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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Donald F. Turner

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Union Camp Corp. v. Oren R. Lewis, U. S. D. J. for the E. D. Va. (C. A. 4, No. 11,818, November 2, 1962; D. J. 60-15-112)

Union Camp Corporation filed a petition for writ of mandamus against Judge Oren R. Lewis, United States District Judge for the Eastern District of Virginia, before the United States Court of Appeals for the Fourth Circuit, seeking review of an adverse decision on a motion to quash a grand jury subpoena duces tecum directed to certain attorney memoranda. The Government intervened in support of the district court, which had ruled in the Government's favor below. The basic contention of the Government had been that the documents were unprivileged because they constituted advice by the lawyer as to how the client should commit a crime and fraud on the public -- exclusion of competitors by assertion of a patent known to be invalid (see Walker Process Equipment Corp. v. Food Machinery Corp., 382 U. S. 172 (1965)).

Union's position was that the subpoenaed documents were shielded by the attorney-client privilege. In this respect Union contended, first, that the documents did not show that the patent lawyer advised Union in respect to the enforcement of a patent known to be invalid; and, second, that, in any event, the Sherman Act was not violated by such conduct. Union also contended that the district court had denied it due process of law, because it had been given insufficient notice of the issues of the case, and had been denied an evidentiary hearing in which "to marshal all of its evidence".

The Government contended that the record (the 16 Union documents attached as exhibits to the Government's papers in the district court) established that Union had used the patent it knew to be invalid as a means of excluding and controlling competitors, and that the subpoenaed document gave advice for use in this program. The Government also argued, in this connection that the exclusion of competitors by use of a patent known to be invalid is a fraud on the public and violates the Sherman Act. The Government expressly disclaimed the contention that anyone would violate the Sherman Act by enforcing a patent he honestly believed to be invalid, even if the courts later declared

the patent invalid. The sole contention made was that the deliberate enforcement of an invalid patent claim, in order to restrict competition -- when in fact the patent holder clearly knows that the patent claim is bad -- is a fraud on the public and a violation of the Sherman Act. The Government characterized as illogical Union's position that the Walker doctrine must be confined to fraud on the Patent Office, since this would lead to the conclusion that a fraud on the courts (Union had filed a patent infringement suit under the patent that it was said to know was invalid) was less objectionable than a fraud on an administrative agency. The dominant public interest in the patent system, it was argued, required that the court impose no such limitation on the Walker rule.

As to the due process issue, the Government claimed that the subpoena itself gave Union ample notice of the issues, and that the Government's legal theories in this case had been brought out in previous hearings in open court to which Union was a party (other subpoena motions). The Government further argued that the cases are unanimous in holding that the attorney-client cloak is withdrawn upon a prima facie showing that the lawyer's advice is for use in connection with a crime to be committed by the client, and it is therefore not necessary actually to prove the crime or fraud to secure the evidence, or to have a full scale evidentiary hearing. Since the Government had made out its prima facie case through Union's documents, no further hearing was necessary. The compelling need for expedition of grand jury proceedings precludes such dress rehearsals of the actual trial. Finally, the Government noted that Union had failed to make any specific offer of proof to the district court, but had instead merely requested postponements so that the patent lawyer could answer the "charges" for which, Union said, "he is going to be indicted by this grand jury".

The Court of Appeals (Bryan, Craven, Butzner, J. J.) denied the writ of mandamus, per curiam, November 2, 1967. It ruled that the attorney-client privilege is withdrawn upon a prima facie showing that the lawyer's advice was designed to serve his client in commission of a fraud or crime. It found that the Government had met this burden, and was not to be required actually to prove the crime or fraud in order to secure the evidence thereof. In so holding, the Court pointed out that it expressed no opinion of the facts or law touching the merits of the case, nor did it foreclose Union or others from subsequently moving to suppress the evidence or otherwise objecting to its admission.

The Court did not pass on the Government's contention that Union was not entitled to an evidentiary hearing. It found that the district judge did not deny Union a hearing on its motion to quash; he denied a continuance of two weeks, but granted one of several hours, after which Union's attorneys mentioned the names of prospective witnesses but did at no time proffer their testimony.

The Court concluded that, in the circumstances, the district judge did not abuse his discretion in allowing no further continuance.

Staff: Richard H. Stern and James H. Wallace (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

ADMINISTRATIVE LAW

"AGENCY DISCRETION" EXEMPTION IN SECTION 10 OF ADMINISTRATIVE PROCEDURE ACT DOES NOT PRECLUDE REVIEW FOR ABUSE OF DISCRETION; MILITARY DECISION TO DENY WEEKLY NEWSPAPER ACCESS TO DISTRIBUTION FACILITIES IN FAR EAST IS SUBJECT TO JUDICIAL REVIEW.

Overseas Media Corp. v. McNamara (C. A. D. C., No. 2590; October 3, 1967; D. J. 145-15-105)

Plaintiffs publish a newspaper entitled "Overseas Weekly", which is primarily sold to non-commissioned military personnel. In this action, plaintiffs requested the district court to order the Secretary of Defense to allow them access to the use of newsstands in military post exchanges in the Far East for the purposes of selling their papers. Plaintiffs initially had attempted to obtain administrative approval for distribution through post exchanges. This approval was denied, and plaintiffs also failed to obtain a "no objection letter" from the Defense Department, which was assertedly a requirement for distribution of newspapers in certain Far Eastern countries without falling afoul of the foreign governments involved. The Defense Department's denial was based on three grounds: (1) there was already a "balanced selection" of material available for sale; (2) space limitations precluded further publications being sold; (3) the logistics pipeline in the area was saturated. In the district court, plaintiffs alleged that, subsequent to their application, other publications had received approval. The district court granted summary judgment for the Government on the ground that the military has "full discretion to determine what items of merchandise to handle" and that this determination was not subject to judicial review.

The Court of Appeals reversed and remanded for trial. It rejected the Government's argument that this type of procurement decision is non-reviewable because it has traditionally been regarded as "committed to agency discretion" within the meaning of Section 10 of the Administrative Procedure Act, and held that matters "committed to agency discretion" within the meaning of the Act could be reviewed for an "abuse of discretion". The Court noted that the matter was far removed from "what is ordinarily subsumed under the head of military operations". The Court also noted that there was some doubt as to whether "procurement in the usual sense" was involved, since there was some suggestion in the record that the military

does not buy newspapers for resale. Relying on its decision in Gonzales v. Freeman, 334 F. 2d 570, the Court rejected the Government's argument that no one has a right to a government contract, and stated that, even if there is no such right, the Government may not proceed in an arbitrary fashion.

The Court of Appeals' holding that the exception from the judicial review provisions of the Administrative Procedure Act for "matters committed to agency discretion", does not mean that such matters cannot be reviewed for an "abuse of discretion", conflicts with decisions of other Circuits. See, e.g., United States v. One 1961 Cadillac, 337 F. 2d 730, 733 (C.A. 6); Ferry v. Udall, 336 F. 2d 706, 711 (C.A. 9); United States v. Wiley's Cove Ranch, 295 F. 2d 436 (C.A. 8); Updegraff v. Talbott, 221 F. 2d 342, 346 (C.A. 4). In our view, these cases correctly interpret Section 10 of the Administrative Procedure Act, and the holding in the instant case is erroneous.

Staff: John C. Eldridge (Civil Division)

DEFICIENCY JUDGMENTS

FEDERAL HOUSING ADMINISTRATION'S RIGHT TO OBTAIN DEFICIENCY JUDGMENT IS GOVERNED BY FEDERAL LAW; FAILURE TO FOLLOW NEW YORK PRACTICE HELD IRRELEVANT.

United States v. Walker Park Realty, Inc. (C.A. 2, No. 31,385; September 28, 1967; D.J. 130-52-5891)

The Federal Housing Administration sought to obtain a deficiency judgment in a mortgage foreclosure action in the United States District Court for the Eastern District of New York. Contrary to the New York law, the original judgment of foreclosure and sale, which directed the Master to report any deficiency if the proceeds of the sale were insufficient to satisfy the judgment, did not expressly provide for the subsequent entry of a deficiency judgment. The Second Circuit, in a per curiam decision, held that the failure to follow the New York procedure was irrelevant.

The Court noted that federal law governs an action by the United States to foreclose a mortgage insured by and assigned to the FHA. The Court then noted that the complaint had requested a deficiency judgment, and that the appellant, who personally assumed the mortgage, was personally served. The Court found that, under the circumstances, it was sufficiently clear that the original judgment was a personal judgment against the appellant for the full amount due under the mortgage and that it contemplated the further entry

of a deficiency judgment if a deficiency were found to exist after the foreclosure sale.

Staff: United States Attorney Joseph P. Hoey
Assistant United States Attorney Cyril Hyman
(E. D. N. Y.)

FEDERAL EMPLOYEES' COMPENSATION ACT

ACCEPTANCE OF BENEFITS UNDER FEDERAL EMPLOYEES' COMPENSATION ACT BARS ACTION UNDER FEDERAL TORT CLAIMS ACT.

Charles Cobia, et al. v. United States (C. A. 10, No. 9276; October 10, 1967; D. J. 157-77-142)

Plaintiff, a civilian employee of Hill Air Force Base, was injured while going home from work in an automobile collision with a Government truck on the premises of the base. In the companion case of United States v. Udy, C. A. 10, No. 9156, involving an action by the widow of the deceased driver of the car in which Mr. Cobia was riding, the Tenth Circuit had held that there was no "substantial question" of coverage under the Federal Employees' Compensation Act and affirmed an award of damages against the United States under the Tort Claims Act. In that case, the administrative benefit payments under the Federal Employees' Compensation Act had been rejected by the plaintiff. In Cobia, on the other hand, plaintiff accepted such benefit payments and the Court accordingly ruled that the plaintiff was barred from recovering any additional damages under the Tort Claims Act. In so ruling, the Court declared that "Acceptance of benefits under the Federal Employees' Compensation Act is an injured employee's exclusive remedy".

Staff: Robert E. Kopp and J. F. Bishop (Civil Division)

FEDERAL TORT CLAIMS ACT -- FLOODS

IMMUNITY OF UNITED STATES FROM LIABILITY FOR DAMAGES RESULTING FROM FLOODS OR FLOOD WATERS UNDER 33 U. S. C. 702(c) IS ABSOLUTE DEFENSE WHERE PLAINTIFF ALLEGES DAMAGES CAUSED BY FLOODING THROUGH NEGLIGENCE OF UNITED STATES IN CONSTRUCTION OF PART OF FLOOD CONTROL PROJECT.

Minnie McClaskey, et al. v. United States (C. A. 9, No. 21,497; ...ember 21, 1967; D. J. 157-61-1167)

This action was commenced under the Tort Claims Act to recover property damages resulting from the flood of plaintiff's property allegedly caused by the negligent construction of a railroad "shoofly" during relocation of a part of the China Creek Canal in Arlington, Oregon. The district court found the United States negligent in constructing the "shoofly", but held the Government absolutely immune from liability on the ground that 33 U. S. C. 702(c) provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place".

The Court of Appeals affirmed. The Court noted that the improvement of the canal project was specifically authorized in the Flood Control Act of 1944 and later incorporated as part of the John Day Flood Control Project on the Columbia River. The Court rejected the argument that the Government's immunity was limited only to those situations where the damages resulted from the negligent construction of public works such as dams, dikes and levees but extended the immunity to any part of a stream improvement and flood control project authorized by Congress.

This decision is significant in that the Ninth Circuit distinguished its earlier decision in Peterson v. United States, 367 F. 2d 271 (1966, D. J. No. 61-6-18) where it had refused to accept the Government's contention that "the mere happening of a flood insulates the Government from all damage claims flowing from it". In this case, the Court of Appeals asserted that the Government's immunity extends to any situation where the Government's conduct was pursuant to a flood control project authorized by an Act of Congress.

Staff: Carl Eardley and Jack H. Weiner
(Civil Division)

GOVERNMENT CONTRACTS -- GOVERNMENT'S RIGHT TO INSPECT BOOKS OF CONTRACTOR

UNDER 10 U. S. C. 2313 GOVERNMENT HAS RIGHT TO INSPECT BOOKS AND RECORDS PERTAINING TO COSTS OF PRODUCTION UNDER PROCUREMENT CONTRACT.

Hewlett-Packard Co. v. United States (C. A. 9, No. 21, 323; November 15, 1965; D. J. 145-158-4196)

10 U. S. C. 2313 requires that Government procurement contracts provide that the Comptroller General is entitled for a period of three years after final payment to examine any records of the contractor "that directly pertain to, and involve transactions relating to, the contract or

subcontract". The Government in a contract with Hewlett-Packard, a manufacturer of electronic test and measurement equipment, inserted a clause consistent with this statutory requirement. After final payment by the Government on the contract, the Comptroller General sought to examine all records of Hewlett-Packard "relating to the pricing and cost of performance, support for prices charged to the Government, and such other necessary information which would permit such Representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts". Hewlett-Packard opposed this demand on the ground that cost or production information was not directly pertinent to these contracts.

The district court held that the Government was entitled to examine the records relating to the cost of producing the items furnished by Hewlett-Packard Company under the contracts, and the Court of Appeals affirmed. Hewlett-Packard argued that the word "contract" in the statute embraced only the specific terms and conditions of the agreement, and since production costs were not taken into consideration in arriving at the terms of the contract, data relating to those costs could not be said to directly pertain to, and involve transactions relating to, the contract. The Court of Appeals rejected this argument, holding that the word "contract", as used in this statute, is intended to have a broader meaning, "embracing not only the specific terms and conditions of the agreement, but also the general subject matter". The subject matter of these four contracts "is the procurement of described property by the Government . . . Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government."

Staff: United States Attorney Cecil F. Poole
Assistant United States Attorney Robert N. Ensign
(N. D. Cal.)

GUARANTORS

GUARANTORS OF SBA LOAN WAIVE ANY PROTECTION OF STATE LAW REQUIRING ASSURED TO BRING SUIT AGAINST PRINCIPAL ON DEMAND OF GUARANTOR; "WILLFUL FAILURE TO ACT" CLAUSE IN GUARANTEE WHICH WOULD RELEASE GUARANTORS ONLY APPLIES TO ACTUAL PHYSICAL DETERIORATION OF COLLATERAL.

Austad v. United States (C.A. 9, No. 20,876; November 16, 1967; D.J. 105-8-13)

This action was brought by the United States to foreclose a mortgage held by the Small Business Administration on property of the Austad Steel

Company and for a judgment against the Austads personally as unconditional guarantors of the company's note. The guarantors defended on the grounds that the United States had failed to bring an action against the principal within 60 days after demand by the guarantors to do so, thus releasing the guarantors under Arizona law, and that the "willful and unconscionable delay" in bringing the action while the value of the security deteriorated released the guarantors under the SBA contract of guarantee, which specified that the obligations of the guarantors would not be discharged or affected "by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of SBA". They also asserted a defense of laches.

The district court granted our motion for judgment on the pleadings. The Ninth Circuit affirmed. It did not reach our contention that federal law governed the transaction, rendering the Arizona statute irrelevant. Instead, the Court held that under the terms of the SBA form guarantee here involved, the guarantors plainly waived any right which they might otherwise have had to require SBA to bring suit, even if state law were to govern. The terms of the guarantee, which allowed SBA to grant any indulgence or to enter into any agreement of forbearance, also were held to dispose of the guarantors' defense of laches.

As to the "willful failure to act" defense, the Court held that the clause referred only to actual physical loss to the property rather than a mere decline in value during a period of inaction on the part of the assured.

Staff: Robert C. McDiarmid (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

EMPLOYEE'S DEATH FROM HEART ATTACK NOT COMPENSABLE WHERE THERE IS SUBSTANTIAL NEGATIVE EVIDENCE THAT IT WAS NOT WORK-RELATED.

Mary R. Wheatly v. Herman Adler, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, et al. (C. A. D. C., No. 20,455; October 2, 1967; D. J. 83-16-287)

In this case, the appellant's husband who had been suffering from arteriosclerosis, died from myocardial insufficiency while at work. The Deputy Commissioner denied the wife's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, on the ground that decedent's death did not arise out of or in the course of his employment,

but rather resulted from a natural progression of his existing arteriosclerosis. The evidence showed that on the day in question the decedent showed no strain or trauma or anything abnormal. The doctors who testified expressed the view that the heart attack could have occurred as a result of the decedent's act of urinating outdoors in 40-degree weather soon after he reported to work.

The Court of Appeals upheld the denial of compensation, holding that the Deputy Commissioner had met his burden of overcoming the statutory presumption (33 U. S. C. 920(a)) that "the claim comes within the provisions of the Act". That burden was overcome in the Court's view, by substantial negative evidence showing no unusual strain or upset on the day of the death. And the Court found it unnecessary to reach the question of whether the decedent's urination in the outdoors was in the course of employment, for in its view the evidence did not establish, either way, whether it was causally connected with the heart attack.

Judge Leventhal dissented. In his view, the case law established that the decedent's urination in the outdoors would be considered in the course of his employment and that it was thus critical to determine whether that act caused the death. Since the medical evidence showed a real possibility that decedent's urination caused his death, and in view of the statutory presumption, Judge Leventhal believed that any doubts were to be resolved in favor of the claimant, and that compensation should be awarded.

Staff: United States Attorney David G. Bress
Assistant United States Attorney Frank Q. Nebeker (D. D. C.)

MEDICAL CARE RECOVERY ACT

ACT GIVES UNITED STATES AN INDEPENDENT RIGHT TO RECOVER COST OF GOVERNMENT-FURNISHED MEDICAL CARE.

United States v. Fort Benning Rifle and Pistol Club (C. A. 5, No. 23,979; November 27, 1967; D. J. 77-19M-268)

The Medical Care Recovery Act provides that "[i]n any case in which the United States is authorized or required by law to furnish * * * medical care * * * to a person who is injured or suffers a disease * * * under circumstances creating a tort liability upon some third person to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured person * * * has against such third person to the extent of the

reasonable value of the care and treatment so furnished or to be furnished". 42 U. S. C. 2651(a). This action was commenced by the United States on January 6, 1966, under the Act to recover from the Club the reasonable value of the medical care which the Government furnished a serviceman negligently injured at the Club on June 3, 1963. The district court granted the Club's motion to dismiss on the ground that the Government's claim was barred by the two-year Georgia statute of limitations on personal injury actions.

We appealed, contending that the Act gives the United States an independent right to recover, and that this right was not subject to state statutes of limitation. The Fifth Circuit agreed and reversed, stating that the Government's right was "subrogated" only "to the extent that it is subject to any state substantive defenses which would negate the requirement that the injury arise 'under circumstances creating a tort liability upon some third person'."

This decision represents the first Federal appellate court holding on the question of the nature of the United States' right under the Medical Care Recovery Act. See also Tolliver v. Shumate, 150 S. E. 2d 579 (W. Va., 1966).

Staff: Howard J. Kashner (Civil Division)

TUCKER ACT

$10,000 LIMITATION ON DISTRICT COURT JURISDICTION UNDER ACT BARS ACTION BY GUAM TAXPAYER ASSERTING $10,000,000 CLAIM ON BEHALF OF GOVERNMENT OF GUAM AGAINST UNITED STATES; TAXPAYER OF GUAM NOT ENTITLED TO ASSERT CLAIM BELONGING TO GOVERNMENT OF GUAM.

Salas v. United States (C. A. 9, No. 21401; October 23, 1967; D. J. 78-91-3)

48 U. S. C. 1421d(c) requires the United States to pay transportation and housing expenses of employees of the Government of Guam who come from off the island. Since 1953, Congress has failed to appropriate these funds, and as a result the expenses have been paid by the Government of Guam. This action was brought by a citizen and taxpayer of Guam, asserting a claim for these expenses on behalf of the Government of Guam, which allegedly refused to assert the claim itself. The district court dismissed the action. On appeal, plaintiff sought to avoid the $10,000 jurisdictional limitation of the Tucker Act by arguing that, for purposes of jurisdictional amount, the claim could be divided among each taxpayer. There being some 50,000 taxpayers in Guam, plaintiff alleged that his interest in the

claim was only about $200. The Court of Appeals rejected this argument, holding that the claim exceeded the jurisdictional amount. The Court also held that the claim belonged only to the Territory of Guam and that "none other than the Territory was empowered to assert it".

Staff: Robert V. Zener (Civil Division)

UNITED STATES SAVINGS BONDS

TREASURY REGULATIONS AND NOT STATE LAW DETERMINE OWNERSHIP OF "LOST" UNITED STATES SAVINGS BONDS.

Hoeppner v. Slagle (Appellate Court of Indiana, No. 20,651; November 15, 1967; D. J. 146-37-463)

The intermediate Indiana appellate tribunal, reversing a state circuit court decision, has ruled in this case that United States Treasury Regulations and not the Indiana law of abandoned property determine the ownership of mislaid United States Savings Bonds. Accepting the contentions set out in our brief as amicus curiae, the Appellate Court cited Free v. Bland, 369 U. S. 663, and Yiatchos v. Yiatchos, 376 U. S. 306, in holding that "any state law which is in conflict" must yield to the Federal Treasury regulations controlling the issue, ownership and redemption of Series E Government Bonds. The Court went on to reverse the trial court's decision (based on Indiana law) that the finder of "abandoned" savings bonds was entitled to retain them against the claim of the estate of the deceased named owner of the bonds.

Staff: Richard S. Salzman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

FIREARMS

CONFISCATION OF FIREARMS FOUND IN THE POSSESSION OF CONVICTED FELONS

Title 18 U. S. C. 3611 provides in substance that a judgment of conviction may include an order by the court confiscating any firearms or ammunition found at the time of arrest in the possession or under the immediate control of a defendant subsequently found guilty of one of the offenses enumerated in the statute. Crimes which come within the scope of the statute include murder, manslaughter, rape, robbery, killing or assaulting a Federal officer, bank robbery and kidnapping.

Frequently revolvers, rifles and other weapons taken from criminals are not subject to forfeiture under other Federal laws, and it is obviously undesirable to have the weapons returned to individuals who may use them in committing crimes of violence. Accordingly, it is strongly recommended that 18 U. S. C. 3611 be brought to the court's attention in proper cases at the time of sentence for the purpose of preventing the return of the weapons to convicted felons.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

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California, Central - HOWARD B. FRANK; DePaul University, J. D., and formerly in private practice.

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Florida, Middle - JOHN W. CAVEN, JR.; University of Florida, LL. B., and formerly in private practice.

Florida, Middle - GARY B. TULLIS; University of Florida, LL. B., and formerly in private practice.

Louisiana, Eastern - HORACE P. ROWLEY, III; Tulane University, LL. B.

New York, Southern - SIMON P. GOURDINE; Fordham University, LL. B., and formerly Assistant Inspector General U. S. Army.

Tennessee, Eastern - WILLIAM T. DILLARD; University of Texas, LL. B., and formerly in private practice.

Texas, Eastern - CARL R. ROTH; University of Texas, LL. B., and formerly a law clerk, district court.

Texas, Western - WARREN N. WEIR; University of Texas, LL. B., and formerly with Equal Employment Opportunity Commission.

Utah - JAMES F. HOUSLEY; University of Utah, LL. B., and formerly in private practice.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

COURT OF APPEALS

IMMIGRATION

ALIEN'S TESTIMONY COMPELLED IN VIOLATION OF FIFTH AMENDMENT IN DEPORTATION HEARING CANNOT SUPPORT FINDING OF DEPORTABILITY.

Herminia Venus Valeros v. INS (No. 16087, C.A. 7, Nov. 28, 1967; D.J. 39-23-369)

The above proceedings involved a petition to review a deportation order for the petitioner, a Filipino National, who was admitted as an exchange visitor and overstayed her authorized admission.

Petitioner in her deportation hearing initially refused to testify on the ground that her testimony might incriminate her. The Special Inquiry Officer, while recognizing that the Fifth Amendment privilege may be asserted in a deportation hearing, found that petitioner's testimony would not incriminate her and directed her to testify which she did. On appeal the Board of Immigration Appeals found that the Special Inquiry Officer had properly directed petitioner to testify and that even if he did err, the testimony was admissible because a deportation hearing is civil and not criminal in nature.

The Court of Appeals for the Seventh Circuit ruled that the Special Inquiry Officer was not sufficiently informed to determine whether petitioner's testimony would incriminate her, that he erred in compelling her testimony and that the Board of Immigration Appeals improperly considered her testimony given after a claim of self incrimination.

The Court went on to rule that immigration documents in the deportation record in the name of petitioner were sufficient to support the deportation order. The immigration documents were challenged only on the basis that there was no proof that petitioner was the alien named in them. This challenge was brushed aside for the reason that petitioner had presented no proof that she was not the alien named in the documents. The petition to set aside the deportation order was denied.

Staff: United States Attorney Edward V. Hanrahan
Assistant United States Attorney John Peter Lulinski (N.D. Ill.)

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