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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Edwin M. Zimmerman

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COURT HOLDS DISTRICT COURT HAS DUTY TO MODIFY DECREE IN MONOPOLIZATION CASE.

United States v. United Shoe Machinery Corp. (Sup. Ct. 597 May 20, 1968; D. J. 60-137-1)

The Supreme Court has ruled that it is the duty of a district court to modify a decree in a monopolization case, entered after an adjudication of liability, "if after ten years it was shown that the decree had not achieved the adequate relief to which the Government is entitled"--i.e., "to assure the complete extirpation of the illegal monopoly". A ruling by the district court (D. C. Mass.) to the contrary was set aside and the matter remanded.

In 1953, the United States was awarded judgment in a civil action upon a finding that the defendant, United Shoe Machinery Corporation, had monopolized the manufacture of shoe machinery. 110 F. Supp. 295. Although the Government sought a decree which would have broken United into three separate shoe machinery companies, the district court rejected the proposal and instead imposed a series of injunctive restrictions upon the defendant's operations designed "to recreate a competitive market". The decree also provided (Paragraph 18) that ten years after entry, both parties "shall report to this court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition". Defendant appealed both the merits and the relief to the Supreme Court. The United States did not cross-appeal on relief; instead it urged affirmance. As to relief, the Government advised the Court that it "proceeded on the premise that relatively mild remedies should be tried as a first resort, and that the possibility of more drastic measures should be held in abeyance". The Supreme Court affirmed, per curiam. 347 U.S. 521.

On January 1, 1965, both parties reported to the district court pursuant to Paragraph 18 their assessment of the effect of the decree in establishing workable competition. The Government's petition asserted that the decree had failed to achieve its objectives and that United should be required to establish a competitive full line shoe machinery manufacturer. United urged that the decree had satisfactorily established competition in the shoe machinery market and that most of its restrictive provision should be lifted. The district court elected to hear evidence on and determine only

the question of whether the decree had worked properly and achieved its objectives. It held in abeyance the issue of modification, if any, until after disposition of the first question. After extensive hearings, the district court ruled that under United States v. Swift & Co., 286 U.S. 106 (1932), it could modify the decree only upon "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen circumstances." Under this standard, the court found that, although United's share of the market was about 65%, the 1953 decree had sucessfully achieved its previously unarticulated objective, which was "not to restore workable competition but to move toward establishing it." The district court also found that the decree had not established viable competition throughout the shoe machinery market, and, accordingly, denied United's petition, as well as the Government's. From this decision, the Government appealed. On May 20, 1968, the Supreme Court reversed.

The Supreme Court first held that Swift had been misinterpreted by the district court and that it "in no way restricts the district court's power to grant the relief requested by the Government in the present case." Swift involved an attempt by the defendants in a monopolization case to be relieved of certain injunctive provisions in a consent decree. The Supreme Court in Swift established a stringent standard for modification at the instance of defendants. In the instant case, the Court held that under Swift, a decree "may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved." The Court found this rationale inapposite to a case in which the Government, having prevailed on the merits, seeks modification to assure adequate redress of an antitrust violation. Under such circumstances, the Court held "the trial court is charged with inescapable responsibility to achieve" the objective of its original adjudication and decree.

The ten-year period permitted by Paragraph 18 is adequate for a decree to achieve its "principal objects" and if it had not done so "the time has come to prescribe other, and if necessary more definitive, means to achieve that result. A decade is enough."

The Court did not reach the question of whether, as urged by the Government, United's possession of some 65% of the market ten years after entry of the original decree constituted a clear showing that the decree had failed. Rather, it remanded for reconsideration of this question in the light of its ruling.

The case was argued by then Assistant Attorney General Turner.

Staff: James S. Campbell, Howard E. Shapiro, Thomas R. Asher, Margaret H. Brass and Robert J. Ludwig (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SUPREME COURT

FAIR LABOR STANDARDS ACT

MINIMUM WAGE AND OVERTIME REQUIREMENTS MAY CONSTITUTIONALLY BE APPLIED TO STATE EMPLOYEES.

Maryland v. Wirtz (Supreme Court, October Term 1967, No. 742; decided June 10, 1968; D. J. 143-35-72)

The 1966 Amendments to the Fair Labor Standards Act, 29 U. S. C. 201, extended the Act's minimum wage and overtime provisions to certain employees of State hospitals and schools. Twenty-eight States sought to enjoin the enforcement of this extension of the Act. The States also attacked the "enterprise" coverage introduced by the 1961 Amendments to the Act. Under the "enterprise" concept, coverage extends not only to employees personally engaged in commerce and in the production of goods for commerce, but also to all employees of an enterprise which has employees so engaged. A three-judge district court denied injunctive relief, 269 F. Supp. 826 (D. Md.).

On direct appeal, the Supreme Court upheld the constitutionality, under the commerce power, of the "enterprise" coverage concept and the application of the Act to the various employees of the States. The Court noted that a rational basis exists for congressional action prescribing minimum labor standards for schools and hospitals. With respect to the asserted sovereign right of the States to be immune from federal regulation, the Court stated: "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activity to federal regulation."

Staff: Solicitor General Erwin N. Griswold; Morton Hollander and Michael C. Farrar (Civil Division)

LABOR LAW

UNION BYLAW LIMITING ELIGIBILITY FOR MAJOR ELECTIVE OFFICE TO MEMBERS WHO HOLD OR PREVIOUSLY HELD ELECTIVE OFFICE IS ILLEGAL; ENFORCEMENT OF BYLAW MAY HAVE AFFECTED OUTCOME OF ELECTION, AND THEREFORE NEW ELECTION WOULD BE ORDERED.

Wirtz v. Hotel Employees Local 6 (Supreme Court, October Term 1967, No. 891, decided June 3, 1968, D. J. 156-51-742)

The Secretary of Labor commenced an action in the district court seeking a judgment declaring void an election held by the defendant, Local 6, and ordering a new election under the Secretary's supervision. The Secretary charged that a bylaw of the Local which limited eligibility for major elective offices to union members who hold or have previously held elective offices was not a "reasonable qualification" within the meaning of Section 402(e) of the Labor-Management Reporting and Disclosure Act of 1959, which provides that "every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ." The Secretary also claimed that enforcement of the bylaw "may have affected the outcome" of the election within the meaning of Section 402(c) of the Act, and thus the election should be set aside and a new election held. The district court ruled that the bylaw was unreasonable, but that it could not be found that its enforcement "may have affected the outcome" of the election. The court, therefore, refused to set aside the old election, but granted an injunction against enforcement of the bylaw in the future. The Second Circuit reversed the part of the judgment which declared the bylaw unreasonable, finding no violation of the statute. The Supreme Court reversed, holding (1) the bylaw was unreasonable and (2) enforcement of the bylaw "may have affected the outcome" of the election. Accordingly, the Supreme Court set aside the old election and ordered a new election under the Secretary's supervision.

The Supreme Court reasoned that the bylaw was in conflict with the policy of the Act to assure that union elections would be conducted in accordance with democratic principles, and that the authority to impose "reasonable qualifications" was not intended to limit this basic policy. The Court noted that the bylaw had the effect of disqualifying 93% of the union members.

In ruling that the bylaw "may have affected the outcome" of the election, the Court noted that, because of the difficulties of proof, Congress intended that a violation of Section 401 should establish a "prima facie" case that it "may have affected the outcome" of the election, and that this "prima facie" case had not been rebutted in the instant case. The Court noted that "since 93% of the membership was ineligible under the invalid bylaw, it is impossible to know that the election would not have attracted more candidates but for the bylaw," and that there was a "logical inference" that some or all of the disqualified candidates might have won if permitted to run.

Staff: Harris Weinstein (Office of the Solicitor General);
Robert V. Zener (Civil Division)

FIRST AMENDMENT -- SEPARATION OF CHURCH AND STATE

STATE LAW AUTHORIZING FREE LOAN OF TEXTBOOKS TO STUDENTS ATTENDING PAROCHIAL SCHOOLS DOES NOT VIOLATE FIRST AMENDMENT

Board of Education v. Allen (Supreme Court, October Term 1967, No. 660; decided June 10, 1968; D. J. 169-50-2)

Section 701 of the New York Education Law requires local public schools authorities to lend textbooks free of charge to all students in grades 7 through 12. Students attending private schools which comply with the State's compulsory attendance law -- including parochial schools -- are covered by the statute. The textbooks must be approved for use in public schools. In this suit, two local school boards sought a declaratory judgment that this statute violates the Establishment and Free Exercise Clauses of the First Amendment, as applied to the States through the Fourteenth Amendment. The Supreme Court noted probable jurisdiction after the New York Court of Appeals, in a 4 - 3 opinion, upheld the statute. The United States submitted an amicus brief in support of the State law which is virtually identical to provisions of a federal statute, the Elementary and Secondary Education Act of 1965.

The Supreme Court held that the statute is valid, relying primarily on Everson v. Board of Education, 330 U. S. 1, a case which upheld a state law providing a free bussing of school children, including children attending parochial schools. The Court stated:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. * * * * Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution.

The Court recognized that "books are different from buses", since books may have a religious significance. However, the New York Court of Appeals had construed the statute to authorize only the loaning of secular textbooks, and the Court stated that "we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books * * *".

The appellant school board argued that free textbooks differ from free bus fares in that books are critical to the teaching process, while buses are not; it was argued that religion is inextricably involved in the entire teaching

process of parochial schools, and that therefore the provision of free textbooks, even though they are secular, constitutes a direct aid to religion. The Court rejected this argument. It noted that states may, and commonly do, adopt compulsory attendance laws which impose requirements as to content and nature of curriculum in religious schools. Indeed, under Pierce v. Society of Sisters, 268 U. S. 510, the states are required to permit religious schools to comply with their compulsory attendance laws. Thus religious schools are recognized as fulfilling the state's interest in secular education. The Court concluded:

> Against this background of judgment and experience * * *, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of sectarian and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.

The Court's opinion emphasized that the record before it was meager and contained no factual proof that the state aid was being utilized for religious purposes. Thus, it would presumably still be possible to upset state aid where it was shown to be utilized for the purchase of religiously-oriented textbooks.

Staff: Solicitor General Erwin N. Griswold;
Robert V. Zener (Civil Division)

STANDING -- TAXPAYERS' SUIT

FEDERAL TAXPAYERS HAVE STANDING TO CHALLENGE FEDERAL EXPENDITURES UNDER ELEMENTARY AND SECONDARY EDUCATION ACT ALLEGED TO VIOLATE ESTABLISHMENT CLAUSE OF FIRST AMENDMENT.

Flast v. Cohen (Supreme Court, October Term 1967, No. 416; decided June 10, 1968; D. J. 145-16-198)

This suit was brought by a group of federal taxpayers challenging expenditures of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965, 20 U. S. C. 241a, et seq., 821 et seq. (Supp. II 1965-66). Under that Act, federal funds are paid to state agencies to finance programs for special educational services and for the loan of textbooks and other library materials. Private schools, including sectarian schools, are eligible to participate in programs financed by federal funds. A three-judge court, with one dissent, held that the plaintiffs had no standing to sue, under the rule of Frothingham v. Mellon, 262 U. S. 447. The

Supreme Court reversed.

The Government raised a threshold question of the jurisdiction of the Supreme Court on direct appeal. The Government argued that a three-judge court was improperly convened, because the attack was not on the statute itself but rather on the form of specific local programs financed under the statute. The Supreme Court rejected this argument on the authority of Zemel v. Rusk, 381 U.S. 1. The Court pointed out that the plaintiffs were making alternative arguments: a non-constitutional argument that particular programs which had been financed under the Act were not authorized by it; and the constitutional argument that, if these programs were authorized, they violate the First Amendment. The Court concluded that "a litigant need not abandon his non-constitutional argument in order to obtain a three-judge court".

On the principal issue, the Court held that federal taxpayers have standing to attack federal expenditures if two requirements are met. First, the taxpayer must attack "exercises of congressional power under the taxing and spending clause of Article I, Section 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." This requirement was met here. The second requirement is that "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Article I, Section 8." The Establishment Clause of the First Amendment is, in the Court's view, such a "specific constitutional limitation". In the Court's view, the decision in Frothingham was consistent with these limitations, since Mrs. Frothingham had merely alleged that Congress had exceeded its general powers, without alleging any contravention of a specific constitutional limitation on taxing and spending. The Court left open the question of whether the Constitution contains other specific limitations on taxing and spending, in addition to the Establishment Clause, which would be sufficient to confer taxpayers' standing.

Mr. Justice Douglas concurred on the ground that the Frothingham case should be overruled entirely and the taxpayer granted standing to object to any violation of the Constitution by the Federal Government. Mr. Justice Stewart, concurring, noted his understanding that the Court's opinion holds "only that a Federal taxpayer has standing to assert that a specific expenditure of Federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution." Mr. Justice Fortas concurred on the ground that the opinion should be limited to suits attacking

expenditures for violation of the Establishment Clause, and that the doors should not be opened to a "general assault upon exercises of the spending power".

Mr. Justice Harlan dissented. In his view, the Court's tests for taxpayer standing are not meaningful; he would refuse to recognize taxpayers' standing unless Congress authorized it.

Staff: Solicitor General Erwin N. Griswold;
Robert V. Zener (Civil Division)

COURTS OF APPEALS

FEDERAL RULES OF CIVIL PROCEDURE -- SUMMARY JUDGMENT AND COLLATERAL ESTOPPEL

SUMMARY JUDGMENT WAS PROPERLY GIVEN THE UNITED STATES SINCE DEFENDANTS WERE COLLATERALLY ESTOPPED FROM DISPUTING THEIR LIABILITY.

United States v. Richard Anthony Webber, et al. (C.A. 3, Nos. 16,816, 16,873; May 31, 1968; D.J. 77-15-121)

Two individuals, as partners, entered into a subcontract with a Government contractor. Thereafter, their partnership was succeeded by a corporation. An individual named Browne sued the corporation to recover compensation for services rendered by him in obtaining the subcontract for the partnership. This suit was successfully defended on the ground that the services were rendered pursuant to a contingent fee agreement, which was unenforceable under an Executive Order. Thereafter, the United States, as assignee of the general contractor, relying on a warranty against contingent fees in the original subcontract, sued in the same court the two individuals and the corporation to recover the amount of the contingent fee. The district court granted the Government's motion for summary judgment. On appeal, the Third Circuit affirmed.

The Court of Appeals agreed with the district court that the corporation could not be permitted to defend the instant suit by taking a position inconsistent with that taken by it in the prior suit. The Court of Appeals also held that the corporation was collaterally estopped from raising any factual question of the existence of the contingent fee agreement even though the Government was not a party to the first action. The Court ruled that the individuals were also collaterally estopped from denying the once-proved contingent fee agreement since they were "privies" to the prior litigation, which they controlled. The Court ruled that the district court could properly take judicial

notice of the record in the prior litigation in that court, and that the mere denial of liability in the pleadings by defendants was not enough to defeat summary judgment. The Court also ruled that the individuals were personally liable since they entered into the contract in behalf of the partnership.

Judge Freedman concurred in affirming as to the corporate defendant, but dissented on the ground that summary judgment was not appropriate to determine the liability of the individual defendants, who were not parties to the prior litigation.

Staff: Stephen R. Felson (Civil Division)

NATIONAL BANK ACT

STATE BANK CHALLENGING COMPTROLLER'S AUTHORIZATION OF CHARTERING OF NEW NATIONAL BANK WAS NOT ENTITLED TO TRIAL DE NOVO. PLAINTIFF BANK WAS NOT ENTITLED TO DEPOSE COMPTROLLER AND HIS STAFF IN SUIT BROUGHT TO REVIEW HIS ACTION.

Warren Bank v. Camp and National Bank of Warren (C.A. 6, Nos. 17,718, 17,719; May 31, 1968; D.J. 145-3-812)

Plaintiff, Warren Bank, sought to enjoin the Comptroller of the Currency from authorizing the chartering of a new national bank in Warren, Michigan. The Comptroller moved for summary judgment on the ground that the administrative file showed that his action was not arbitrary or capricious. Plaintiff sought to depose the Comptroller and several staff members before responding to the motion for summary judgment, but the district court refused to permit them to depose these officials. Plaintiff then answered the motion for summary judgment and demanded a trial de novo. The district court, however, granted the Comptroller's motion for summary judgment.

The Sixth Circuit affirmed, holding that "a trial de novo is not required for every complaint where abuse of administrative discretion is pled", and was not required in this case because the Warren Bank "had not made out a prima facie case of abuse of discretion". The Sixth Circuit further held, citing United States v. Morgan, 313 U.S. 409, 421-22, that the Comptroller and his staff could not be deposed. The Court of Appeals did not decide the threshold question of whether plaintiff had standing to maintain the action, but assume arguendo that standing existed.

Staff: Walter H. Fleischer (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICE

NARCOTIC AND DANGEROUS DRUG CASES

With the creation of the Bureau of Narcotics and Dangerous Drugs in the Department of Justice, all functions heretofore performed with respect to the Drug Abuse Control Act by Assistant General Counsel to the Department of Health, Education, and Welfare have been transferred to the Narcotic and Dangerous Drug Section of the Criminal Division. Accordingly, it will no longer be necessary to advise the Assistant General Counsel of developments in cases referred by the BNDD. It is requested, however, that the Narcotic and Dangerous Drug Section be furnished with copies of all pleadings filed in such cases and that the Section be kept currently advised of the progress of such cases.

COURTS OF APPEALS

INDICTMENT

PRE-INDICTMENT DELAY NOT GROUNDS FOR DISMISSAL ABSENT SHOWING OF PREJUDICE; IMPEACHMENT BY QUESTION CONCERNING PRIOR CONVICTION ON APPEAL.

United States v. Hauff (C. A. 7, decided May 28, 1968, D. J. 36-23-457)

The defendant was convicted for wire fraud in connection with a scheme to defraud one Lederman and obtaining money for building a planned hotel in Las Vegas. Lederman had complained to the Government in the fall of 1961; the defendant was interviewed by the FBI in July 1963; and the indictment was returned in November 1965. On appeal, it was contended that the defendant had been denied a speedy trial and prejudice was claimed because of the death of Silver, who would have testified that the funds obtained from Lederman were loans. The Court noted that the name of Silver had not been given to the FBI by the defendant in his interview and Silver was not mentioned during the trial, and the burden of proving prejudice had not been sustained. The Court found that it was reasonable that a lengthy investigation had been necessary, since transactions occurred in a number of cities.

Prior to the trial, the Court denied the defendant's motion to prohibit the prosecutor from impeaching him by the use of his prior conviction

which was pending on appeal. When he took the stand, his attorney introduced the prior conviction, but Government counsel asked no questions concerning it and made no mention of the conviction in his closing argument. The Court of Appeals found no error, stating that the majority rule is that unless and until a conviction is reversed, the defendant may properly be questioned concerning it for the purpose of testing credibility.

Staff: United States Attorney Thomas A. Foran (N. D. Ill.)

NARCOTICS

INTRASTATE REGULATION OF DANGEROUS DRUGS AND DELEGATION OF AUTHORITY TO SECRETARY OF HEALTH, EDUCATION AND WELFARE TO DETERMINE WHAT IS DEPRESSANT OR STIMULANT DRUG HELD CONSTITUTIONAL.

Lawrence W. White v. United States (C. A. 1, May 17, 1968; D. J. 21-36-411)

The defendant, in appealing his conviction for the unlawful sale of lysergic acid diethylamide (LSD), "a depressant or stimulant drug" within the meaning of 21 U. S. C. 321(v)(3) in violation of 21 U. S. C. (q)(2), challenged the constitutionality of these statutes. Section 331 prohibits the sale of a "depressant or stimulant drug" which is defined in Section 321 as one found by the Secretary of Health, Education, and Welfare as having a "potential for abuse".

Regarding 21 U. S. C. 331(q)(2), the defendant asserted that Congress exceeded its authority under the Commerce Clause by regulating the interstate traffic in dangerous drugs. The Court of Appeals found that Congress' "dual objective of fostering proper interstate commerce and proscribing improper interstate commerce would be aborted without the power to regulate all intrastate commerce". Supreme Court cases were cited to show that legislation has been upheld which appeared to be intrastate in nature in their individual or local character yet when added together, these events affect the interstate flow of that particular commerce. The Court held that Congress did not exceed its constitutional power in enacting this section.

In considering the defendant's charge that 21 U. S. C. 321 was an improper delegation of legislative authority and without intelligible guidelines, the Court stated that the proscribed traffic in "depressant or stimulant drugs" which have a "potential for abuse" because of their "effect on the central nervous system or (their) hallucinogenic effect" was more than a

vacant standard. Also, a statutory list of abusive drugs would be inappropriate because of the rapid drug development.

Staff: United States Attorney Paul F. Markham; Assistant United States Attorneys John Wall and Albert F. Cullen, Jr. (D. Mass.)

DISTRICT COURTS

OBSCENITY

WHERE FILM HAS OBVIOUS PRURIENT APPEAL FOR AVERAGE PERSON AND IS PLAINLY OFFENSIVE BY NATIONAL COMMUNITY STANDARDS, NO PROOF OTHER THAN FILM ITSELF IS NECESSARY TO ALLOW FOR JURY FINDING OF OBSCENITY.

United States v. A Motion Picture Film Entitled "I Am Curious--Yellow" (S. D. N. Y., May 27, 1968; D. J. 54-51-1403)

The United States proceeded under the customs laws (19 U. S. C. 1305) to condemn and confiscate as obscene a Swedish motion picture, "I Am Curious--Yellow." After introducing and exhibiting the film, the United States rested. Claimant moved for a directed verdict, arguing in reliance on United States v. Klaw, 350 F. 2d 155 (C. A. 2, 1965), and Hudson v. United States, 234 A. 2d 903 (Ct. App. D. C. 1967) that the Government had to offer evidence as to the contemporary standards of the nation. The Court (Murphy, D. J.) reserved decision, and claimant went forward with its proof, chiefly "expert" testimony that the motion picture had redeeming social value. After a jury finding that the picture was obscene, the Court denied claimant a directed verdict. The Court distinguished Klaw because it involved "bondage" booklets of a "sado-masochistic" nature whereas "I Am Curious--Yellow" showed nude couples engaged in various forms of sexual congress. The Court considered its holding in keeping with statement in the Hudson case. In the Court's view, proof of the standards of tolerance prevalent in the nation generally is necessary only when obscene attributes of the material involved are not patent. Claimant has filed a notice of appeal.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Lawrence W. Schilling (S. D. N. Y.)

SELECTIVE SERVICE ACT

INDUCTION ACCELERATED OF REGISTRANT DECLARED DELINQUENT FOR FAILURE TO POSSESS DRAFT CARDS; FAILURE TO COMPLY WITH ORDER FOR INDUCTION.

United States v. David Earl Gutknecht (D. Minn., No. 4-68-Cr-22; May 9, 1968; D. J. 25-39-637)

The defendant, who was classified in Class 1-A, participated in a "Stop the Draft Week" demonstration at the federal office building in Minneapolis on October 16, 1967. When a Deputy United States Marshal refused to accept his Selective Service Registration Certificate and Notice of Classification, he dropped them at the feet of the Deputy Marshal together with mimeographed literature explaining his views on the Vietnam War. On December 20, 1967, he was declared delinquent by his local board for failure to have his draft cards in his possession and was ordered for induction.

He reported as ordered but advised the Armed Forces Entrance and Examining Station processing officer that he would not take part in the induction processing. The defendant was then informed by the processing officer that his refusal to submit to induction would constitute a felony and subject him to punishment. The defendant stated that he was aware of the penalty and presented a prepared statement setting out his reasons for refusing to go through the induction process. He was indicted in a one-count indictment for failure to report for and submit to induction.

The defendant contended that he had not refused induction because he reported as ordered but, by not being directed to take the "one step forward", he was not afforded the opportunity to go through the regular induction ceremony. He also contended that, while the induction order was apparently based on the non-possession of his draft cards, it was in fact directed against his anti- Vietnam activities and thus violated his right to freedom of speech.

The court disposed of the first contention by pointing out that the duty to report for induction contemplates not only the duty to report, but also the duty to submit to induction; and that the "step forward" procedure is only taken after the inductees are given the physical and mental tests that the defendant refused to take.

The court also stated that there was no evidence to support the defendant's claim that he was ordered for induction because of his views regarding Vietnam. It was held that the Selective Service regulations authorize a local board to declare a registrant delinquent for failure to possess his certificates and to order him for induction.

Staff: United States Attorney Patrick J. Foley; Assistant United States Attorney J. Earl Cudd (D. Minn.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

COURT OF APPEALS

THREE-JUDGE COURT STATUTE, 28, U.S.C. 2282. SUIT FOR INJUNCTIVE AND DECLARATORY RELIEF AGAINST CONGRESSIONAL COMMITTEE.

Krebs and Teague, et al. v. Ashbrook, et al. (C.A.D.C., No. 21382, decided May 14, 1968; D.J. 146-1-51-18391)

Alan M. Krebs and Walter D. Teague, III, brought this suit in the U.S. District Court, D.C., against the House Committee on Un-American Activities to enjoin the Committee's operations and enforcement of Rule XI, the Committee's authorizing resolution, on grounds of unconstitutionality of Rule XI and violation of plaintiffs' constitutional rights. Plaintiffs also seek to enjoin any attempted prosecution under 2 U.S.C. 192 for contempt of Congress arising out of their failure to testify at hearings held by the Committee as required by subpoenas duly issued. A three-judge court was requested and was convened. On September 11, 1967, the three-judge district court entered an order dissolving itself. On motions to dismiss, defendants had argued: First, no "Act of Congress" is under attack, and 28 U.S.C. 2282 does not apply to require a three-judge court. Second, the three-judge court is not required because the complaint and supplemental complaint state no basis for equitable relief. Third, the relief sought would be an unauthorized interference with the legislative function in violation of the constitutional separation of powers doctrine. The District Court did not pass on the last two arguments, but ruled that this was not a case for a three-judge court because Section 2282 requires a three-judge court for granting an injunction or order restraining the enforcement, operation or execution of an "Act of Congress" for repugnance to the Constitution. However, the Committee on Un-American Activities acts under authority of the rules of procedure of the House of Representatives; Rule X creates the Committee and Rule XI provides the powers and duties of the Committee. The Court traced the history of the Committee's authority, and discussed the scope of Section 2282 as stated by the Supreme Court in various decisions, and found that the pertinent rules are rules of the House of Representatives pertaining to internal administrative procedures, and do not come within the meaning of an "Act of Congress" under Section 2282 of 28 U.S.C.

Plaintiffs appealed to the Supreme Court but later withdrew the appeal and perfected their appeal to the Court of Appeals for the D.C. Circuit. On May 14, 1968, the Court of Appeals handed down its unanimous judgment.

In a per curiam opinion the Court said that it was "in general agreement" with the opinion of the District Court (275 F. Supp. 111). Accordingly, if plaintiffs do not petition for certiorari in the Supreme Court, the case will now go back to a single judge in the District Court.

Staff: Assistant Attorney General J. Walter Yeagley, Kevin T. Maroney and Lee B. Anderson (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

FEDERAL PARKWAYS

SECRETARY OF INTERIOR HAS AUTHORITY TO REGULATE COMMERCIAL BUS LINES USING NATIONAL PARK HIGHWAY; PERMISSIBLE DISCRIMINATION.

Udall v. Washington, Virginia and Maryland Coach Co., Inc., D. C. Transit System, Inc., Intervenor; United States v. Washington, Virginia, and Maryland Coach Co., Inc., D. C. Transit System, Inc., Washington Metropolitan Area Transit Commission, and Virginia State Corp. Commission, Intervenors (C. A. D. C. Nos. 21394, 21395; June 12, 1968, D. J. 90-1-4-91, 90-1-4-101)

George Washington Memorial Parkway, a multi-lane highway, is located along the Potomac River in Virginia and is administered by the Department of the Interior through the National Park Service. The Parkway, which runs from Mount Vernon on the south to its intersection with the Capital Beltway above Washington, D. C., at its northern terminus, was built in several stages between 1932 and 1959. The nature and condition of the highway vary from one segment to another. Below Arlington Memorial Bridge, the Parkway connects with several cross-streets and bisects communities south of Alexandria. Above Key Bridge, the Parkway is a limited access highway. In issuing regulations on use of the Parkway by commercial vehicles, the Secretary discriminated among the types of vehicles which were permitted on the Parkway and the uses allowed by permitted vehicles. Trucks were prohibited substantially all use of the Parkway. Taxicabs, limousines and sightseeing buses have substantially unlimited use of the Parkway. Commuter buses below Memorial Bridge were allowed on the Parkway freely. Above Key Bridge, the Secretary's regulations prohibited all commuter buses except those going to the C.I.A. Building and Dulles International Airport.

W.V.&M. was issued a permit under these regulations to provide commuter bus service from Key Bridge to the C.I.A. Building "and direct return". W.V.&M., contending that this regulation was invalid, used the Parkway for its commuter buses to the C.I.A. Building, but continued on into suburban Virginia instead of returning directly. The United States brought this suit to restrain the unauthorized use of the Parkway by W.V.&M.

In a separate suit against the Secretary, W. V. &M. sued to have the regulations declared invalid. The district court held the Secretary's regulations were unreasonably discriminatory. On appeal, this was reversed.

The Court held that there is a judicial presumption of the validity of administrative action, with the burden on W. V. &M. to overcome this presumption. The district court should not make a de novo determination. The judicial function is exhausted when it is determined that there is a rational basis for the action taken. The Court of Appeals held the task of weighing competing uses of federal property had been delegated by Congress to the Secretary, and any reasonable regulations will be upheld unless it is beyond his authority. The Court of Appeals found that the Secretary could have reasonably concluded on the facts of this case, that commuter bus traffic above Key Bridge should be restricted, while allowing unrestricted use on the lower portion for the Parkway for historic and aesthetic considerations. There was a dissent by Judge Tamm, who would have affirmed the lower court. It is probable that a petition for rehearing and/or a petition for certiorari will be filed by the bus companies.

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

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

SUMMONS ENFORCEMENT

TAXPAYER-INTERVENOR CANNOT PREVENT PRODUCTION OF BANK RECORDS SOUGHT PURSUANT TO SUMMONS EVEN THOUGH SUCH PRODUCTION MIGHT CONTAIN EVIDENCE BEARING ON TAXPAYER'S CRIMINAL LIABILITY. SUBPOENAS SERVED ON INTERNAL REVENUE SERVICE AGENTS WERE QUASHED SINCE PROCEEDING WAS INVESTIGATORY IN NATURE AND NO CIVIL ACTION WAS PENDING.

United States and Vincent C. Morrison v. Bank of Commerce, Respondent, Arthur Meister, Intervenor (D. N.J.; February 26, 1968; Civil No. 1227-67; D.J. 5-48-7422) (68-1 U.S.T.C. Par. 9388)

This action was commenced by the United States seeking to enforce two internal revenue summonses against the Bank of Commerce. The summonses directed the production of certain bank records relevant to the tax liabilities of Arthur Meister for years 1960 through 1964. The bank furnished the information for the years 1961 through 1964, but refused to turn over documents relating to 1960, in view of taxpayer's objection that the year 1960 was barred by the statute of limitations.

The taxpayer moved to intervene in this proceeding, stating, in part, that the summonses were being used for the improper purpose of obtaining evidence for criminal use; that an examination of the books and records of the respondent-bank for the year 1960 is barred by the statute of limitations; and is further violative of his rights under the Fourth and Fifth Amendments to the Constitution.

The taxpayer caused subpoenas duces tecum to be served on two special agents of Internal Revenue Service involved in the investigation of this matter.

Although the taxpayer was permitted to intervene, the court found that the taxpayer cannot prevent the bank's production of the requested records, even though such records might disclose information as to the taxpayer's tax liability which might be used against him in a criminal proceeding; and that the documents relating to 1960 were material and relevant to the investigation and not barred by the statute of limitations as to civil tax liability. The application of the United States to direct the bank to comply with the summonses was therefore granted by the court.

The court further granted the Government's motion to quash the two subpoenas served on the Internal Revenue Service agents. The court agreed with the Government's argument that this proceeding was in the investigatory stage; that no assessment had been made; that no civil action was pending; and thus discovery should be denied.

A notice of appeal has been filed by the taxpayer.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorneys Kenneth C. Zauber and Thomas J. Alworth (D. N.J.); and Earl Kaplan (Tax Division)

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