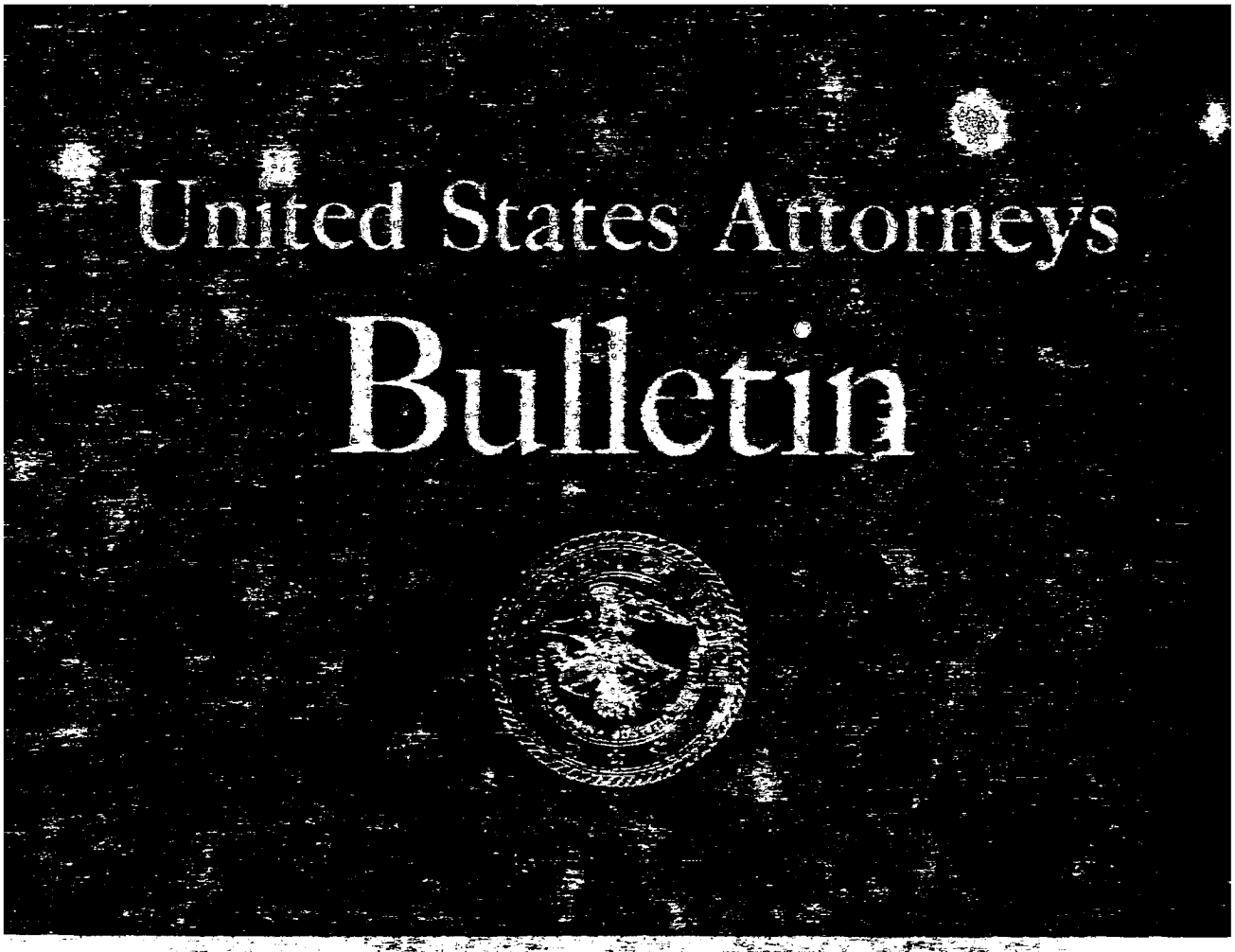


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UNITED STATES DEPARTMENT OF JUSTICE

Vol. 16 May 10, 1968 No. 10

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# ADMINISTRATIVE DIVISION

Assistant Attorney General L. M. Pellerzi

## SPECIAL NOTICE

### Signature of Head of Office

Frequently, Forms DJ-25 and DJ-10 are signed by an Assistant without use of the name of the head of the office. See the instructions on the reverse side of Form DJ-25. If the signature of the head of the office cannot be obtained, his name and title together with the name and title of the officer signing should appear. This is a reminder that when delegating this authority the United States Attorney is responsible for the expenditure.

* * *

# CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

## SPECIAL NOTICE

## FRAUD

## STATUTE OF LIMITATIONS
(Title 28 U.S.C. 2415, 2416)

P.L. 89-505, enacted July 18, 1966, creates a general period of limitations, where none had previously existed, for the commencement of certain types of civil actions by the United States. The Act adds Sections 2415 and 2416 to Title 28, U.S. Code.

One provision (28 U.S.C. 2415(b)) establishes a three-year period of limitations for actions by the United States for money damages "founded upon a tort". The statute further provides that (1) any right of action which accrued prior to July 18, 1966 shall be deemed to have accrued on that date for the purpose of limitations, and (2) the running of limitations will be suspended during the period that "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances".

This three-year period of limitations clearly embraces civil actions for common law fraud, although it will not affect civil actions under the False Claims Act where a six-year period of limitations (31 U.S.C. 235) is expressly applicable. It may also be held to apply to civil actions where the gravamen of the offense is bribery, conflict of interest, violation of the Anti-Kickback Act (41 U.S.C. 51), violation of the fraud provisions of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 489(b)), and other such civil remedies sounding in tort.

This new period of limitations will require greater expedition in analyzing the civil phase of all fraud and related matters, both those which are now pending and those which are referred to the Department and the United States Attorneys' offices in the future, in order to insure that suit is timely filed in appropriate cases. In most instances, it will no longer be practical nor prudent to defer a determination as to the advisability of a civil fraud action pending disposition of the criminal aspects. It is foreseeable that situations will more frequently arise in which it will be necessary to consider the institution of a civil fraud action before a decision as to criminal prosecution is reached, or during the pendency of criminal proceedings. When circumstances of this nature come to your attention, the same should be referred to the Frauds Section of the Civil Division, together with your recommendation

as to the advisability of bringing a civil action before disposition of the criminal phase. A copy of your referral should be addressed to the Criminal Division.

In those instances in which civil actions are instituted prior to the conclusion of the criminal phase, it will remain for a determination whether the civil action should be pursued to trial and disposition. It is probable that a stay of proceedings will be sought in such civil actions pending the completion of criminal prosecution. Certainly, the question of whether a settlement of the civil claims should be consummated will be referred to the Criminal Division in each such instance.

It is suggested that the following measures be taken in order to implement the foregoing. Hereafter, the statute of limitations date on new civil fraud files will be calculated for purposes of the Department's records in terms of Sections 2415 and 2416, unless only False Claims Act liability is indicated. This means that as to the majority of such new files a three-year limitations period will be assigned either from the time of the occurrence of the event giving rise to a cause of action or from the earliest time the United States had knowledge of facts material to the right of action, provided that as to potential claims which arose before July 18, 1966, the earliest limitations date will be July 17, 1969. Similar limitations date entries should be made in your records upon referral of the matter to your office.

Second, in those offices in which the handling of the criminal and civil aspects is segregated, the unit responsible for civil proceedings should initiate steps whereby:

(1) the civil unit will be notified promptly by the criminal unit of the referral to the United States Attorney's office of matters in which a civil fraud or related claim may be present;

(2) a separate file will be established for the civil unit; and

(3) correspondence to that office relative to the civil aspects will be referred to the Assistant United States Attorney handling that phase rather than to the Assistant handling the criminal aspects.

Any inquiries regarding this notice should be directed to the Frauds Section of the Civil Division.

## COURT OF APPEALS

### SMALL BUSINESS ADMINISTRATION

THIRD CIRCUIT HOLDS RULE 60 F.R. CIV. P., PERMITS, AFTER

ENTRY OF JUDGMENT, ADDITION TO RECORD OF DOCUMENTS JUDGMENT WAS BASED UPON BUT WHICH WERE INADVERTENTLY OMITTED FROM ORIGINAL RECORD.

United States v. Mary Stuart (C. A. 3, No. 16,710; April 4, 1968; D. J. 705-62-39)

As collateral security for a loan which appellant's company obtained from a bank and the S. B. A., the appellant executed a guaranty agreement and confession of judgment in favor of the bank and its assignees. After the loan was in default, the bank assigned all documents to the S. B. A. The United States, on behalf of the S. B. A., subsequently caused a judgment to be entered in its favor based upon the confession of judgment and the guaranty agreement between appellant and the bank. Inadvertently omitted from the record was the assignment agreement between the bank and the S. B. A. as well as the guaranty agreement itself. Appellant filed a motion in the district court to vacate the judgment asserting the record did not support the judgment. The United States alleged that the documents supporting the judgment had been inadvertently omitted from the record and moved to add them to the record. The district court granted our motion and denied that of appellant.

On appeal, the Court of Appeals for the Third Circuit held that rule 60(a), F. R. Civ. P., providing for correction of clerical mistakes or other errors arising from oversight after entry of judgment, permitted reasonable additions to the record that had been "inadvertently omitted". The court noted that the additions did not create a prejudicial change of circumstances as the appellant had had knowledge of the Government's connection with the transaction out of which the judgment ultimately arose.

Staff: United States Attorney Bernard J. Brown (M. D. Pa.)

## SUITS AGAINST THE GOVERNMENT

FIFTH CIRCUIT HOLDS DECLARATORY JUDGMENT ACT NO INDEPENDENT BASIS FOR JURISDICTION FOR SUIT AGAINST GOVERNMENT; UNITED STATES NOT BOUND BY TERMS OF DECREE IN STATE COURT ACTION TO WHICH IT IS NOT A PARTY; PURPORTED ASSIGNMENT OF PORTION OF ARMY RETIREMENT PAY INVALID BOTH UNDER ANTI-ASSIGNMENT ACT AND UNDER 37 U.S.C. 701.

United States v. Gretchen E. Smith ( C. A. 5, No. 24,864; April 16, 1968; D. J. 78-76-39)

Under Texas law and the terms of a property settlement embodied in a Texas divorce decree, Mrs. Smith was awarded one-half of the Army retirement pay due her ex-husband. Mr. Smith accordingly directed the Army to

send one-half of his retirement pay to his former wife. Shortly thereafter, he withdrew that direction and the Army made no further payments to her.

This action was brought in the federal district court against the United States and Mr. Smith. The court, assuming jurisdiction under the Tucker Act and the Declaratory Judgment Act, entered judgment jointly against the United States and Mr. Smith for the amount of the retirement pay which had not reached Mrs. Smith.

On our appeal, the Fifth Circuit reversed, ruling that there was no jurisdiction for this suit against the Government. Noting that the Declaratory Judgment Act "plainly does not confer an independent source of jurisdiction upon courts for a suit against the government * * *", and that the United States could not be bound by the decree in the Texas divorce action to which it was not a party, the court held that retirement pay is governed wholly by statute, which statute conferred no actionable rights upon Mrs. Smith. The Court of Appeals also held that the earlier direction by Mr. Smith to pay over one-half of his pay was invalid as against the Government, both under the Anti-Assignment Act, 31 U.S.C. 203, and under the prohibition against the assignment of pay by servicemen in advance of the date due and payable. 27 U.S.C. 701(a)(C).

Staff: Robert C. McDiarmid (Civil Division)

* * *

# CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## SPECIAL NOTICES

### ARMED FORCES

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940, AS AMENDED. POLICY REGARDING CRIMINAL PROSECUTION.

Due to the large number of persons presently being called to military duty, it seems desirable to set forth the Department's prosecutive policy under the criminal provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. App. 501 et seq.).

The Soldiers' and Sailors' Civil Relief Act is designed to protect servicemen from various financial and legal difficulties stemming from their military service. Its protections apply to "persons in military service," i.e., all persons on extended active military duty; see 50 U.S.C. App. 511(1). Creditors, landlords, and others having business dealings with servicemen are affected by the Act's provisions relating, inter alia, to evictions, installment purchases, mortgage foreclosures, termination of leases, taxation, and limitations on interest rates. Many of the protective provisions (e.g., those relating to interest limitations, installment purchases, mortgage foreclosures, and termination of leases) apply only to obligations incurred before entry into service. Generally, the Act prohibits enforcement of civil liabilities against servicemen other than through a court of competent jurisdiction. A court may stay the enforcement of an obligation if it appears that a serviceman's ability to meet it is materially impaired by reason of his military service (50 U.S.C. App. 521, 523).

Only a few activities are made criminal (misdemeanors) by the Soldiers' and Sailors' Civil Relief Act. Prosecution will lie when the Act's provisions relating to the filing of false military status affidavits (50 U.S.C. App. 520(2)), unauthorized evictions (50 U.S.C. App. 530(3)), installment purchase repossessions (50 U.S.C. App. 531(2)), mortgage foreclosures (50 U.S.C. App. 532(4)), termination of leases (50 U.S.C. App. 534(3)), and life insurance (50 U.S.C. App. 535(3)) have been violated.

Generally, the factors to be considered in determining whether to institute prosecution under the Soldiers' and Sailors' Civil Relief Act are: whether the offense was committed in ignorance or misunderstanding of the Act's provisions; whether there are circumstances indicating malevolence, personal animosity, etc., on the violator's part; whether the serviceman and

his family have suffered substantial harm; whether restitution has been made or offered; and whether the serviceman seems to have entered into the obligation only or primarily in anticipation of entry into service (see 50 U.S.C. App. 580). Ordinarily, when aggravating circumstances are not present and an offer of restitution has been made, prosecution need not be instituted.

The question of whether a given violation should be prosecuted is left to the discretion of United States Attorneys. However, if a case presents unusual factual and legal problems, United States Attorneys should consult the Administrative Regulations Section of the Criminal Division.

## FIREARMS

GUN REGISTRATION STATUTES, 26 U.S.C. 5841, 5851; COLLATERAL ATTACK ON FINAL CONVICTIONS ADJUDGED PRIOR TO HAYNES v. UNITED STATES, 390 U.S. 85 (1968).

On January 29, 1968, in Haynes v. United States, 390 U.S. 85 (1968), the Supreme Court held that "a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecution either for failure to register a firearm or for possession of an unregistered firearm". To date the Court has given no indication whether or not this decision is to be retroactively applied to cases which have resulted in a final conviction before it was decided.

Though the Court did not hold the gun registration statutes unconstitutional, convictions under sections 5841 and 5851 are currently coming under attack through motions to withdraw guilty pleas under Rule 32(d), F.R.Cr.P., and motions to vacate sentence under 28 U.S.C. 2255. These motions should be defended on their individual merits on the issue of waiver of the Fifth Amendment defense, through failure to claim the privilege against self-incrimination at the time of the conviction. As a separate defense, both supplementary and alternative to the waiver defense, it should be urged that the Haynes decision was not intended to be applied retroactively.

The Supreme Court inferentially held that a proper claim of the privilege against self-incrimination must be made if it is to constitute a defense to prosecution under these statutes when it found that "petitioner has reasonably and consistently asserted a claim of privilege". The issue of voluntary waiver through failure to claim the privilege will turn on the circumstances of the individual case, the primary question being, of course, did the defendant raise the self-incrimination question at any stage of the proceedings, or in any manner which could have afforded opportunity for judicial ruling. Another obvious factor in the waiver issue is whether the accused was represented by counsel or whether he had waived assistance of counsel. If the

circumstances show a voluntary waiver through failure to claim the privilege, neither Rule 32(d) nor a motion under 28 U.S.C. 2255 should permit successful attack on convictions antedating Haynes.

Rule 32(d) provides that a guilty plea may be withdrawn after sentence is imposed only to correct "manifest injustice". A valid guilty plea constitutes an admission of the substantive offense and a waiver of all but jurisdictional defenses. In numerous analogous situations the courts have ruled that there existed no manifest injustice in convictions involving waivers of available defenses by failure to assert them. See, for example, Watts v. United States, 278 F. 2d 247 (C.A.D.C. 1960); and Edwards v. United States, 256 F. 2d 707 (C.A.D.C. 1958), cert. denied, 358 U.S. 847, involving confessions secured during illegal detention and improper use of a co-defendant's confession. In addition it has been held that the guilt or innocence of a defendant is controlling in withdrawal of the guilty plea on grounds of manifest injustice, Zaffarano v. United States, 330 F. 2d 114 (C.A. 9, 1964), cert. denied, 379 U.S. 825; Watts v. United States, supra; this failure to assert innocence of the offense can be used in opposing Rule 32(d) motions.

With respect to defendants convicted on trial rather than plea, it may be argued that if a defense is waived on trial and appeal, it is not available on collateral attack since habeas corpus (of which 28 U.S.C. 2255 is the federal statutory form) cannot be used as a substitute for appeal. Nor can a later discovered shift in the law, which if known beforehand might have resulted in use of a waived defense, entitle a defendant to successfully attack his conviction through collateral attack. See Sunal v. Large, 332 U.S. 174 (1947); Warring v. Colpoys, 122 F. 2d 642 (C.A.D.C. 1941), cert. denied, 314 U.S. 678. Such collateral attack has been held foreclosed even in cases approaching constitutional dimensions, for example, in cases of failure to move to suppress illegally obtained evidence, DeWilles v. United States, 372 F. 2d 67 (C.A. 7, 1967), cert. denied, 388 U.S. 919; Thornton v. United States, 368 F. 2d 822 (C.A.D.C.); Kapsalis v. United States, 345 F. 2d 392 (C.A. 7, 1965), cert. denied, 382 U.S. 946. Though Fay v. Noia, 372 U.S. 391 (1963), held that federal habeas corpus could be used to free a state prisoner convicted through a coerced confession, despite his failure to appeal his original conviction, this decision will not preclude our opposing 2255 motions since habeas corpus decisions are peculiarly limited by their factual situations rather than being controlled by stare decisis principles. On Fay v. Noia, see the discussion in Thornton v. United States, supra, at pages 828, 829.

As noted above, the alternative argument should be made that in accordance with the recently held decisions on retroactivity in Stovall v. Denno, 388 U.S. 293 (1967), and Johnson v. New Jersey, 381 U.S. 618 (1966), the Haynes decision was not intended to be applied retroactively to cases which

have reached final decision. The United States District Court for the Middle District of Tennessee has so held on March 12, 1968, in ruling on a 2255 motion attacking a conviction under the gun registration statutes. For cases still in litigation at the time of the Haynes decision, see the United States Attorney's Bulletin, Vol. 16, No. 6, March 15, 1968, p. 190.

## INDIANS

### PUBLIC LAW 90-284 (H. R. 2516), PROVISIONS RELATING TO CRIMINAL JURISDICTION OVER INDIANS IN THE INDIAN COUNTRY.

#### A. Background of the provisions relating to criminal jurisdiction over Indians.

On April 11, 1968, Public Law 90-284 (Civil Rights Law) was signed by the President. Title IV of this law amends Public Law 280, 83rd Congress (18 U. S. C. 1162; 28 U. S. C. 1360) relating to state jurisdiction over Indians. Prior to the amendment, Public Law 280 granted to five states, with certain exceptions, jurisdiction with respect to criminal offenses and civil causes of action arising in the Indian country within such states. Since its enactment in 1953, Public Law 280 was amended to include the Menominee Reservation in Wisconsin (P. L. 661, 83rd Cong.) and Alaska (P. L. 85-615, 85th Cong.). Section 6 of this law gave the consent of the United States to states, where necessary, to amend their constitutions or existing statutes so that these states could, along with other states, assume the jurisdiction conferred by the Act. Section 7 of the law gave the consent of the United States to any other state to assume the jurisdiction granted by the Act when the people of the state, by affirmative legislative action, shall bind the state to the assumption of such jurisdiction.

#### B. Effect of the Amendment

Title IV of Public Law 90-284 provides for a piecemeal or fragmentary assumption and retrocession of criminal and civil jurisdiction over Indians. Section 401(a) grants the consent of the United States to any state to assume, with the consent of the tribe, such measure of jurisdiction over any or all offenses committed within the Indian country or part thereof as may be determined by the state. Such jurisdiction will vest in the state only when the enrolled Indians in the affected area accept jurisdiction by a majority vote of adult Indians voting at a special election. The Secretary of the Interior shall call such election under such rules and regulations as he may prescribe.

Section 401(a) supersedes Section 7 of Public Law 280 and Section 403(b) provides for the repeal of Section 7. Section 404 amounts in effect to a restatement of Section 6 of Public Law 280.

Section 403(a) authorizes the United States to accept a retrocession of any measure of jurisdiction acquired by a state pursuant to 18 U.S.C. 1162 and 28 U.S.C. 1360. The law, however, does not designate the Federal official or department or agency of the Government which shall have the power to accept the retrocession of jurisdiction.

Title V of the new legislation adds a new offense to 18 U.S.C. 1153, to wit: "assault resulting in serious bodily injury".

The above mentioned provisions relating to Indians were neither sponsored nor recommended by the Criminal Division but were incorporated in the Civil Rights Bill before its enactment by the Senate and in such form the bill passed the House.

United States Attorneys are requested to advise the Criminal Division promptly when they receive information of an assumption or retrocession of jurisdiction pursuant to the provisions of the Act.

## JUVENILES

### JUVENILE DELINQUENCY; DIVERSION TO STATE AUTHORITY.

Title 18, Section 5001 provides that whenever a person under 21 years of age has been charged with the commission of an offense punishable in any court of the United States or the District of Columbia and it appears that such act constitutes an offense or a state of delinquency under the laws of any state or the District of Columbia, which can and will assume jurisdiction over such person, the United States Attorney may surrender him to the state authorities for proceedings under state law. Such diversion to state authority was the purpose of our letter to all United States Attorneys on July 18, 1966.

It is of utmost importance in effecting diversion to state authority that United States Attorneys advise the investigating agency of the urgency of determining accurately the age of the accused before federal jurisdiction is assumed, and, if a juvenile, whether he is either on probation to state authority or a run-away from state custody. If the accused person was a juvenile at the time of the commission of the offense but had not previously come under state jurisdiction, it is equally urgent that the United States Attorney should provide for early inquiries of state and local authorities as to whether they will accept jurisdiction of their juvenile. Careful determination of these essential facts before federal jurisdiction is assumed will eliminate unnecessary expenditure of time in later effecting appropriate return of the juvenile to state custody.

In recent months it has also been noted that delays of considerable duration have occurred in some districts between the date of decision to

divert to state authority and actual return of the subject juvenile to state custody. Some delays are harmful both 1) to the juvenile, through his being held unnecessarily in local jails, sometimes without juvenile facilities, and 2) to our prosecutive policy for diversion of such juveniles, in that delay in turning the juvenile over to state custody can cause a failure to accomplish diversion.

The Manual for United States Marshals is being revised to show the need for diversion of such juveniles as quickly as possible. Until this revision is effected and for assurance thereafter, the person in the United States Attorney's office who notifies the United States Marshal's office of the diversion should also personally see to it that United States Marshals are made aware that it is imperative for juveniles to be moved at the earliest possible time, even if special trips are necessary.

## COURT OF APPEALS

### SEARCH WARRANTS

SUFFICIENCY OF AFFIDAVITS TO ESTABLISH PROBABLE CAUSE NECESSARY FOR ISSUANCE OF SEARCH WARRANT.

United States v. Leon J. Lewis (No. 31754, C. A. 2, April 3, 1968; D. J. 23-51-1867)

The defendant in this case was appealing a conviction on one count for possession, custody and control of an unregistered still in violation of 26 U. S. C. 5179(a), 5601(a)(1).

The primary assignment of error claimed by the defendant was the denial by the trial court of a motion to suppress evidence found under a search warrant which the defendant contended was legally insufficient because it was not founded on sufficient affidavits to establish probable cause for its issuance.

While the affidavit on which the warrant was based recited that two Deputy United States Marshals had detected an odor which they thought was that of alcohol when they had gone to the apartment of the defendant in order to arrest him for a parole violation, it did not state the qualifications of the two Marshals to recognize the odor of mash or alcohol.

The Court of Appeals stated that all that is necessary as to the affidavit supporting the issuance of a search warrant is that it "set forth sufficient facts so that the Commissioner might make an independent assessment of the probability that the law was being violated on the premises to be searched".

In the case before it the Court found that sufficient facts were set forth by the affidavit to enable the Commissioner to determine the probability that the law was being violated. A statement in the affidavit that the defendant was known to have been convicted for a previous alcohol violation was found to be corroborative of the conclusion that the odor coming from the defendant's apartment was that of alcohol.

Another important circumstance the Court noted, in support of its decision, was that the "experienced Commissioner who issued the warrant was in a position to determine from his personal knowledge of the affiant, a Deputy United States Marshal, and the nature of his work, the qualifications of the Deputy Marshal to distinguish the odor of alcohol or mash from that of other substances". (Emphasis supplied).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Roger J. Hawke and Pierre N. Leval (S. D. N. Y.)

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# IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

## COURT OF APPEALS

### DEPORTATION

NOT ERROR TO CONSIDER STATE DEPARTMENT'S VIEWS IN DETERMINING APPLICATION FOR STAY OF DEPORTATION TO IRAN.

Hossein Hosseinmardi v. INS (No. 21772, C. A. 9, March 22, 1968; D. J. 39-12C-16)

The above action involved a petition to review the denial of petitioner's application for stay of deportation to Iran. Petitioner, a national of Iran, was admitted to the United States as a student in 1959 and conceded his deportability on the ground that he overstayed his temporary admission to the United States. He applied for a stay of deportation under section 243(h), Immigration and Nationality Act, 8 U. S. C. 1253 (h), contending that if he were deported to Iran he would be persecuted there because of his political beliefs and activities here in the United States in opposition to the Shah of Iran. The Special Inquiry Officer denied his application under section 243(h) and his denial was affirmed by the Board of Immigration Appeals.

The petitioner contended that the Special Inquiry Officer erred in considering a letter from the State Department expressing the opinion of the Department as to whether the petitioner might be subject to persecution if returned to Iran. The letter stated that an Iranian student would in all likelihood not be persecuted for activities in the United States, that any persecution that has taken place in the past as to such students was the result of their activities within Iran and that certain Iranian students had participated in anti-Shah activities in the United States solely in order to make a case for staying of their deportation.

The receipt of the letter of the State Department in evidence at the hearing was attacked on the ground that the petitioner was denied the opportunity to cross-examine or present interrogatories to the author of the letter and that therefore the Special Inquiry Officer had no basis for relying on such evidence since no foundation had been laid as to the author's expertise or experience. On the basis of its decision in Namkung v. Boyd, 226 F. 2d 385 (C. A. 9, 1955), the Court found no error in the consideration of the State Department's letter.

Petitioner also contended that the Special Inquiry Officer's decision was against the weight of the evidence. On this issue the Court stated that

the petitioner misconstrued the nature of the Court's review of an order denying a stay of deportation and that if the petitioner desired to have the decision overturned, he must show that it was without a rational basis and was arbitrary, capricious or an abuse of discretion. The Court found that the evidence amply supported the decision of the Special Inquiry Officer and that it was not arbitrary or capricious and did not constitute an abuse of discretion.

The petitioner finally complained that he was denied due process of law in that the investigative, prosecuting and adjudicative officers in his case were subject to the control and jurisdiction of the Department of Justice. This complaint was rejected upon the basis of the decision in Marcello v. Bond, 349 U.S. 302, 311 (1955).

The decision denying the stay of deportation was affirmed.

Staff: United States Attorney William Matthew Byrne, Jr.; Assistant United States Attorneys Frederick M. Brosio, Jr. and William T. Lamb (C.D. Calif.)

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# TAX DIVISION

Assistant Attorney General Mitchell Rogovin

## DISTRICT COURT

### INJUNCTIVE RELIEF

WIFE CANNOT ENJOIN ASSESSMENT OR COLLECTION OF INCOME TAX DEFICIENCIES AND PENALTIES WHICH ARE BASED UPON HUSBAND'S EMBEZZLEMENTS.

Nell D. Surber v. United States, et al. (S.D. Ohio, February 14, 1968; 68-1 U.S.T.C., par. 9244; D.J. 5-58-4049)

The taxpayer, having first filed a petition with the Tax Court, brought the instant action to permanently enjoin the defendants from proceeding with the pending Tax Court case and to have the District Court determine the validity of the proposed tax assessments.

The taxpayer and her husband executed and filed a joint return for the year 1961. Subsequently, the husband was convicted of embezzlement and the Internal Revenue Service made an income tax deficiency determination against the wife based upon income resulting from the husband's embezzlements. The taxpayer argued that the district court rather than the Tax Court should hear the case because the Tax Court remedy provided by Section 6512 of the Code is inequitable and in violation of due process. In addition, she claimed to have been induced by fraud to execute the tax return and, therefore, the return could not be held to be in substance a joint return.

The United States moved to dismiss asserting that the injunctive relief sought was prohibited by Section 7421 of the Code, in that the plaintiff had not met the double burden imposed by Enochs v. Williams Packing Co., 370 U.S. 1 (1962). In addition, the United States relied on Nash Miami Motors v. Commissioner, 358 F. 2d 636 (C.A. 5th), cert. denied, 385 U.S. 918 in claiming that the remedy provided by the Tax Court is adequate at law.

The Court dismissed the suit, holding that there were no extraordinary and exceptional circumstances to bring the taxpayer's case outside the statutory prohibition against suits to restrain the assessment or collection of taxes. The Court also found that under the most liberal view of the law and the facts, the United States would probably prevail in this case, inasmuch as in the absence of duress or perhaps fraud in the inducement, the wife is subject to joint and several liability under Section 6013(d)(3) of the Code. The Court had obvious sympathy for the taxpayer's situation but found that Section

6013(d)(3) is inflexible and unless the taxpayer could prevail on her contention of fraud in the inducement, relief could only be obtained through amendment of the statute.

Staff: Assistant United States Attorney Thomas Smith (S.D. Ohio); James L. McBride (Tax Division)

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