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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Donald F. Turner

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United States v. Schenley Industries, Inc., et al. (S. D. N. Y. 66 Civ. 1175; January 24, 1968; D. J. 60-0-37-818)

The complaint, filed on April 25, 1966, charges Schenley Industries, Inc. and The Buckingham Corporation with a violation of Section 7 of the Clayton Act by reason of Schenley's acquisition in excess of 50% of the outstanding common stock of Buckingham.

After joinder of issue, the Government moved before Judge Tyler to strike a "cartel" defense (subparagraphs 8(A) through 8(G) from Schenley's answer). The Court by an order dated October 5, 1966, granted the motion in all respects.

Schenley has deposed witnesses Obernauer and Vitale, officers of Bohemian Distributing Company in Los Angeles, California. During the course of the examination, the witnesses objected to a proposed line of questioning and through counsel in New York moved for an order pursuant to Rule 30(b) and (d), F. R. C. P., limiting the scope of their examination to exclude any inquiry into personal and business relationships between them and Bohemian Distributing Company (Bohemian) and Distillers Corporation-Seagram's Ltd. (Seagram's), its subsidiaries, officers or agents.

The principal argument made on behalf of the witnesses in seeking a protective order was the assertion that Schenley's proposed line of questioning with respect to Seagram's relationship with Bohemian was in fact an attempt to circumvent Judge Tyler's order striking the "cartel" defense.

Schenley, in opposing any limitation of the proposed examination, denied that any attempt was being made to circumvent the order but was seeking information with respect to its third and fifth defenses, which was left open by Judge Tyler.

The Government took the position that it was not prepared at this time to unequivocally state that Schenley should be foreclosed from this line of inquiry, although it made it clear that it believed this defense to be remote and

tenuous and, unless some limitation was imposed at this point, an unlimited discovery addressed to such remote defense could delay the trial of this case indefinitely and result in calculated harassment.

Judge Sylvester J. Ryan in a memorandum opinion and order dated January 24, 1968, permitted only a limited examination in the disputed area. The Court said: "[T]he examination will be allowed for the purpose of permitting defendant to inquire into the stock ownership of Bohemian by Seagram's, directly or indirectly, for the purpose of testing the control Seagram's exercises, or has power to exercise, over Bohemian." The depositions were rescheduled for this limited purpose, and subpoenas were ordered to be limited to witnesses having knowledge of the stock control outlined above.

The Court, by permitting such examination, did not pass upon the merits of the defense on the ground urged by Schenley.

However, in disposing of Schenley's argument that its inquiry is relevant on the issue of whether Schenley's acquisition of Buckingham stock is likely to produce the anti-competitive effects charged, Judge Ryan said:

> Although among the criteria set forth in Section 7 cases by United States v. Penn-Olin, 378 U.S. 176-77, the Court cited the background of the growth of the competition and the setting in which it grew, this does not mean that a defendant may under the guise of establishing such facts inject into the principal case the resolution of the effect or legality of various other acquisitions by that defendant's competitors and pry into their social, financial and business relationships.

Staff: Norman H. Seidler and Louis Perlmutter (Antitrust Division)

SHERMAN ACT and CLAYTON ACT

DISTRICT COURT FINDS NEWSPAPERS VIOLATED SECTIONS 1 AND 2 OF SHERMAN ACT AND SECTION 7 OF CLAYTON ACT.

United States v. Citizen Publishing Company, et al. (Civ. No. 1969-Tucson; January 31, 1968; D.J. 60-127-82)

On January 31, 1968, Judge James A. Walsh handed down his judgment, findings of fact and conclusions of law in this case. The complaint, which was filed on January 4, 1965, charged that the defendants, publishers of the Star and Citizen, the only two daily newspapers in Tucson, Arizona, had violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and monopolize the daily newspaper business in Tucson. In 1940 the parties entered into a joint publishing agreement under which they established

an agency corporation to set rates for both parties, pooled the profits of both newspapers and allocated the morning and evening fields. The complaint also charged that the 1965 acquisition of Star by Citizen was a step in the combination and conspiracy to monopolize and was a violation of Section 7. Prior to trial of the case (which was held in April of 1966) the court had ruled that the joint publishing agreement constituted per se illegal price fixing, profit pooling and market allocation.

In its decision the Court reaffirmed this ruling and also held that: the relevant product market is the daily newspaper business; the geographic market is the Tucson standard metropolitan statistical area (Pima County); the two newspapers through the joint publishing agreement acquired monopoly power over the daily newspaper business in Tucson; the defendants in entering into the joint publishing agreement had the intent and purpose of eliminating commercial competition in the daily newspaper business in Tucson; and that the 1965 acquisition was in furtherance of and a part of the combination and conspiracy to monopolize and was also a violation of Section 7.

In its judgment the Court ordered the defendants to sell the acquired newspaper and to submit a modification of the joint publishing agreement which would eliminate its price fixing, profit pooling and market allocation features. The two newspapers will still be allowed to share production facilities.

This was the first case brought by the Government challenging joint operating agreements which presently exist in 23 other cities throughout the country. The issue of joint publishing agreements is also currently being considered in the Senate as a result of hearings on the "Failing Newspaper Act". It is the purpose of this bill to allow joint publishing agreements where one of the newspapers "appears unlikely to remain or become a financially sound publication".

Staff: Charles D. Mahaffie, Jr., Gerald A. Connell and Lewis Gold (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SPECIAL NOTICE

MORTGAGE FORECLOSURES

In United States Attorneys Bulletin No. 23 dated November 10, 1967 at page 707, a special notice provided in part:

> It will not be necessary to join state and local governmental units asserting real property tax liens only in the complaints filed in Veterans' Administration and Federal Housing Administration single family mortgage foreclosures or in Farmers Home Administration or Small Business Administration foreclosures. These agencies are willing to pay these taxes even though our mortgage lien may have priority under the Federal rule of "First in time, first in right". See 38 U.S.C. 1820(2)(6); 12 U.S.C. 17066; 7 U.S.C. 1984; 15 U.S.C. 646.

Small Business Administration has now requested that in those instances where a local taxing authority asserts a tax lien which includes penalties or interest, the taxing authority be made a defendant. In the cases of United States v. Christensen, 218 F. Supp. 722 (D.C. Montana, 1963) and United States v. Consumers Scrap Iron Corporation, 384 F.2d 62 (C.A. 6, 1967), it was held that the subordination in 15 U.S.C. 646 of SBA security interests in property to "any lien on such property for taxes due on the property" does not extend to penalties and interest included in the tax claim. Accordingly SBA is unwilling to pay such penalties or interest. Therefore, where the tax lien asserted by the local taxing authority includes penalties or interest, as will probably be the case in most instances, you should join the authority as a defendant.

The above instruction applies only to SBA mortgage foreclosures. It will still be unnecessary to join the local taxing authorities as defendants in suits filed in Veterans Administration and Federal Housing Administration single family mortgage foreclosures or in Farmers Home Administration foreclosures, even though the local tax claim includes penalty and interest. These agencies will either pay the tax lien, including penalties and interest, or permit the property to be sold subject to such lien, where under state law such lien would have priority over their security interests.

FEDERAL TORT CLAIMS ACT

PLAINTIFF HELD BARRED FROM BRINGING ACTION UNDER FEDERAL TORT CLAIMS ACT WHERE HE HAD PREVIOUSLY FILED ADMINISTRATIVE

CLAIM FOR SETTLEMENT AND AGENCY HAD ALLOWED CLAIM: PLAINTIFF'S SUBSEQUENT REJECTION OF SETTLEMENT WITHOUT EFFECT.

Ferreira v. United States (C. A. 9, No. 21488, January 12, 1968; D. J. 157-12-1229)

The plaintiff received injuries when a tractor driven by him went into a hole in the ground left by employees of the Department of Interior. He filed an administrative claim with the Department in the amount of $93. 50 to recover for his personal injuries. His claim contained the printed statement, "I declare . . . that the amount of this claim covers only damages and injury caused by the accident described above. I agree to accept said amount in full satisfaction and final settlement of this claim." The plaintiff made no attempt to withdraw this claim, and the Department allowed his claim in full. However, plaintiff then refused to accept payment of the $93. 50, and brought the present action under the Federal Tort Claims Act, alleging damages arising from the accident in the amount of $75, 000.

At the time the action was brought, 28 U. S. C. 2675(a) provided that suit upon a claim presented to a federal agency could not be brought against the United States until the agency had made a final disposition of the claim. 28 U. S. C. 2675(b) additionally provided that the administrative claimant could, "however," commence an action prior to final disposition of his administrative claim if that administrative claim was first abandoned or withdrawn.

The district court dismissed plaintiff's action under the Tort Claims Act, and the Ninth Circuit affirmed. The Court of Appeals pointed out that the statutes should not be construed so as to allow a claimant to file an administrative claim, wait until the claim has been allowed in full, and then sue the United States for a larger sum. 28 U. S. C. 2675(a) and (b) when read together indicate that judicial relief is intended to be an alternative remedy to administrative relief and available only where the administrative claim is first abandoned and withdrawn under 28 U. S. C. 2675(b) or denied under 28 U. S. C. 2675(a).

Staff: United States Attorney John P. Hyland; Assistant United States Attorney Frederick M. Brosio, Jr. (E. D. Cal.)

GOVERNMENT LITIGATION: SUPERVISION AND CONTROL BY DEPARTMENT OF JUSTICE

FEDERAL TRADE COMMISSION MAY NOT SEEK ENFORCEMENT OF ITS SUBPOENAS IN FEDERAL COURT WITHOUT AID OR CONSENT OF DEPARTMENT OF JUSTICE.

Federal Trade Commission v. Guignon (C. A. 8, No. 18,716; February 9, 1968; D. J. 102-1350)

The Federal Trade Commission, represented by its own attorneys, brought this action in the district court to enforce two discovery subpoenas issued pursuant to the Federal Trade Commission Act. The district court denied enforcement on the ground that the FTC was not represented by the Department of Justice. The Court of Appeals has just affirmed, reiterating the "plenary power and supervision" of the Attorney General over "all litigation to which the United States or an agency thereof is a party."

In its 2-1 decision, the Eighth Circuit held that the FTC could not bring a subpoena enforcement action without the aid or consent of the Attorney General. The Court noted that under 28 U. S. C. 516 and 519 the conduct of the Federal Government's litigation is expressly reserved "to officers of the Department of Justice." In addition, the Court referred to our amicus brief in which we noted that many other agencies had statutory subpoena enforcement provisions virtually identical to those of the Federal Trade Commission Act, and that all of those agencies are either represented by the Department of Justice or are required to obtain the Department's authorization before seeking enforcement of an administrative subpoena by the district court.

Staff: Morton Hollander and Richard S. Salzman (Civil Division)

JUDICIAL SALES

SALE CONDUCTED PURSUANT TO DIRECTION OF COURT ORDER IS JUDICIAL SALE AND NOT EXECUTION SALE UNDER RULE 69(a), FEDERAL RULES OF CIVIL PROCEDURE; THUS, DISTRICT COURT MAY ESTABLISH CONDITIONS OF SALE WITHOUT REGARD TO STATE LAW.

United States v. Branch Coal Corp. (C. A. 3, No. 16515; January 19, 1968; D. J. 105-62-70)

The United States obtained a judgment against the Branch Coal Company in the amount of $95,000. To satisfy that judgment the district court directed the sale of certain property held by Branch Coal. The sale in question was conducted pursuant to an order of the district court which provided that the successful bidder would be required to deposit 10% of his total bid immediately upon the property being struck down to him at the sale; the balance would be due within 30 days thereafter, and if not paid, the deposit would be forfeited.

At the sale, the Sun Protection Company was the successful bidder with

a bid of $80,000. In accordance with the district court order, it paid a deposit of 10% of that sum ($8000). However, it was unable to pay the remaining balance within 30 days, and the district court declared its deposit forfeit. A new sale was held, and the Small Business Administration purchased the property for $25,000. After various costs were deducted from Sun's deposit, the district court ordered that the balance of the deposit be paid to the Small Business Administration.

Sun appealed from this order, contending that the original sale was void because conducted in accordance with the order of the district court and not state law (which allegedly would have allowed Sun to recover most of its deposit). Sun based its argument before the Third Circuit on Rule 69(a) of the Federal Rules of Civil Procedure which provides: "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution... shall be in accordance with the practice and procedure of the state in which the district court is held..." The Court rejected Sun's argument, pointing out that while Rule 69 (a) precludes the application of federal procedure to execution sales, there was no requirement that an execution sale be held in every case where the United States was seeking to enforce a money judgment. The district court here had directed that the sale be held under judicial auspices; thus it was clearly a judicial sale rather than one held under a writ of execution. A judicial sale differs from an execution sale in that the former is conducted pursuant to directions of the court and the federal statutes, e.g., 28 U.S.C. 2001-2007. The Court went on to rule that the district court did not abuse its discretion in conducting a judicial sale by declaring that the successful bidder would forfeit his deposit if he should fail to complete the sale.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sullivan Cistone (E.D. Pa.)

SOCIAL SECURITY

SALARIED MANAGEMENT CONSULTANT PAID MORE THAN $125 A MONTH HELD ENTITLED TO RECEIVE OLD-AGE BENEFITS ONLY IN MONTHS IN WHICH HE DID NOT WORK AT ALL.

John W. Gardner v. Vaud A. Travis (C.A. 10, No. 9356; December 19, 1967, D. J. 137-59-51)

The Tenth Circuit reversed a decision of the district court prohibiting the Secretary from imposing deductions against the old-age benefits of Dr. Travis for all months during 1963, 1964, and 1965. Travis, a retired college professor over the age of 65, but less than 72, was employed as a management consultant by a Canadian firm at a monthly salary of $700. During about six months of each year he was on his employer's premises in

Canada for periods of about two weeks each. In other months, Travis was at home in Oklahoma, where he engaged in research of about 40 hours a week. He stated that less than 5 percent of this research was devoted to his employer's specific problems. While at home, Travis also placed four to six long-distance calls and wrote eight to twelve letters each month to his Canadian employer. Travis conceded that deductions were proper for those months he worked in Canada, but contended they could not be made for the months he remained in the United States.

Section 203(c) of the Social Security Act, 42 U.S.C. §403(c), requires deductions from an individual's old-age benefits for any month "in which such individual is under the age of seventy-two and on seven or more different calendar day * * * [engages] in noncovered remunerative activity outside the United States." Section 203(b) and (f) dictate benefit deductions for any month in which an individual's earnings from wages exceed $125, unless, as provided in Section 203(f)(1)(D), the individual did not, in such month, "render services for wages * * * of more than $125." (Emphasis added). The term "wages" is defined by Section 209 as "remuneration * * * for employment." "Employment" in turn is defined in Section 210(a) as "any service, of whatever nature, performed after 1950 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, * * * or (B) outside the United States by a citizen of the United States as an employee (i) of an American employer * * * or (ii) of a foreign subsidiary * * * of a domestic corporation * * * ."

The Tenth Circuit agreed with the Secretary's position that so long as an employee (1) is paid more than $125 a month, and (2) "did any work whatsoever" for his employer in a month, deductions are properly assessable, since in that month the employee would be rendering "services for wages" of more than $125 within the meaning of Section 203(f)(1)(D). The Court noted that Section 209(i) provides that the term "wages" does not include payments made to the employee where "he did not work for the employer in the period". The Court rejected Travis' argument that the Secretary must determine whether the wages received during months at home were received "in exchange" for services rendered in those months.

Staff: Walter H. Fleischer (Civil Division)

URBAN MASS TRANSPORTATION ACT OF 1964--JUDICIAL REVIEW

SECRETARY OF LABOR'S DETERMINATION AS TO FAIRNESS AND EQUITY OF PROTECTIVE AGREEMENTS REQUIRED TO BE MADE BY THE PROVISIONS OF THE STATUTE IS CONTROLLING.

Harold Kendler, et al. v. W. Willard Wirtz, etc. (C. A. 3, No. 16340; January 18, 1968, D. J. 145-10-84)

The plaintiffs, seven employees of the Pennsylvania Railroad and members of the Brotherhood of Trainmen sued in the district court to enjoin the Secretary of Labor from certifying that "fair and equitable arrangements" within the meaning of Section 10(c) of the Urban Mass Transportation Act of 1964 had been made to protect the interests of railroad employees, as they may be affected by three proposed federal grants-in-aid to New Jersey and certain state agencies for the purpose of improving railroad-commuter service. Plaintiffs also sought to enjoin the Secretary of Housing and Urban Development from disbursing funds for the projects in question until such "fair and equitable arrangements" should be made. The Government moved to dismiss the action on the grounds that plaintiffs lack standing to sue and that the administrative determinations were not subject to judicial review. The Government's motion was granted and the Third Circuit unanimously affirmed.

The Court of Appeals stated that the Ninth Circuit's decision in Johnson v. Redevelopment Agency, 317 F. 2d 872, was in point on the question of plaintiffs standing to sue. However, the Third Circuit did not decide whether it would follow Johnson, basing its affirmance instead on the ground of the unreviewability of the Secretary's determinations. The Court noted that Section 10 of the Administrative Procedure Act expressly excludes "agency action . . . by law committed to agency discretion" from judicial review, and that nothing in the Urban Mass Transportation Act of 1964 suggests that this exclusionary language is inapplicable to the required determinations under the Urban Mass Transportation Act that protective arrangements for the benefit of the employee be "fair and equitable". The Court of Appeals also stated that the Secretary of Labor had made a reasonable accommodation of the conflicting interests here involved, that the type of determinations involved did not present questions within the special competence of lawyers and that it would not be appropriate for a court to substitute its judgment for the Secretary's judgment, which must be accepted as controlling. The Court of Appeals also rejected plaintiffs' contention that the Secretary of Labor, who had received a written statement of plaintiffs' objections, did not grant them a hearing on their complaint.

Staff: Leonard Schaitman (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Stephen J. Pollak

DISTRICT COURT

VOTING

STATE ELECTION OFFICIALS HAVE DUTY UNDER FIFTEENTH AMENDMENT TO UNITED STATES CONSTITUTION AND VOTING RIGHTS ACT OF 1965, 42 U.S.C. 1973, NOT TO ENGAGE IN ACTS OR PRACTICES WHICH HAVE EFFECT OF RACIAL DISCRIMINATION AMONG QUALIFIED VOTERS IN ELECTIONS OF ANY KIND; THIS DUTY INCLUDES REFRAINING FROM CONDUCT WHICH RESULTS IN ALLOWING WHITE VOTERS OPPORTUNITIES TO VOTE WITHOUT AFFORDING SAME OPPORTUNITIES TO NEGRO VOTERS.

United States v. Post, et al. (W.D. La., January 24, 1968; No. 12583)

This suit was filed under Section 2 and 12(d) of the Voting Rights Act of 1965 and 42 U.S.C. 1971 (a) and (c). By order of the District Court, this action and the case of Brown et al. v. Post et al. (Civil No. 12471) were consolidated for trial on the merits.

Generally, the Government's complaint alleged that the defendant state election officials engaged in racially discriminatory acts and practices in the administration of absentee voting for a general election for local school board member. The Government's position was that the defendants, by holding out one set of rules to prospective Negro voters while applying a different set of rules for white voters, subjected qualified Negro electors to a deprivation of their constitutional right to vote without distinction of race.

The District Court for the Western District of Louisiana found that, although the defendants did not engage in any intentional plan to deprive Negro voters of their right to vote, the manner in which the defendants administered absentee voting was discriminatory in fact. Pursuant to that finding, the Court held that if there is discrimination in the administration of the voting process, it is adequate legal ground to void the election regardless of the good faith intentions of the election officials. The Court further held that the fact that the outcome of the election would not have been changed had the disputed absentee ballots been excluded does not preclude the setting aside of the election.

The Court set aside the election for school board member and ordered

that another election be conducted. The defendants were enjoined from engaging in the practices which were found to be discriminatory and any other practices and procedures which may be discriminatory in fact. Costs incurred in the proceedings were taxed against the defendants.

Staff: James P. Turner, J. Harold Flannery, Jesse H. Queen, and Marvin D. Nathan (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

SUPERVISION BY CRIMINAL AND TAX DIVISIONS OF VIOLATIONS BY EMPLOYEES OF THE INTERNAL REVENUE SERVICE

(Amending Special Notice in Vol. 15, No. 22, dtd. October 27, 1967, at pp 668-669)

The Criminal Division has supervisory jurisdiction over criminal violations involving malfeasance or misfeasance of office by employees of the Internal Revenue Service which may also give rise to tax violations. Supervisory jurisdiction over the tax violations is exercised by the Tax Division. In order that the responsibility of both Divisions may be fulfilled expeditiously, each Division has agreed to the following procedures:

1. If there are only employee violations contained in the IRS [~~Intelligence~~] Inspection reports, the Criminal Division will handle the case to the exclusion of the Tax Division.

2. If there are tax liability as well as employee violations contained in the IRS [~~Intelligence~~] reports, the employee violations will be reviewed by the Criminal Division prior to the tax liability review by the Tax Division.

3. Whenever practicable the employee violations will be the subject of an early indictment separate and apart from any indictment charging tax liabilities.

4. If proof of the employee violations needs to be and would be bolstered by their incorporation into a single indictment with the tax violations, the employee violations will be delayed while the Tax Division seeks an opinion of the General Counsel of the Internal Revenue Service and makes other preparations desired by the Tax Division.

ECONOMIC OPPORTUNITY AMENDMENTS OF 1967
PUBLIC LAW 90-222, DECEMBER 23, 1967

Title III of Public Law 90-222 reads:

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any agency receiving financial assistance under the Economic Opportunity Act of 1964 embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to the Economic Opportunity Act of 1964, shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, by threat of procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a grant or contract of assistance under the Economic Opportunity Act of 1964 induces any person to give up any money or thing of any value to any person (including such grantee agency), shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Heretofore, when irregularities have been charged in connection with work-training or other anti-poverty programs administered pursuant to provisions of the Economic Opportunity Act, investigation has been conducted to determine whether there have been violations of the criminal fraud statutes, 18 U.S.C. 287, 371, and 1001. The new section is patterned on the theft of Government property (18 U.S.C. 641), banking misapplication (18 U.S.C. 656), and kick back from public works employees (18 U.S.C. 874) statutes. It may afford a broader vehicle for prosecution in those instances where it is difficult to demonstrate that false books and records were maintained or that false claims were submitted.

When and if instances of possible criminal misconduct are reported in connection with the operation of such programs in your districts, we believe that this statute may afford another effective deterrent force.

Title III of Public Law 90-222 will be codified as Section 2703 of Title 42, United States Code. The Federal Bureau of Investigation has been advised that it will have investigative jurisdiction in these cases.

Any question should be addressed to the Criminal Division, Fraud Section.

NARCOTIC ADDICT REHABILITATION ACT OF 1966

In order to allow the maximum degree of flexibility for the examination or treatment of individuals committed pursuant to Titles I and III of the Narcotic Addict Rehabilitation Act of 1966, the United States Attorneys' petition to the court requesting the commitment of the subject should not designate a particular Clinical Research Center. The court's order should commit the subject "to the custody of the Surgeon General for confinement in a hospital of the Service." This procedure will allow the Surgeon General to take into consideration the availability of facilities and the subject's needs in selecting the commitment center.

UNITED STATES ATTORNEYS--SPECIAL ASSISTANT; NECESSITY FOR SPECIAL APPOINTMENTS BY THE ATTORNEY GENERAL

The United States Attorneys are reminded that special approval and appointment by the Attorney General must be obtained for the participation in trial or appeal of attorneys not employed by the Department of Justice. In a recently published opinion, mention is made of the participation of an attorney employed by another agency in the examination of witnesses and argument during trial, and the absence of a special appointment by the Attorney General for him. Under the circumstances of the case, the Court of Appeals held that the defendants had waived strict compliance with 5 U.S.C. 310 (now 28 U.S.C. 515), which authorized the Attorney General, officers of the Department of Justice, "or any attorney or counselor specially appointed by the Attorney General," to conduct legal proceedings.

It has long been the policy of the Department that only in rare cases will requests for special appointment be granted. We appreciate and require the great assistance we receive from the attorneys of the investigative and referring agencies. However, the responsibility for the conduct of the trial rests on the Department of Justice and should not be delegated.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

Arizona - PHILIP S. MALINSKY; University of Arizona Law School, LL.B., and formerly in private practice.

Illinois, Northern - JOHN B. SIMON; De Paul University College of Law, J.D.

Missouri, Western - CHARLES E. FRENCH; Vanderbilt University Law School, LL.B., and formerly in private practice and Air Force JAG.

New York, Eastern - JOHN LEONE; New York Law School, LL.B., and formerly with Legal Aid Society.

North Dakota - EUGENE K. ANTHONY; University of North Dakota Law School, LL.B., and formerly in private practice.

Ohio, Northern - FREDERIC K. JUREK; Cleveland Marshall Law School, J.D., and formerly in private practice.

Ohio, Southern - ROBERT A STEINBERG; Ohio State University Law School, J.D., and formerly a law clerk to a federal judge.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

COURT OF APPEALS

IMMIGRATION

ORDER RESCINDING ALIEN'S PERMANENT RESIDENT STATUS MUST BE SUPPORTED BY CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE.

Ahmad Waziri v. INS (No. 21,129, C.A. 9, Jan. 18, 1968; D.J. 39-11-598)

The above case involved a petition under section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a); which provides for review of final orders of deportation. The petitioner is an alien, who after admission as a student, had his status changed to that of a permanent resident under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255. Subsequently, his permanent resident status was rescinded by proceedings under section 246 of the Immigration and Nationality Act, 8 U.S.C. 1256. Deportation proceedings were then instituted charging that, since his permanent resident status had been rescinded, he was now illegally in the United States as an alien student who had remained longer than permitted. After entry of an order for his deportation, petitioner by this action sought review of both the rescission and deportation order.

The first issue decided by the Court was that it had jurisdiction under section 106(a), supra, to review the rescission order. It rested its decision on Foti v. INS, 375 U.S. 217 (1963) and Adamo v. U. S., Civil No. 205-65, D.D.C., June 20, 1967.

The final issue passed on by the Court was what burden of proof the Immigration and Naturalization Service had to bear in rescission proceedings. The rescission statute, section 246, supra, provides that, if it shall appear to the satisfaction of the Attorney General that an alien was not in fact eligible for adjustment of status under section 245, the Attorney General shall rescind the adjustment. In the Court's view this language did not define the standard of proof required for a rescission hearing. The Court held that if the objective of Woodby v. INS, 385 U.S. 276 (1966)--that an alien is not to be deported unless the deportation charges are found to be supported by clear, unequivocal and convincing evidence--is to be realized then the Woodby standard of proof must apply in a rescission proceeding.

The rescission and deportation orders were vacated and the case remanded to the respondent for further proceedings consistent with the opinion.

On January 15, 1966 in Rodriques v. INS, No. 16,098, the Third Circuit also held that the Woodby standard of proof applied to rescission proceedings.

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

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

SUPREME COURT

MAGNUSON ACT (50 U.S.C. SECTIONS 191, 192, AND 194)

Herbert Schneider v. Smith, Commandant, United States Coast Guard (Sup. Ct., No. 196, October Term 1967, D.J. 146-1-82-295)

On January 16, 1968, the United States Supreme Court held that the Magnuson Act does not authorize the screening program for merchant seamen on U.S. vessels, which was established by Executive Orders 10173 and 10352 and regulations thereunder (33 C.F.R. 6.10, 121-05).

The Magnuson Act authorizes the President, if he finds that the security of the United States is endangered by subversive activity, to issue regulations "to safeguard against destruction, loss, or injury from sabotage or other subversive acts" all vessels in the territories or waters subject to the jurisdiction of the United States. Executive Orders and regulations were promulgated by President Truman, finding the security of the United States endangered by subversive activity, and delegating the Commandant of the Coast Guard authority to grant or withhold validation of any permit or license evidencing the right of a seaman to serve on a merchant vessel of the United States; and directing him not to issue such validation unless he is satisfied that "the character and habits of life of such person are such to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States". (33 C.F.R., part 6). To enable the Commandant to make the determination required under these regulations, the application form contained questions as to whether the applicant now or ever had advocated overthrow or alteration of the Government of the United States by force or violence or by unconstitutional means, or whether he is now or ever had been a member of any organization on the Attorney General's list of organizations designated under E.O. 10450 as a subversive organization.

Schneider had served on board American flag commercial vessels between 1942 and 1949 and is the holder of a validly issued merchant mariner's document required therefor; but since 1949 has been employed in trades other than that of a merchant seaman. On October 19, 1964 Schneider applied to the Commandant of the Coast Guard for a special validation endorsement of his merchant mariner's document, as required by the Executive Orders and regulations promulgated pursuant to the Magnuson Act. In his application Schneider answered the questions in part and admitted that he had been a member of several organizations on the Attorney General's list (not naming which organizations) but stated that he had not been active in any for 10 years.

The Commandant advised the information furnished was not sufficient and requested him to respond to certain interrogatories. Schneider responded that he had been a member of the Communist Party as well as other organizations on the Attorney General's list, but refused to answer the interrogatories. The Commandant advised Schneider, in accordance with Section 121. 05 (d)92), that his application would be held in abeyance and that no further action would be taken until the required information was furnished. In November of 1965 Schneider sued for an injunction and declaratory relief that the Magnuson Act, Executive Orders and regulations thereunder are unconstitutional and that the Commandant be directed to approve appellant's application for a special validation endorsement.

In its opinion of January 16, the Supreme Court rejected the Government's argument that the power to exclude persons from vessels implies authority to establish a screening program to determine who shall be allowed on board. The Court agreed with the district court that keeping our merchant marine free from saboteurs is within the purview of the Act; but no charge was made that Schneider was a saboteur. However, the regulations and standards used by the Commandant in making his determination authorize a type of screening program directed at "membership" or "sympathetic association" which raises a problem akin to the one in Shelton v. Tucker, 364 U.S. 479, where the Court held that an Arkansas teacher could not be required to submit an affidavit listing all organizations to which he had belonged within five years, and where the Court held that an act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed, and that an unlimited and indiscrminate search of the employee's past which interferes with his associational freedom is unconstitutional. So, in Schneider, the Supreme Court would not conclude that Congress, in its grant of authority to the President to "safeguard" vessels and waterfront facilities from sabotage and other subversive acts, undertook to reach into the First Amendment area. The Court emphasized that no act of sabotage or espionage or act inimical to the security of the United States is raised or charged in this case. Accordingly, the Supreme Court reversed the decision of the three-judge district court which had granted the Government's motion to dismiss Schneider's complaint.

Staff: John S. Martin, Jr., Assistant to the Solicitor General, argued the case. With him of the brief were Solicitor General Erwin N. Griswold, Assistant Attorney General J. Walter Yeagley, Kevin T. Maroney and Lee B. Anderson (Internal Security)

DISTRICT COURT

MILITARY DISCHARGE

THE SECRETARY OF NAVY MAY ISSUE LESS THAN HONORABLE DISCHARGE TO INACTIVE NAVAL RESERVE OFFICER WHO DECLINES TO

SPECIFICALLY REPLY TO CHARGES AND INTERROGATORIES CONCERNING MEMBERSHIP IN COMMUNIST PARTY AND PARTICIPATION IN COMMUNIST PARTY ACTIVITIES AND WAIVES PERSONAL HEARING THEREON.

Kennedy v. Secretary of the Navy (D. D. C. Civil No. 650-66; D. J. 146-1-53-313)

In 1952 Kennedy was discharged from the Naval Reserve "under conditions other than honorable." Eleven years later he applied to Navy Boards for a change in the character of his discharge. On denial Kennedy sued to require the Secretary to issue him an honorable discharge.

Plaintiff contended the Secretary was not authorized to consider his Communist Party activity in determining the character of his discharge as such activity did not relate to the character of his military service, and, if authorized, his discharge was violative of the First Amendment in the absence of findings by the Secretary that plaintiff had a specific intent to further the illegal aims of the Communist Party or had participated in the Party's illegal activities.

The Government replied that plaintiff's failure to respond to the charges was not in keeping with the high traditions of naval honor and raised serious doubts as to his loyalty and the character of his service; that since plaintiff had waived a hearing, no further findings with respect to the charges were required; that the Secretary had authority to issue Kennedy a less than honorable discharge; and that, in any event, the Secretary was not constitutionally required to make the findings demanded by plaintiff.

On January 8, 1968, the Court, Sirica, J., ruling "The constitutional issues need not be decided by the Court," granted the Government's cross-motion for summary judgment.

Staff: Garvin L. Oliver (Internal Security Division)

FEDERAL EMPLOYMENT

CIVIL SERVICE COMMISSION MAY NOT REFUSE TO PROCESS APPLICATION FOR NON-SENSITIVE POSITION AS POSTAL CLERK WHERE APPLICANT REFUSES TO ANSWER QUESTIONS AS TO HIS MEMBERSHIP IN COMMUNIST PARTY AND OTHER PROSCRIBED ORGANIZATIONS.

Steven D. Soltar v. The Postmaster General, et al. (N. D. Calif., December 8, 1967; D. J. 146-1-11-5017)

Soltar applied for Federal employment as a postal clerk but declined to answer questions on the standard application form as to whether he was a

member of the Communist Party and other proscribed organizations, contending the questions violated his constitutional rights. The Civil Service Commission notified Soltar that his application would not be processed until he answered the questions.

Soltar sued to enjoin the defendants from requiring answers to the questions and for an order directing that his application be processed.

The Court, Wollenberg, J., entered judgment December 13, 1967, granting the relief sought. The Court, in an earlier order entered December 8, 1967, relying on Elfbrandt v. Russell, 384 U.S. 11(1966), ruled the questions as written violative of the First Amendment for overbreadth since they inquired into both "protected as well as unprotected areas involving speech and association" in circumstances where no overriding "significant federal interest"(in the position of postal clerk) had been shown "which would necessitate the inquiry at hand."

On December 23, 1967, the Court stayed operation and enforcement of the judgment pending the final disposition of any appeal the Government may take.

Staff: United States Attorney Cecil F. Poole, Assistant United States Attorney Robert N. Ensign (N.D. Calif.); Benjamin C. Flannagan and Garvin L. Oliver (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

PUBLIC PROPERTY

FEDERAL LAW CONTROLS NATURE OF TITLE ACQUIRED BY UNITED STATES IN CONDEMNATION PROCEEDING.

Cyrus Higginson, et al. v. United States (C. A. 6, 1967, 384 F. 2d 504, D. J. 90-1-23-1177)

During World War II, the United States acquired approximately 36,000 acres through eminent domain to establish Camp Breckenridge, Kentucky. The estate described in the condemnation proceedings was "the full fee simple title thereto" subject only to the usual utility easements. In 1953, Camp Breckenridge was placed on an inactive status. Thereafter, Higginson brought this action on behalf of himself and all other former property owners of Camp Breckenridge. It was asserted that the former owners were entitled to repurchase this property in accordance with the terms of Section 23(d) of the Surplus Property Act of 1944, 58 Stat. 777. A second contention was that Kentucky law should govern the title acquired by the United States and that under this law, since the Government did not need fee simple title, it acquired the lands subject to reversionary rights in the former owners when it became surplus. The district court dismissed the complaint for failure to state a cause of action.

On appeal, this was affirmed. The Sixth Circuit held that no rights accrued under the Surplus Property Act of 1944 because it had been repealed in 1949. On the second contention, the Court held "the nature of title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law unless Congress states otherwise." Under federal law, the valid title described passed to the United States on the filing of the declaration of taking. The subsequent abandonment of the original purpose does not affect the validity of the condemnation. Nor could title, once vested in the United States, be returned to the original owners without Congressional authorization. Circuit Judge Peck wrote in a concurring opinion that he would dismiss the appeal because the notice had been filed from the wrong order of the district court. A petition for certiorari by Higginson, contending that Kentucky law should apply, is now pending before the Supreme Court.

Staff: A. Donald Mileur (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CIVIL CASE

LIENS

FEDERAL TAX LIEN HELD EFFECTIVE TO REACH TAXPAYER'S CHOSES IN ACTION IN EXISTENCE AT TIME NOTICE OF TAX LIEN WAS FILED.

United States v. Masonry Contractors, et al. (S. D. Texas, Civil No. 66-H-725; January 10, 1968; D. J. 5-74-1207). (68-1 USTC Par. 9184)

The United States brought suit against a taxpayer, two subcontractors, and a bank-creditor of the taxpayer seeking foreclosure of federal tax liens against debts owed to the taxpayer and in existence after notices of federal tax lien had been filed. One subcontractor admitted the validity of the federal tax lien and paid the amount of the debt into the Court.

The bank-creditor claimed that it was entitled to actual notice of the federal tax lien before the liens could be effective to reach property in its hands which had been transferred from the taxpayer's debtor (the other subcontractor) directly to the bank in satisfaction of the taxpayer's prior indebtedness, the transfer occurring after notice of federal tax lien had been filed. The bank also claimed that the Government was required to prove that the funds were the property of the taxpayer.

The bank failed to show that it came within the provisions of the Internal Revenue Code exempting certain interests from the force of the federal tax lien. The Court held that the bank was not entitled to actual notice of the existence of the federal tax lien, that it did not bring itself within the provisions of the Federal Tax Lien Act exempting mortgagees, pledgees, holders of security interests, and that the Government did not have the burden of proving that the funds transferred belonged to the taxpayer. Thus, the transferred funds were subject to the federal tax lien.

Staff: United States Attorney Morton L. Susman; Assistant United States Attorney Joel P. Kay (S. D. Texas); and Michael D. Cropper (Tax Division)

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