Security Act, is to determine in every case what is a reasonable fee, and that duty cannot be discharged by routine approval of fee contracts.

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

SECTION 206(b)(1) OF SOCIAL SECURITY ACT DOES NOT PERMIT FEE ALLOWANCE OUT OF ACCRUED BENEFITS OF DEPENDENTS.

Sims v. Gardner (C. A. 6, No. 17, 356; June 10, 1967; D. J. File 137-70-141).

In this case, after the district court awarded claimant Social Security disability benefits, it allowed counsel a fee limited to 25 per cent of past-due benefits to which the claimant himself was entitled. The Court refused to award counsel a percentage of the benefits due claimant's dependent, expressly rejecting the contention that Section 206(b)(1) of the Social Security Act permitted an allowance out of dependents' benefits where the eligibility of the dependents was not litigated by the attorney.

On appeal the Sixth Circuit affirmed. In doing so, the Court of Appeals stated that while the judgment in favor of the insured wage earner "is certainly helpful in paving the way for the payment of benefits for the dependents, * * * the dependents must still satisfy the Secretary as to the relationship to the insured and other statutory requirements." Thus, since Section 206(b)(1) limits the fee allowance to a percentage of accrued benefits "to which the claimant is entitled by reason of such [favorable] judgment [awarding beneftis]," (emphasis supplied) the dependents, who did not become entitled to benefits "by reason of such judgment" could not be taxed with fees. The Court of Appeals agreed with the Seventh Circuit's decision in Hopkins v. Gardner, 374 F. 2d 726 (rehearing denied en banc April 21, 1967) that this interpretation of the Act more closely meets the needs of Social Security claimants, and furthermore prevented the situation where an increase in fee awards would be "based upon the fortuity of the insured having dependents," which increase "would defeat the purpose of the statute." Only if counsel is required to raise questions in court as to the eligibility of dependents, would he be entitled to receive a fee from their benefits. The Court expressly rejected the conflicting view of the Fourth Circuit in Redden v. Celebrezze, 370 F. 2d 373.

Thus, both the Sixth and Seventh Circuits, in direct conflict with the Fourth Circuit, have now ruled that Section 206(b)(1) does not permit the

allowance of attorneys' fees out benefits of dependents unless the eligibility of dependents is disputed and litigated.

Staff: Jack H. Weiner (Civil Division)

## SOCIAL SECURITY ACT -- DISABILITY BENEFITS

CLAIMANT'S RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE DECISION AWARDING BENEFITS UPHELD WHERE SUCH DECISION WAS BASED ON SERIOUS MENTAL IMPAIRMENT RATHER THAN ON PHYSICAL IMPAIRMENT ALLEGED BY CLAIMANT.

Johanne Glab v. Gardner (C.A. 2, No. 31102; May 22, 1967; D.J. File 137-52-230).

In this Social Security disability case, claimant, who was an alien, sought benefits based only upon an alleged back injury. The Secretary awarded claimant benefits for her injuries, listing as one of them "a severe psychiatric impairment, possibly more severe than psychoneurosis." Claimant sought review of the Secretary's decision contending that the issue of psychiatric injury was not before the Secretary, that there was no substantial evidence to support such a finding, and that the finding if not stricken might adversely affect her employment opportunities. The District Court dismissed the complaint for failure to state a claim for relief, since claimant had been awarded maximum disability payments.

On claimant's appeal the Second Circuit reversed. The Court stated that 42 U.S.C. 405(g) provided for review of administrative decisions "irrespective of the amount in controversy," and that it could not hold that the injury done by administrative findings could never rise to the level of justiciability, simply because a full monetary award had been made. On remand the District Court was directed to consider, with the benefit of the administrative transcript (which had not been furnished to the District Court and which was therefore not part of the record), whether claimant's allegations of potential harm reach the threshold of justiciability, whether claimant's mental state had been put in issue, whether the administrative decision was supported by the record, whether claimant was afforded notice and opportunity for administrative review, and whether claimant's apparent acceptance of benefits constituted a waiver of her claim.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorneys Howard L. Stevens and Steve C. Arniotes (E.D. N.Y.)

## VETERANS ADMINISTRATION

VETERANS ADMINISTRATOR'S TERMINATION OF BENEFITS HELD REVIEWABLE, AS NOT WITHIN PROHIBITION AGAINST REVIEW OF 38 U.S.C. 211(a).

Tracy v. John S. Gleason, Jr. (C.A.D.C., No. 20,117; May 25, 1967; D.J. File 151-16-533).

George Tracy, a veteran, was adjudicated incompetent and admitted to St. Elizabeth's Hospital in July 1936, where he remained until his death in September 1961. In September 1948, the Veterans Administrator found Tracy entitled to a monthly pension so long as he remained disabled. In March 1949, the pension was discontinued because of his failure to execute and return a form indicating his 1948 income. There was a regulation requiring a pensioner to file such a form or risk losing his pension. The V.A. did not contend that the regulation applied to incompetents; instead the agency believed Tracy to be mentally competent despite his confinement at the hospital. As of November, 1960 Tracy was again found entitled to a pension.

The District Court, on the basis of 38 U.S.C. 211(a), dismissed, disclaiming jurisdiction to review the administrative determination. That statute provides that V.A. decisions "on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." The Court of Appeals reversed, stating that the administrator's determination, as described in the complaint, was arbitrary and capricious, and holding that 38 U.S.C. 211(a) applied only to the determination on the original claim for benefits, not to a subsequent termination of benefits. According to the Court, the administrator's termination of benefits was not an unreviewable decision "on any question of law or fact concerning a claim for benefits or payments," within the meaning of 38 U.S.C. 211(a). The Court thus followed its prior holdings in Wellman v. Whittier, 259 F. 2d 163, and Thompson v. Gleason, 317 F. 2d 901, and overruled its prior holdings in Sinlao v. United States, 271 F. 2d 846, Hahn v. Gray, 203 F. 2d 625, and Van Horne v. Hines, 122 F. 2d 207.

The decision in this case is in direct conflict with Smith v. Settle, 286 F. 2d 420 (C.A. 8); Milliken v. Gleason, 332 F. 2d 122 (C.A. 1), certiorari denied, 379 U.S. 1002, and Redfield v. Driver, 364 F. 2d 812 (C.A. 9). In those decisions, the courts have held that 38 U.S.C. 211(a) precludes review of determinations by the Veterans' Administration regardless of whether the administrative decision dealt with the termination or the reduction of benefits already awarded. The decisions of the First, Eighth and Ninth Circuits

are in our view correct, and the District of Columbia Circuit's holding that the statute applies only to the original "claim" is in error.

Staff: Alan S. Rosenthal and J. F. Bishop (Civil Division)

## VETERANS REEMPLOYMENT RIGHTS

MILITARY TRAINING AND SERVICE ACT DOES NOT ENTITLE RE-EMPLOYED VETERANS TO CLAIM "FRINGE BENEFITS" THEY WOULD HAVE RECEIVED AUTOMATICALLY BUT FOR THEIR MILITARY SERVICE.

Magma Copper Co. v. Eagar, et al. (C.A. 9, No. 19777; May 31, 1967; D.J. File 151-8-399).

The Universal Military Training and Service Act (50 U.S.C. App. 459(b)) requires that a veteran returning from service in the Armed Forces be restored to his former civilian job or to one of "like seniority, status, and pay." The Supreme Court has held this provision to mean that a restored veteran is entitled to receive any "seniority" rights and benefits which he would have accrued automatically had he remained in civilian employment rather than entered the armed forces.

In this case, the majority of the Ninth Circuit reversed a lower court judgment in favor of the veterans and rejected their petition for rehearing, holding that "vacation pay" was not included within the class of rights vouchsafed returning veterans by 50 U.S.C. App. 459(b). The Court ruled that it was merely a "fringe benefit" not included within the concept of "seniority, status and pay" as used in the Act.

Judge Madden (Senior Judge of the Court of Claims, sitting by designation) dissented. He noted that a Second Circuit decision which applied that same rationale to reject veterans' claims for severance pay had recently been reversed by the Supreme Court. Accardi v. Pennsylvania Railroad Co., 383 U.S. 225. Judge Madden pointed out that, had appellants been employed continuously instead of being called into service, they would automatically have accrued the rights to the vacation pay benefits they claimed. This, the dissent stated, was the test adopted by the Court in Accardi, and it required affirmance of the District Court's decision in the veterans' favor in this case as well.

The Government believes that the dissent states the law correctly. We, therefore, have not acquiesced in the Ninth Circuit's decision and are contemplating the filing of a petition for certiorari.

Staff: Edward Berlin (Formerly of the Civil Division)

* * *

## CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## INTERSTATE SHIPMENT

FEDERAL PROSECUTION OF THEFT FROM INTERSTATE SHIPMENT MATTERS.

As the result of a preference indicated by one of the United States Attorneys, the Criminal Division determined that the United States Attorney had written to the FBI Special Agent in Charge requesting that the Bureau no longer present to him thefts from interstate shipments unless the stolen property involved was valued at $100 or more. The United States Attorney's preference did include the request that he receive referrals of all cases involving unusual circumstances even though the stolen property was valued at less than $100 (misdemeanors under 18 U. S. C. 659). In its consideration of this matter, the Criminal Division assumed that a substantial percentage of the cases relating to stolen property valued at less than $100 would involve juvenile offenders who are subject to referral to local authorities under 18 U. S. C. 5001 (see the Criminal Division letter of July 18, 1966 to all United States Attorneys regarding 18 U. S. C. 5001). Accordingly, the Criminal Division has notified the United States Attorney involved and the FBI that it has no objections to the preference of the United States Attorney that the Bureau present to him cases involving thefts of property valued at $100 or more and only those cases involving thefts of property valued at less than $100 which contain unusual circumstances.

* * *

## EXECUTIVE OFFICE FOR U.S. ATTORNEYS

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

## ASSISTANT UNITED STATES ATTORNEYS

The following Assistant United States Attorneys have been recently appointed:

Florida, Middle - ROBERT MACKENZIE, ESQ.; University of Florida, LL.B., and formerly in private practice.

Illinois, Northern - DAVID HARTIGAN, ESQ.; Loyola Law School, LL.B., and formerly an attorney with SEC and in private practice.

Oregon - CHARLES TURNER, ESQ.; DePaul University LL.B., and formerly Assistant United States Attorney Illinois Northern and General Attorney with the Department of Interior.

Texas, Northern - WILLIAM BARR, ESQ.; University of Texas, LL.B., and formerly an attorney in private practice.

* * *

# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

## DISTRICT COURT

### ESPIONAGE

CONVICTION FOR CONSPIRACY TO COMMIT ESPIONAGE.

United States v. Herbert W. Boeckenhaupt (E. D. Va., No. 4428; June 7, 1967; D. J. File 146-7-76-256).

On May 25, 1967 a jury in Alexandria, Virginia returned a verdict of guilty against the defendant for conspiring to commit espionage, 18 U. S. C. 794(c) and 793(g). At the close of the Government's case, the trial judge dismissed the third count on the grounds that it was inconsistent with the two espionage counts. This count had charged a conspiracy under 18 U. S. C. 951, i. e., acting as an agent of a foreign government without prior notification to the Secretary of State, and has been included in several prior espionage indictments. This marks the first time that any court has dismissed such a count.

The first and second counts in the indictment had charged the defendant, who was a Staff Sergeant in the United States Air Force, with having conspired with a Soviet national employed at the Soviet Embassy in Washington, D. C., to obtain and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States and particularly information relating to the electronics communications and cryptographic systems and equipment of the Strategic Air Command and the classified traffic and information going through such equipment, with intent and reason to believe that said information would be used to the advantage of the Soviet Union.

On June 7, 1967, the defendant was sentenced to 20 years on Count I and 10 years on Count II, the sentences to run consecutively for a total of 30 years.

Staff: United States Attorney C. Vernon Spratley (E. D. Va.); Paul C. Vincent and Jim J. Shoemake (Internal Security Division).

* * *

## LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

## COURTS OF APPEALS

### INTERVENTION OF RIGHT

STARE DECISIS AS "PRACTICAL" HARM; PETITION ALLOWED TO BE FILED WITHOUT REGARD TO JURISDICTIONAL AND SUBSTANTIVE INSUFFICIENCY.

Atlantis Development Corp. v. United States (C.A. 5; June 12, 1967; D.J. File 90-1-10-666).

Louis M. Ray and others, claiming title by discovery of Triumph Reef and Long Reef, two submerged reefs in the Atlantic Ocean about five miles east of Biscayne Bay, began an extensive dredging and filling operation to create an artificial island for resort or commercial use. The United States sued to enjoin the operation as a trespass on the outer continental shelf of the United States and for lack of a permit from the Secretary of the Army as required by 43 U.S.C. 1333(f). A preliminary injunction was issued. Atlantis Development Corporation, claiming superior title on the ground that it had first discovered these and other reefs outside the territorial jurisdiction of the United States, moved to intervene, seeking a judgment that would quiet its title, declare that the United States has neither ownership nor territorial jurisdiction over the reefs, and enjoin defendants' operation. The district court denied intervention on the ground that Atlantis had not "such an interest in this cause as will justify its intervention, either as a matter of right or permissively." Atlantis' alternative motion to file an amicus brief was granted. After Atlantis appealed, and before the appeal was argued, Rule 24(a), F.R. Civ. P., governing intervention, was amended.

The Court of Appeals reversed. It conceded that Atlantis had no right to intervene under the former rule, but construed the new rule (application of which was not opposed by the United States) as giving that right. The rule allows intervention of right by one who (1) claims an interest in the same property or transaction, (2) is so situated that the disposition of the case "may as a practical matter" impede his ability to protect that interest, and (3) is not adequately represented by existing parties. The issue was as to the second requirement. The United States argued that in intervention cases, impediment "as a practical matter" had a well settled meaning limited to operational effects of a judgment, as distinguished from merely precedential effects of an opinion. The court conceded that no decision in the main case could affect Atlantis in any way except as a precedent, but held that this constitutes a "practical" detriment under the new rule. It said that this

construction will not open the door to too many interventions, because of the further requirement that the intervenor's claim relates to the same property or transaction. It did not deal with our contention that it is unreasonable to construe those affected as a "practical matter" in such a way that the further requirement, that their claims relate to the same property or transaction, is utterly irrelevant to how the decision will affect them, and becomes a purely arbitrary test for selecting a favored few out of a large group, all of whom will be affected by the legal precedent in exactly the same way.

The United States opposed the intervention on the further grounds that the proffered complaint would be subject to motion to strike for jurisdictional and substantive defects, and so should not be allowed to be filed. Those defects are: that it is an unconsented suit against the United States; that since petitioner's claim of title rests on the allegation that the reefs were open to discovery because they are beyond the territorial jurisdiction of the United States, it states by hypothesis a claim beyond the territorial jurisdiction of a court of the United States; and that the court should take judicial notice that the reefs are on the continental shelf and so belong to the United States under 43 U.S.C. 1332 and were not open to discovery. The Court of Appeals rejected those contentions. It said the inconsistency between the substantive claim and the territorial jurisdiction of the court is resolved by 43 U.S.C. 1333(b), which "invests jurisdiction in the United States District Court of the nearest adjacent state," but failed to note that the jurisdiction so given is limited to controversies relating to the outer continental shelf. Petitioner's claim is premised on the allegation that these reefs are not on the outer continental shelf. The court declined to consider other deficiencies of the pleading, saying they should be passed on later, because "it hardly comports with good administration, if not due process, to determine the merits of a claim * * * by denying access to the court at all." It did not explain how petitioner's "access to the court" will be better on a motion to strike than it is on the motion for leave to file.

Staff: George S. Swarth (Land and Natural Resources Division).

## PUBLIC LANDS

### ISOLATED TRACT ACT; PREFERENCE RIGHT APPLICANTS; SECRETARY'S RIGHT TO WITHHOLD FINAL CERTIFICATE.

Lewis v. Udall (C.A. 9; March 7, 1967; D.J. File 90-1-18-699).

As owners of contiguous land, appellants were preference right applicants to 160.62 acres of public land in Maricopa County, Arizona, classified for public auction sale under 43 U.S.C. 1171. Appellants were declared high

bidders on December 4, 1959, and only awaited the issuance of a cash certificate and fee patent to the land. In February 1960, the Secretary of the Interior issued, via press release, his Anti-speculation Land Policy which withdrew from public auction all land within the influence of expanding cities. In accord with this policy, the local manager of the Land Office in Phoenix vacated the December 1959 sale on the basis that no rights had vested in the appellants prior to the issuance of a cash certificate. This decision was upheld in subsequent Interior departmental appeals, and administrative review was sought in the Federal District Court for Arizona. Appeal was taken from the entry of summary judgment in favor of the Government.

In affirming, the Ninth Circuit noted that its 1964 decision in Ferry v. Udall, 336 F. 2d 706, was unmistakably clear in holding that the decision to sell is within the Secretary's discretion and that this auction, like all others, was an auction with reserve, absent contrary announcement. It was held that appellants had not met the reserve, which consisted of a cash certificate, and that the preference right of appellants only operated against other applicants for the land and not against the United States. The Court further ruled that 43 U.S.C. 315(f) (the Taylor Grazing Act provision dealing with the classification of public lands) was not in conflict with 43 U.S.C. 1171 (the Isolated Tract Act) and thus refused to accept appellants' novel argument that rights had vested in them under Section 315 (f).

Staff: John G. Gill, Jr. (Land and Natural Resources Division).

## DISTRICT COURTS

### INJUNCTION

SUIT AGAINST OFFICERS; SUIT AGAINST UNITED STATES; SUIT TO ENJOIN FILING CONDEMNATION ACTION.

Delaware Valley Conservation Association v. Stanley R. Resor, Individually and as Secretary of the Department of the Army, et al. (M.D. Pa., Civil No. 9675; June 5, 1967; D.J. File 90-1-3-1627).

This action was brought by an association of 600 individual property owners to enjoin the institution of condemnation proceedings for the development of the Delaware Water Gap National Recreational Area and the Tocks Island Reservoir which had been approved by Congress and which will be a large project when completed. The defendants named were the Secretary of the Army, Secretary of the Interior and the Chief of Engineers of the Department of the Army, who were authorized by Congress to acquire the necessary land for the project. We filed a motion to dismiss on the grounds (1)

that the action was a suit against the United States, (2) that the relief sought would invade the powers of the executive branch, and (3) that the pleadings failed to state a claim upon which relief could be granted. The Court dismissed the case on the ground of jurisdiction, namely that it was a suit against the United States. The Court said:

> Plaintiffs do not satisfy the jurisdictional prerequisites in cases of this nature by filing a generalized pleading and then relying on liberal pleading interpretations. That the Supreme Court did not intend such bare allegations to suffice where sovereign immunity may be involved is best demonstrated by the repeated statements throughout the Larson and Malone opinions that more specificity is required. There is a complete lack of reference to any applicable statute limiting defendants' powers, with the exception of a blanket assertion in paragraph 16(l) of the complaint that "(d)efendants have or are about to enter into contracts or activities in violation of the Federal Power Act, 49 Stat. 863, 16 U.S.C.A. 791(a) and 58 Stat. 890, 16 U.S.C.A. 8255." But this bare allegation does not survive the "affirmative allegation" test laid down by the Supreme Court. If a plaintiff is to contend that the doctrine of sovereign immunity is not applicable even though the defendant officials on the surface appear to be acting properly, then that plaintiff should clearly and expressly set forth allegations in the complaint revealing the factual and legal foundation on which he relies. For if we are to delay the progress of an undertaking of this magnitude, then we should be able to proceed with confidence that the matter and the parties are properly before us.

Staff: United States Attorney Bernard J. Brown (M.D. Pa.), and Howard O. Sigmond (Land and Natural Resources Division).

* * *

# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## DISTRICT COURT

### EVIDENCE

PREMATURITY OF MOTION TO SUPPRESS; PREINDICTMENT INJUNCTION; ALLEGED VIOLATIONS OF CONSTITUTIONAL RIGHTS.

Theron I. Moon, et ux. v. James B. Brennan, United States Attorney for the Eastern District of Wisconsin, and Walter S. Stumpf, District Director of Internal Revenue (E. D. Wis. No. 66 C 299; November 21, 1966; D. J. File 5-85-2437).

The taxpayers alleged that between 1963 and 1965 they were interrogated by a Special Agent and a Revenue Agent of the Internal Revenue Service and made available to them various books of account, correspondence files, expense reports, bank statements, cancelled checks and other books and records for what they were led to believe was a routine audit of their income tax liabilities; that they were unaware of but were in fact the subjects of a criminal tax investigation; that the respondent United States Attorney was preparing to commence a criminal prosecution against them; that they had not been advised of their constitutional rights under the Fourth, Fifth and Sixth Amendments to the Constitution; and that accordingly their rights guaranteed by those amendments had been violated.

The taxpayers sought an order requiring the return of all material furnished the agents, an order suppressing all clues, leads, knowledge, information and evidence derived from the material and a permanent injunction restraining the respondents and all agents of the Department of Justice and the Internal Revenue Service from using or disclosing any such evidence before any preliminary examination, grand jury hearing, trial or other criminal proceeding.

In granting the Government's motion to dismiss, the District Court ruled that the petitioners had an adequate remedy at law, i. e., the right to move to suppress in any subsequent criminal trial; that the requirement of Miranda v. Arizona, 384 U. S. 436 (1966), that a citizen in custody be apprised of his constitutional rights does not apply to tax investigations: and that the taxpayers were premature as in Parrish v. United States, 256 F. Supp. 793 (E. D. Va. 1966).

Staff: Assistant United States Attorney Robert J. Lerner (E. D. Wis.) and James H. Jeffries, III (Tax Division).

## LEVY

IN SUIT FOR ENFORCEMENT OF LEVY, JURY FOUND THAT SOME OFFSETS CLAIMED AGAINST INDEBTEDNESS TO TAXPAYER WERE VALID AND AWARDED BALANCE OF OBLIGATION TO UNITED STATES.

United States v. Weaver E. Madison, d/b/a Madison Oil Co. (S. D. Iowa, Civil No. 6-1784-C-1; April 3, 1967; D. J. File 5-28-750) 67-1 U. S. T. C. par. 9399.

On October 17, 1962, defendant Weaver E. Madison executed a promissory note to Colonial Oil and Supply Co., Inc. in the amount of $3,581.95 representing the balance due on petroleum products and other merchandise that had been furnished to Madison. In 1962 and 1963, certain cash payments were made on the note reducing the balance thereon on January 3, 1963 to $2,965.68 plus interest.

During 1963 and 1964, assessments were made against Colonial Oil and Supply Co., Inc. by the Internal Revenue Service for withholding and social security taxes and for excise taxes and a substantial amount of these taxes remains unpaid. On August 19, 1963, Colonial assigned its note from Madison to the Internal Revenue Service. On October 1, 1963, a levy was served upon Madison by the Internal Revenue Service, thereby effecting an administrative seizure under the code of any remaining indebtedness from Madison to Colonial.

Madison did not pay anything on account of the levy, contending that certain offsets reduced the net amount of the indebtedness to Colonial to $269.68. A suit was brought against Madison under Section 6332, IRC of 1954, for enforcement of the levy. It was stipulated that defenses available to defendant Madison against Colonial were good against the Government as the assignment of the note to the Internal Revenue Service was after the due date thereof.

The jury found that some of the offsets claimed by Madison were valid and awarded the United States $1,498.68 representing the net amount of the indebtedness found to be due.

Staff: Former United States Attorney Jerry E. Williams and Assistant United States Attorney Claude E. Freeman (S. D. Iowa).

* * *