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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

"NORTHERN LINES" MERGER

May 9, 1968: The Department of Justice filed suit in the District of Columbia to block the proposed "Northern Lines" railroad merger, which had been previously approved by the ICC. Under the plan, the Great Northern, Northern Pacific, Pacific Coast and Chicago, Burlington and Quincy railroad companies were to merge into a new company -- The Great Northern Pacific and Burlington Lines, Inc. The Department alleged that the ICC approval orders are in violation of the Interstate Commerce Act and Administrative Procedure Act.

CLOSING OF NATIONAL TRAINING SCHOOL

May 16, 1968: The National Training School for Boys released its last student on May 15th. The Bureau of Prisons closed the school because its facilities had become obsolete, and the federal youth center under construction in Morgantown, W. Va., will provide replacement capacity for 15 to 19 year olds sentenced for federal crimes. President Johnson previously announced plans to develop a model city on the site of the school.

OLEA GRANT ON VOICE IDENTIFICATION

June 18, 1968: The Department of Justice has awarded a grant to the Michigan Department of State Police for research on whether the human voice can be as positive a means of identification as fingerprints in criminal cases. The project will include studies of present voiceprint identification methods, development of new techniques, and extensive tests.

NARCOTICS SEIZURE

June 26, 1968: Agents of the Bureau of Narcotics and Dangerous Drugs have seized 112 kilograms of pure heroin in the largest single seizure in the nation's history. Henry L. Giordano, Associate Director of the Bureau of Narcotics and Dangerous Drugs, said the heroin, valued at $22.4 million, was discovered in a hidden compartment in a foreign automobile which had been shipped to New York City from France. Attorney General Ramsey Clark said one United States citizen was arrested in New York City and four French citizens were apprehended in Paris in connection with the seizure. All are charged with conspiracy to violate U.S., or French narcotic laws.

DEPARTMENT CHALLENGES "FREEDOM OF CHOICE" PLANS

July 6, 1968: The Department of Justice will seek to require some 159 southern school districts to replace "freedom of choice" plans with more effective

desegregation methods this fall. Attorney General Ramsey Clark said the Department had begun filing a series of motions calling for new student assignment plans involving geographic attendance zones. The motions, which are being filed in United States District Courts which earlier approved the "freedom of choice" plans in cases in which the Department of Justice participated, result from a May 27 decision by the United States Supreme Court which held that "freedom of choice" plans are unacceptable if other "reasonably available" methods promise "speedier and more effective conversion to a unitary, nonracial system."

ATTORNEY GENERAL TESTIFIES ON SUPREME COURT NOMINATIONS

July 11, 1968: Ramsey Clark appeared before the Senate Judiciary Committee to testify concerning President Johnson's appointments of Abe Fortas as Chief Justice and Homer Thornberry as Associate Justice of the Supreme Court. Mr. Clark stated, "Since ratification of the Constitution, Presidents have frequently and as a preferred method in the interest of continuity in government nominated persons to every position so defined in the Constitution (Article II, Section 2, Clause 2,) while an incumbent served until his successor could relieve him of the duties of office. The Senate has not questioned its power to confirm."

FORMER NARCOTICS OFFICIAL INDICTED

July 10, 1968: A former official of the Bureau of Narcotics and Dangerous Drugs was arrested on charges of corruption, accepting bribes and illegally selling heroin. Attorney General Ramsey Clark said Charles McDonnell was arrested in Baltimore following his indictment Tuesday by a federal grand jury there. McDonnell, 43, was Assistant Director of the Baltimore field office of the Bureau of Drug Abuse Control (BDAC) and retained his title when BDAC and the Bureau of Narcotics were transferred to the Department of Justice April 8 and combined in the Bureau of Narcotics and Dangerous Drugs. He resigned May 31. At the same time, Mr. Clark announced that a permanent Inspection Service had been established in the Bureau of Narcotics and Dangerous Drugs shortly after the bureau's formation in April. The Inspection Service was created to assure integrity in enforcement of federal drug and narcotics laws. Eight highly-qualified inspectors have been assigned to the unit, he said, and are conducting a wide-ranging investigation. The investigation and arrest of McDonnell were carried out by the new unit.

RECENT MEMOS AND ORDERS

May 28, 1968: Order No. 395-68 amends CFR to require U. S. Attorneys to seek prior clearance from the Solicitor General's Office before authorizing or declining to authorize petitions to appellate courts for the issuance of extraordinary writs.

June 24, 1968: Memo No. 584 contains a summary of the recently enacted Omnibus Crime Control and Safe Streets Act of 1968.

July 9, 1968: Memo No. 586, superseding in part Memo No. 559, sets forth new procedures and policy in dispositions of certain types of Selective Service cases.

July 10, 1968: Memo No. 584, Supp. No. 1, sets out certain policies with regard to Title VIII of the "Omnibus Crime Control and Safe Streets Act of 1968" (authorizing appeal by the United States from certain pre-trial suppression orders). The decision as to whether or not to appeal a suppression order will be made by the Solicitor General.

POINTS TO REMEMBER

ANTI-RIOT LAWS

There is attached to this Bulletin an analysis of those parts of the Civil Rights Law (Public Law 90-284 signed into law on April 11, 1968) relating to riots and civil disorders.

FIREARMS--NEWLY ENACTED LAWS

Title VII of Public Law 90-351 became effective upon Presidential approval on June 19, 1968. An analysis of this statute is contained in an appendix to this issue of the Bulletin. Please note the limitation upon prosecutive action under Title VII as indicated in instructions contained in the analysis.

Title IV of Public Law 90-351, dealing with State Firearms Control Assistance (new 18 U. S. C. 921 et seq.), will become effective 180 days subsequent to June 19 and upon taking effect will repeal and supersede the existing Federal Firearms Act (15 U. S. C. 901 et seq.). An analysis of Title IV will be distributed soon.

HATCH ACT

The Department of Justice has received inquiries in the past few months from U. S. Attorneys who wish to take an active part in the political campaign. The Department's policy concerning political activity by U. S. Attorneys is set out in Justice Circular No. 3301, dated October 26, 1939, in which it is pointed out that U. S. Attorneys and their Assistants are covered by the provisions of Section 9 of the Hatch Act. The Civil Service Commission in its rulings has also taken the position that U. S. Attorneys are subject to the Hatch Act prohibitions on political activity. Circular No. 3301 sets out various activity which would constitute taking an "active part in political management or in political campaigns" within the meaning of Section 9 of the Hatch Act. If you have any questions concerning the Hatch Act, please forward all inquiries to the Executive Office for United States Attorneys.

SELECTIVE SERVICE

When United States Attorneys submit Form No. USA-900 requesting authorization of the Department's Criminal Division to dismiss indictments

in selective service cases, paragraph numbered 6 should indicate the recommendation of the State Director of Selective Service rather than of the Federal Bureau of Investigation.

"ANTI-RIOT LAWS": PROVISIONS OF PUBLIC LAW 90-284 RELATED TO RIOTS AND CIVIL DISORDERS

A. Introduction

On April 11, 1968, President Johnson signed into law a civil rights bill, Public Law 90-284, H. R. 2516 of the 90th Congress. This is an omnibus bill made up of ten titles. The focus of this memorandum is on Section 101(a) of Title I (Section 245(b)(3) of Title 18, United States Code); Section 104 of Title I (Chapter 102 of Title 18, United States Code); and Title X (Chapter 12 of Title 18, United States Code). These provisions have been assigned to the General Crimes Section of the Criminal Division for supervision.

H. R. 2516 of the 90th Congress was originally introduced in the House of Representatives as a civil rights measure, limited to protecting civil rights workers and ethnic minorities by making their intimidation and abuse by others a criminal offense. By amendment, the scope of the bill was later broadened in the Senate to include, among other things, the controversial subject of "open housing." The "open housing" issue was debated in the Senate for almost a month and then on March 4, 1968, after several unsuccessful attempts, cloture to limit debate was finally approved. Thereafter, numerous amendments were considered, debated and voted on. In this manner not only was the initial language of H. R. 2516 modified, but a bill of rights for American Indians and provisions on "open housing" and riot-related activities were added to the bill. On March 8, the Act was passed by the Senate. On April 10, in the wake of the killing of Dr. Martin Luther King, Jr. and the rioting that followed his murder, the House approved the Senate version and the Act was signed by the President the next day.

Public Law 90-284, therefore, as maneuvered through Congress represents, if not a consensus, at least a compromise. In it are reflected Congressional desires that ethnic minorities enjoy an equal opportunity to enter the mainstream of American political, social and economic life. At the same time, there is also reflected Congressional insistence upon compliance with the rule of law. This later view is manifested in the prohibition against certain acts related to rioting, including attacks upon law enforcement officers.

A penetrating interpretation of Section 245(b)(3) and Chapters 102 and 12 of Title 18, United States Code, is difficult. These laws have a very limited legislative history; none was subjected to committee hearings in either House. All three provisions were grafted on to H. R. 2516 by way of amendment. Time for questions, discussion and debate on these amendments was restricted since debate took place after cloture was in effect. As a consequence, this limited legislative history precludes an in-depth analysis; therefore, this memorandum will cover only the essential aspects of the above cited provisions.

B. Section 245(b)(3) of Title 18, United States Code

Its sponsor said Section 245(b)(3) was "designed to give the individual who operates a small store or shop or other small business the same freedom from interference, coercion, or intimidation as the pending bill will give to an individual who wants to go to a theater or to a sporting event. . . . The hoodlum who throws a Molotov cocktail through a window of a store during the course of a riot will be subject to the same penalties as the hoodlum who burns down the house of a civil rights worker." 114 Cong. Rec. 2240 (daily ed. March 5, 1968).

Section 245(b)(3) and the related penalty provision follow:

> (b) Whoever, whether or not acting under color of law, by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with --
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> * * * * *
>
> (3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travellers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce;
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> * * * * *
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> shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if

death results shall be subject to imprisonment for any term of years or for life.

The operative effect of Section 245(b)(3) is limited to acts done "during or incident to a riot or civil disorder." The phrase "incident to" is not defined. It is reasonable to assume, however, that to constitute a violation of the statute the prohibited conduct must occur during the time of a riot or civil disorder or at least shortly before or shortly thereafter. However, there is no requirement that the prohibited acts take place at the site of the business. Prosecution is limited to those offenses the Attorney General or the Deputy Attorney General certify should be prosecuted "in the public interest and necessary to secure substantial justice" (Section 245(a)(1)). Congress bridled the exercise of Federal power under Section 245 by providing it was not the intent of Congress to prevent any state or possession from exercising jurisdiction over any offenses over which it would have jurisdiction in the absence of this Section, and that state and local law enforcement responsibilities for prosecutions of such offenses are not limited by this Section (Section 245(a)(1)).

C. Chapter 102 - Riots

This statute has been referred to as an "anti-riot law." In considering anti-riot bills, Congress has been faced with a vexing problem: Under its delegated powers how could the Congress draft a law that would help the several states prevent or control riots and at the same time not infringe on individual or states' rights guaranteed by the Constitution? Proponents of the measure saw militant "outsiders" travelling between states, preaching hate and violence as bearing a substantial share of the responsibility for recent big city riots. They believed the bill would increase cooperation between Federal and state investigative agencies. Opponents, on the other hand, argued the statute would not prevent riots because it fails to strike at the cause of riots which are disruptive economic and social conditions. In addition, the measure's constitutionality was questioned, primarily on the issues of violation of First Amendment rights and denial of due process. The due process objection was bottomed on vagueness and a statutory failure to require the elements of intent and overt act to occur contemporaneously.

Chapter 102 contains two Sections, 2101 and 2102. Section 2101(a) makes it a felony, punishable by up to five years' imprisonment or a fine of up to $10,000, or both, for any person to:

1. travel in or use any facility of interstate or foreign commerce (including the mail, telegraph, telephone, radio and television);

2. with intent to incite, organize, promote, encourage, participate in, carry on, or commit any act of violence in furtherance of a riot, or aid and abet another in inciting, participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

3. if during or after such travel or use the individual performs or attempts to perform any other overt act for any of the prohibited purposes.

Section 2101(b) as it now stands, seems to add little, if anything, to the new Chapter. When originally introduced in the Senate as an amendment, Section 2101(b) contained an evidentiary rebuttable presumption relating to intent. The presumption was not favored and the language that gave it life was deleted from the Section. What remained, after this deletion, is Section 2101(b).

The term "riot" is defined as a public disturbance involving an act or threat of the commission of an act of violence by one or more persons part of an assemblage of three or more persons which constitutes a clear and present danger of, or shall result in, damage or injury to the property or person of another individual. In the case of a threat, the ability of immediate execution, individually or collectively, must be manifest (18 U. S. C. 2102(a)). (Compare with the definition of "civil disorder" in Section 232 of Chapter 12 of Title 18, United States Code, which is defined as "acts of violence by assemblages of three or more persons.")

The terms "to incite a riot" or "to organize, promote, encourage, participate in, or carry on a riot" include, but are not limited to, urging or instigating other persons to riot. However, such terms do not mean the mere oral or written advocacy of ideas or expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts (18 U. S. C. 2102(b)).

Travel or use of an interstate facility is a fundamental element of, and the jurisdictional foundation for, Chapter 102. The precise nature of such travel or use, however, is not clear. The question was not considered in Senate debate. The question was raised in debate on H. R. 421, 90th Congress, a similar bill and the Chairman of the subcommittee which reported that bill said if one used "an interstate facility with the intent to create a riot, even if he uses these facilities intrastate . . . he consummates this part of the offense." 113 Cong. Rec. 9004 (daily ed. July 19, 1967). Apparently, one who travels in or uses an interstate facility need not actually cross state lines provided the facility used or travelled in is, per se, an interstate facility. The amount of use of the interstate facility necessary

to consummate this element of the offense is not hinted at in the language of Chapter 102. Presumably, the slightest degree of use is sufficient, provided other elements of the crime are complete.

Organized labor's use of interstate and foreign facilities for pursuit of their legitimate objectives is given tacit approval. Section 2101(e) explicitly states that "Nothing in the Section shall be construed to make it unlawful for any person to travel in, or use any facility of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means." This provision apparently satisfied those who feared the statute could be used as a tool to hamper interstate organizational activities of labor unions.

The Attorney General is required to prosecute promptly anyone who, in his opinion, has violated the statute, or report in writing to the Congress the Department's reason for not so proceeding (18 U. S. C. 2101(d)). Nevertheless, the Congress made it clear that the statute does not preempt or supplant local law or local law enforcement (18 U. S. C. 2101(f)). This conclusion is reinforced by Section 2101(c) which prohibits the Federal Government from prosecuting, for the same act or acts, any individual who has been convicted or acquitted on the merits under the laws of any state.

It is not the intent of Congress that Chapter 102 be used as a Federal substitute for state law. Over 40 states have laws relating to riots or incitement to riot. All states have criminal statutes prohibiting illegal acts usually associated with rioting (e. g., robbery, burglary, arson, assault, larceny, etc.).

The law is intended to focus on those who might travel from place to place inciting, organizing, promoting and encouraging riots, although it would also reach someone who participated in a riot after it started if such person travelled in interstate commerce with intent to participate. Also reached would be the interstate traveller who makes either one or several attempts to incite a riot.

Thus, there is an area of overlap with regard to the Federal statute and the state and local laws in that one who had unlawfully participated in a riot and who had travelled in interstate commerce and who had incited or otherwise fostered the riot could be prosecuted under either set of laws. On the other hand, there is a line of demarcation: The Federal law would not apply to purely domestic rioters and the state law would not reach the interstate traveller whose acts had not yet resulted in an offense punishable by state law. It seems the Congressional intent would best be served, however, if Federal prosecution is pursued only when the illegal acts are of an

interstate character and not covered by state law or where local prosecution is lax or not feasible.

D. Chapter 12 - Civil Disorders

When introduced in the Senate, Chapter 12 (amendment 517 to H. R. 2516) contained seven substantive criminal offenses. The thrust of the measure was against riots ("civil disorders" in its language) and its Constitutional support was based on the "commerce clause." Its sponsor requested and obtained consent of the Senate to consider and vote separately upon separate parts of the bill. Through this process four of the original criminal offenses were erased; the three that remained make up Section 231 of Chapter 12. Section 232 consists of definitions and the last Section, 233, precludes Federal preemption.

In summary, this chapter makes it a felony, punishable by up to five years' imprisonment and a fine of up to $10,000, or both, to:

1. teach or demonstrate the use or making of any firearm or explosive or incendiary device, or technique knowing or having reason to know or intending that it will be unlawfully employed for use in, or in furtherance of, a civil disorder which may affect commerce or the performance of any Federally protected function (18 U. S. C. 231(a)(1));

2. transport or manufacture for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that it will be used unlawfully in furtherance of a civil disorder (18 U. S. C. 231(a)(2));

3. commit or attempt to commit any act to obstruct, impede or interfere with any fireman or law enforcement officer, including military personnel, lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which obstructs, delays or adversely affects commerce or performance of any Federally protected functions (18 U. S. C. 231(a)(3)).

Although the legislation is primarily aimed at the "professional" rioter or organizer of riots, it could conceivably apply to the case of a hardware dealer who sells guns during a time of tense racial crisis and demonstrates their use to his customers. What knowledge must he have about the future use of these guns by his customers to possess the intent

necessary to violate Section 231(a)(2)? The answer is not clear but the sponsor of the measure said, "The man /hardware dealer/ is presumed to be innocent and entitled to the presumption that he acted honorably and properly when he demonstrated the use of the firearm." But, later in the same debate the sponsor was asked: "So, what we really have here, as I understand it now, if one is able to demonstrate or show that long arms or short arms are going to be used in any kind of disorder, and a dealer or someone who sells these firearms has not assumed due care in selling those firearms to persons who incite riots or may be using these arms in disorders, he would fall under this legislation?" The sponsor answered "Yes." 114 Cong. Rec. 2332-33 (daily ed. March 6, 1968). As a practical matter, it seems a successful prosecution of a hardware dealer in these circumstances would require one to be prepared to prove the hardware dealer had some specific knowledge that the buyer would probably use the weapon unlawfully in furtherance of a civil disorder.

E. Responsibilities of the United States Attorney

The United States Attorney has a significant role related to enforcement of Section 245(b)(3) and Chapters 102 and 12, Title 18, United States Code. Under Section 245(a)(1) the Congress has placed upon the Attorney General or the Deputy Attorney General specific enforcement responsibilities as well as restrictions. To effectively respond to the Congressional requirements, the Attorney General and his Deputy must in a large measure rely upon information given them by the United States Attorney in the district where violations may have occurred. Specifically, the Attorney General will expect to receive details about the extent of actual and possible violence, the nature of critical decisions made by local law enforcement authorities and other information about the public interest and about the need for Federal action to secure substantial justice. In addition, the United States Attorney will be relied upon to provide analysis, interpretation and advice about any enforcement problems related to riots or civil disorders.

F. Investigation and Prosecution

As stated before, the General Crimes Section of the Criminal Division has been assigned supervisory responsibility over Section 245(b)(3) and Chapters 102 and 12 of Title 18, United States Code. The Federal Bureau of Investigation has investigative responsibility.

(a) When possible violation occurs:

The Federal Bureau of Investigation should be requested to conduct a preliminary investigation when the office of the United States Attorney receives reliable information of a possible violation of the above quoted

provisions. The preliminary investigation will consist of a prompt and thorough interview of the complainant and up to three other witnesses who purportedly possess relevant information about any element of the alleged crime.

In those instances where the Federal Bureau of Investigation obtains information of a possible violation and delay of its investigation might impede discovery or collection of evidence, the Bureau will begin a preliminary investigation on its own initiative. As soon thereafter as reasonably possible the United States Attorney whose district is affected should be notified by the FBI that such preliminary investigation has been undertaken.

(b) Cooperation with local and state officials:

Whenever the alleged act constituting a possible violation of any of the foregoing statutes may also be violative of state or local law, the Federal Bureau of Investigation will inform local and/or state authorities about such illegal acts. State and local authorities will be offered assistance on out-of-state leads and services of the FBI Identification Bureau and Laboratory will be made available to them. In addition, the FBI will ascertain what investigative or prosecutive action has been taken or is contemplated by state or local authorities. In the event state or local authorities are unwilling or unable to investigate or prosecute, a full explanation of the reason for their inaction will be sought.

(c) Prosecution responsibilities:

Information obtained by the Federal Bureau of Investigation during the course of its preliminary investigation will be given to the appropriate United States Attorney who will promptly review it. Thereupon the United States Attorney will advise the Federal Bureau of Investigation of the prosecutive merits of the case under Federal law and what further investigation, if any, should be made. In view of the expressed intention of Congress not to preempt state or local authority, the United States Attorney should be fully advised as to present or contemplated state or local action and render his prosecutive opinion with such action in mind. He will also state his opinion about the prospect of current or contemplated prosecution under state or local law (all of which will be incorporated in the FBI report).

Congress has given the Attorney General specific statutory obligations relating to enforcement of Section 245 and Chapter 102 of Title 18, United States Code. Therefore, in the interest of uniformity, as a matter of policy, prosecutive procedures under all three statutes discussed herein will be identical. No prosecution under Section 245(b)(3) or Chapters 102 or 12 of Title 18, United States Code, will be commenced by the United States Attorney without express authorization from the Attorney General, his designee

or the Criminal Division. When the United States Attorney believes there are compelling reasons for Federal prosecution, he will submit a prosecutive analysis and opinion to the Criminal Division. If prosecution is authorized, the United States Attorney should provide the Criminal Division with a current account of all major developments in each case filed.

Since venue has not been expressly provided for by Congress, it would appear to be controlled by 18 U. S. C. 3237.

All inquiries and correspondence relating to the statutes which are the subject of this memorandum should be captioned "Anti-Riot Laws" and classified for the Records Administration Office as 95-800.

Analysis of Title VII - Unlawful Possession or Receipt of Firearms - Public Law 90-351 (90th Congress, H. R. 5037), approved June 19, 1968.

Section 1202(a) of Title VII makes it unlawful for any person in any category listed below to receive, possess, or transport in interstate or foreign commerce any firearm, under penalty of a fine of not more than $10,000 or imprisonment for not more than 2 years, or both:

1. who has been convicted of a felony in any federal court or court of any state or political subdivision thereof;

2. who has been discharged from the Armed Forces under other than honorable conditions;

3. who has been adjudged mentally incompetent by a federal court or court of any state or political subdivision thereof;

4. who, having been a citizen of the United States, has renounced that citizenship;

5. who, being an alien, is illegally or unlawfully in the United States.

Section 1202(b) makes it unlawful for anyone knowingly to receive, possess, or transport any firearm in interstate or foreign commerce, in the course of his employment by any person in any of the five categories listed in the above paragraph.

"Firearm" as defined in Title VII includes handguns, rifles, shotguns, silencers, and destructive devices.

The classification of persons designated in subsection (a) as barred from interstate traffic in firearms seemingly could be argued to be arbitrary, unreasonable, and baseless so as to amount to a denial of due process and thus be beyond the power of Congress. Cf. United States v. DePugh (W. D. Mo. 1967) 266 F. Supp. 453. Senator Long addressed himself to the constitutional basis of Title VII when he introduced the proposal.[1/] The Senator contended the measure could be based constitutionally upon the commerce power, and upon the power and duty of Congress to protect the President, to protect the exercise of free speech and to protect the operation of the Federal Government and of the various state governments. The reasonableness of the classification of persons barred from interstate firearms traffic must, of course, ultimately be determined by the courts.

One class of persons so named in Title VII includes those who have been discharged from the Armed Forces under other than honorable conditions. This classification was the subject of a colloquy between Senator Dominick and Senator Long at the time the latter's amendment was agreed to by the Senate. Cong. Rec., May 23, 1968, Vol. 114, p. S6268.

Senator Dominick inquired whether a medical discharge was within the coverage of the proposal. Senator Long replied that he believed a person receiving a medical discharge could be honorably discharged. He indicated that his proposal was intended to cover undesirable persons who, rather than face military courts-martial, would accept a discharge for the good of the service.

Senator Long stated he thought the measure in this respect could be ironed out in conference, perhaps by providing that the measure would not apply to a person whose discharge was clearly based on reasons of health. However, the House of Representatives did not request a conference with the Senate, but instead approved H. Res. 1197 agreeing to the Senate amendments to H. R. 5037. Cong. Rec., June 6, 1968, Vol. 114, pp. H4628 to H4655. Apparently, Title VII was not specifically mentioned in debate in the House of Representatives preceding passage of H. Res. 1197.

1/ Title VII derived from an amendment (No. 802) to S. 917 introduced on the Senate floor by Senator Long of Louisiana, Cong. Rec., 90th Cong., 2d Sess., May 17, 1968, Vol. 114, pp. S5848 to S5850.

The intent required for violation of Section 1202(b) is not clear in view of ambiguity in the wording of the statute. Moreover, the scanty legislative history sheds little light upon Congressional intent in this regard. When the statute in subsection (b) refers to "Any individual who to his knowledge . . .", it is unclear whether or not the requisite knowledge of the employee must include knowledge of the fact that the employer is a person in one of the five categories named. It would appear requisite to a violation that the employee receive, possess or transport a firearm in the course of his employment, that the employee know that it is in fact a firearm which he is thus receiving, possessing, or transporting, and that the employee know that his employer is a person who has been convicted or who has been adjudged incompetent, etc. This portion of the measure appears to have been treated only in Senator Long's remarks when he introduced the proposal. 2/

2/ Cong. Rec., May 17, 1968, Vol. 114, p. S5850:

> Mr. President, there is an additional provision which I recommend would take care of the underworld element which has been so successful. Having been found guilty of felonious conduct and denied the right to possess weapons themselves, they proceed to hire bodyguards, triggermen, and goon squads to go out and do their dirty work for them, all in the same general course of conduct. The murder-incorporated types, or the major underworld characters have been known to have so-called triggermen working for them.
>
> If the boss is the kind of person whom I have described and he hires a triggerman to do his shooting for him, then while he is in the performance of his duties he would not be permitted to possess firearms.
>
> Many people are concerned about the Mafia and concerned that some member of the Mafia may have a number of gun-carrying lieutenants working for them who would otherwise be permitted to possess firearms to endanger the lives of good citizens who are interested to do that which is right, as the Lord gives them the right to see it.
>
> If a person is in the employ of a person who is not permitted to possess a firearm then the employee would not be permitted in the performance of his employment to possess a firearm; and one who is either convicted of a felony, or for other reasons not permitted to carry weapons, would be covered.

Definitions are contained in Section 1202(c). Section 1203 exempts from operation of the measure any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison, as well as any person who has been pardoned by the President or chief executive of a state and has been expressly authorized by the President or the state chief executive, as the case may be, to receive, possess, or transport a firearm in commerce.

Title VII became effective as of its approval on June 19, 1968, and presumably will be codified in Title 18, United States Code. With respect to transportation or receipt of firearms in interstate commerce to or by a person convicted of a crime punishable by imprisonment for a term exceeding one year, Title VII overlaps a portion of the existing Federal Firearms Act (15 USC 902) and Title IV of P. L. 90-351 (new 18 USC 922(c), (e), (f)) which will repeal and supersede the Federal Firearms Act effective 180 days subsequent to June 19. It is noted also that problems may arise with respect to persons discharged from the Armed Forces under other than honorable conditions.

In view of the foregoing, United States Attorneys are instructed not to initiate or authorize prosecution for violation of Title VII unless and until contemplated prosecution action has first been approved by the Criminal Division, General Crimes Section. In this regard, it is anticipated that in a situation where the facts indicate violations of Title VII and of the National or Federal Firearms Acts(or Title IV of Public Law 90-351) prosecution will be instituted under the National or Federal Firearms Acts rather than under Title VII. We prefer that Title VII prosecutions approved by the Criminal Division not be combined with violations of other statutes.

Primary investigative jurisdiction with respect to violations of Title VII rests with the Alcohol and Tobacco Tax Division of Internal Revenue Service, which also investigates violations of the National and Federal Firearms Acts (and the new Title IV which will supersede the Federal Firearms Act). The Immigration and Naturalization Service may exercise investigative jurisdiction over violations of Title VII which are ancillary to investigations within its primary jurisdiction. The Federal Bureau of Investigation may exercise investigative jurisdiction over violations of Title VII which are ancillary to investigations within its primary jurisdiction. The Post Office Department may exercise investigative jurisdiction over violations of Title VII which are ancillary to investigations within its primary jurisdiction.

2/ Cont'd.

It seems to me that this simply strikes at the possession of firearms by the wrong kind of people.

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Hammond, III

DISTRICT COURT

SHERMAN ACT

COURT RULES ON THREE MOTIONS IN BAKERY CASE.

United States v. American Bakeries Company, et al. (Cr. 7656; June 4, 1968; D.J. 60-70-64)

On March 15, 1968, Judge Noel P. Fox accepted nolo pleas of eight corporate and eight individual defendants, and rejected nolo pleas of four corporate and five individual defendants. One corporate defendant and one trade association did not attempt to plead nolo.

On May 8, 1968, the defendants whose nolo pleas had been denied filed a petition for a writ of mandamus in the Sixth Circuit Court of Appeals, alleging that ability to pay treble damages had been the basis on which Judge Fox accepted some nolo pleas and denied others, and that they had been denied equal protection of the laws. Shortly thereafter, however, defendants withdrew their petition, and on June 3, 1968, filed in the district court a motion to reconsider the rejection of nolo pleas.

On June 4, 1968, Judge Fox issued a 12 page written opinion in support of his action of March 15, 1968, accepting nolo pleas of the "local" companies, and denying nolo pleas of the "national" companies. After discussing the different purposes of Section 5 of the Clayton Act, Judge Fox states that the basic standard to be applied in deciding whether to accept nolo pleas is the "public interest," which is served by preserving the deterrent value of the antitrust laws. In this connection, Judge Fox notes that the public does not attach the same stigma to nolo pleas as to convictions or guilty pleas, and that treble damage suits promote a public interest in deterrence. Turning to a consideration of "the impact on the economy of accepting or rejecting nolo," Judge Fox cites at length studies of the Senate Antitrust Subcommittee to the effect that the major baking companies tend to drive local independent bakers out of business by predatory tactics. Judge Fox concludes that the local Michigan companies may be driven out of business by antitrust litigation, and accepts their nolo pleas for this reason, and because they are not previous antitrust violators and are not powerful. Nolo pleas of the major baking companies are denied because they will not be put out of business by antitrust litigation, and because each had been fined previously in antitrust cases.

On June 7, 1968, the court heard oral argument on the following defense motions:

(1) Motion to reconsider nolo pleas;

(2) Motion to suppress documents and information gathered by the grand jury.

(3) Motion to dismiss the information.

The Court had also set down for argument defendants' motion to transfer the case to Detroit, and various discovery motions, but these matters were not reached at the hearing. The defendants argued for suppression of the evidence and dismissal of the information on the ground that the grand juries which gathered the evidence were improperly selected and did not represent a cross-section of the community. The court permitted defendants to put the clerk of the court on the stand and examine him about the "key man" system of jury selection used in the district. The Government took the position that since the original indictment had been dismissed and replaced with an information, invalidity of the grand jury was not grounds for suppression, or dismissal of the information, relying on United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949).

At the conclusion of the hearing, Judge Fox announced his decision to reconsider his earlier ruling and accept the nolo pleas of the major companies and their employees. In a written opinion entered June 18, 1968, accepting the nolo pleas, Judge Fox rejected defendants' claim that they had been denied equal protection of the laws, but allowed their nolo pleas because of the "close legal questions" presented by the pending motions, asserting that "the public interest may be served by the expeditious resolution of potentially protracted cases." In discussing the various legal issues, Judge Fox indicates he is particularly bothered by the grand jury selection issue.

On June 24, 1968 Judge Fox imposed fines in the amount of $206,500. Twelve individual defendants were given suspended sentences and placed on probation.

Staff: John Edward Burke, William T. Huyck, Thomas S. Howard, Richard L. Reinish and James E. Mann (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl Jr.

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE

COURTS MAY REVIEW ADMINISTRATIVE DETERMINATION OF NORMAL ACREAGE YIELD UNDER WHEAT MARKETING PROGRAM; COUNTY AND STATE ASC COMMITTEES MAY USE INFORMAL PROCEDURES, BUT SHOULD NOT TAKE EX PARTE EVIDENCE; COUNTY COMMITTEE PROCEDURES ARE NOT VIOLATIVE OF DUE PROCESS BECAUSE COMMITTEEMEN ARE INTERESTED IN OUTCOME OF THE CASE.

Garvey v. Freeman (C. A. 10, Nos. 9623, 9626; June 28, 1968; D. J. 145-8-691, 145-8-733)

Garvey attacked administrative determinations of the normal per acre wheat yield for his five Colorado farms. Under the statute, the appraised normal yield was to be determined by the ASC County Committee, with de novo appeals to the State Committee and the Deputy Administrator. The statute provides that "the facts constituting the basis for any payment * * * when officially determined in conformity with the applicable regulations * * * shall be final." 7 U.S.C. 1385. Judicial review was provided by statute for wheat programs in which mandatory quotas were imposed on the farmers, but no review was provided by statute in the case of the program here involved -- a program in which participation was voluntary.

Garvey argued that: (1) the administrative decisions were based on secret evidence, since members of the State Committee or the Deputy Administrator's staff, in conjunction in hearing Garvey's appeal from the County Committee determination, consulted with the County Committee unbeknownst to Garvey; (2) the County Committee proceeding lacked due process because its determination was based on appraisals by community committeemen, all of whom had a direct interest in the determination since they also were farmers in the County and there was a limited amount of subsidy to be parcelled out among all the farmers in the County; and (3) the determinations lacked factual support in the administrative record. The district court held that there was judicial review but concluded that there had been no procedural violations and that the administrative determination was supported by the record.

The Court of Appeals affirmed. It held that there was judicial review of both the procedures and the evidence, despite the finality provision in the

statute. Moreover, it concluded that, despite the informal nature of the Committee hearings, the practice of secret consultations between the Deputy Administrator and the State Committee on the one hand, and the County Committee, was extremely questionable. It concluded, however, that there was no prejudice to Garvey since the record of these consultations did not contain any matters that had not been brought out at the formal hearings and that Garvey had not had a chance to rebut. The Court rejected Garvey's contention that due process was violated by the fact that some Committeemen were farmers interested in the outcome of the case, ruling that this was simply a consequence of the Congressional decision to place the responsibility for administration of these programs in "neighborhood tribunals." Finally, the Court rejected the contention that there was no evidence in the record to support the administrative determinations.

Staff: Robert V. Zener (Civil Division)

ADMIRALTY -- PREPAID FREIGHT EARNED ON DELIVERY

STANDARD FORM CONTRACT ("SPACE CHARTER") FOR CARRIAGE OF GOVERNMENT CARGOES DOES NOT VARY GENERAL PRINCIPLE OF AMERICAN MARITIME LAW THAT PREPAID FREIGHT IS EARNED ON DELIVERY AND NOT ON LOADING.

United States v. Waterman Steamship Corporation, et al. (C. A. 5, No. 24,450; June 27, 1968; D. J. 61-3-70)

The Military Sea Transportation Service contracted for the transportation of Government cargo under a standard form contract ("Space Charter") of Government cargoes. The predecessor standard form had expressly provided for prepayment of 80% of the freight and also that the prepaid freight was to be regarded as "completely earned" on loading. The revised contract provision provided for prepayment of 80% of the freight, but omitted the provision that prepaid freight was to be regarded as earned on loading. The issue in this case was whether, under the revised contract provision, the prepaid freight was earned on loading, or, as the Government contended, only on delivery. The district court ruled against the Government, but the Fifth Circuit reversed.

The Court of Appeals held that, under American maritime law principles, prepaid freight is earned on delivery, not on loading, and that there was nothing in the present contractual provisions to indicate any intention to vary this principle. The Court also relied upon (1) a course of conduct under which both parties had treated the contractual provisions in the instant case as providing that prepaid freight is earned on delivery; and (2) the fact that, in contrast to the present contract, previous contractual provisions had expressly

provided that prepaid freight is earned on loading. The Court found the shipowner's expert evidence to be unconvincing since it was based upon the British practice, which is contrary to American law in that it treats prepaid freight as earned on loading.

Staff: Alan S. Rosenthal (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT -- PERMANENCY OF INJURY

DEPUTY COMMISSIONER'S FINDING OF PERMANENT DISABILITY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE EVEN THOUGH PHYSICIAN TESTIFIED THAT IT WAS REASONABLY AND MEDICALLY PROBABLE THAT CLAIMANT'S AMPUTATED LEG COULD BE REHABILITATED.

Bertram A. Watson and R. J. Shea v. Gulf Stevedore Corp., et al. (C. A. 5, No. 25,007; June 28, 1968; D. J. 83-74-60)

Claimant's left leg was amputated below the knee in 1962. Claimant's right leg also incurred "significant disability" by reason of aching, cramping and swelling due to certain surgical procedures performed on that leg. From 1962 to 1966, however, claimant worked in the form of "key" jobs on the waterfront obtained by virtue of seniority and performed with the aid of a prosthesis on his left leg. In 1966 an ulcer on the stump of the left leg required an operation and claimant's cessation of work. At the compensation hearing held in November 1966, a physician testified that it was "reasonably and medically probable" that claimant's left leg would be rehabilitated to the point where he could again tolerate a prosthesis and resume work. However, the physician could not say when this possible rehabilitation would occur. The Deputy Commissioner ruled that it would be "speculation" to say that claimant could be rehabilitated and that his disability was permanent within the meaning of the Longshoremen's Act. The district court set aside the award, ruling that substantial evidence did not support the finding of permanent disability. The Fifth Circuit reversed and reinstated the Deputy Commissioner's award.

The Court of Appeals initially ruled that the scope of judicial review of the Deputy Commissioner's inference of permanent disability is extremely narrow. The Court went on to hold that in order to be "permanent", an injury under the Longshoremen's Act need not be "eternal or everlasting, but [it need be shown] merely that the disability is lasting or continuous as distinguished from temporary, or that it will be long continued". In addition, the Court of Appeals stated that the Deputy Commissioner was not bound by the medical witness's opinion, and that if the claimant's condition should improve to the point where he could again work, the employer could request a modification of the award pursuant to 33 U.S.C. 922.

Staff: Leonard Schaitman (Civil Division)

PUBLIC INFORMATION ACT -- PROCEDURE

PROVISION IN PUBLIC INFORMATION ACT DIRECTING THAT CASES THEREUNDER BE EXPEDITED DOES NOT REQUIRE SHORT CIRCUITING OF REGULAR PROCEDURES.

Dwight Aubrey Martin v. M. Neuschel, Clerk Local Board No. 136 (C. A. 3, No. 17169; June 28, 1968; D. J. 25-62-1999)

In an action brought by a Selective Service registrant under the Public Information Act, 5 U.S.C. 552, to obtain the private home addresses of the members of his local draft board, the district court signed an order compelling disclosure 27 hours after the United States Attorney had been served. The district court rejected the Government's request for "the usual 60 days within which to answer." On appeal, the Third Circuit reversed and remanded the case to the district court "for further litigation and disposition in accordance with the regular and prescribed procedures." The Court of Appeals stated that "[t]he fact that a court doubts that a public officer can justify acts complained of does not warrant a denial of the right to plead whatever defense he may [have] and to have the merits of the controversy decided in regular course."

Staff: Ralph A. Fine (Civil Division)

RAILWAY LABOR ACT

DISTRICT COURT HAD NO AUTHORITY TO REVIEW DETERMINATION BY NATIONAL MEDIATION BOARD THAT AN INCUMBENT UNION, INVOLVED IN REPRESENTATION DISPUTE, MUST ALLOW ITS NAME TO APPEAR ON BALLOT OR DISCLAIM ANY INTEREST IN REPRESENTING EMPLOYEES.

International Brotherhood of Teamsters, etc. v. Brotherhood of Railway, Airline and Steamship Clerks, etc. (C. A. D. C., No. 21620; June 28, 1968; D. J. 124-16-74, 124-16-75)

This case involved two representation disputes, one concerning employees of Pan American World Airways, Inc., and one concerning employees of Braniff International Airways. The Clerks Union was the incumbent representative of both groups of employees; the Teamsters had collected sufficient authorization cards to challenge this representation, and had applied to the National Mediation Board to investigate the disputes.

Two elections had already been held at Pan American; in each of these, the Clerks Union had been granted permission by the Board to remain off the

ballot. It apparently thought that, since the Board's rules would allow certification of the Teamsters only if more than 50 per cent of the employees cast valid ballots for union representation, it could remain as representative if it could induce more than half of the employees to abstain from voting. Both of these elections were tainted by alleged fraudulent incidents designed to confuse the employees on this issue. Consequently, the Board invalidated both of them and ordered a third Pan American election; it further decided that in this election (and in the upcoming Braniff election) the Clerks Union would have to appear on the ballot or disclaim its interest in representing the employees.

The Clerks Union then brought suit to enjoin the elections; it further insisted that numerous ballots cast in the second Pan American election were invalid, and that, therefore, less than 50 per cent of the employees had cast valid ballots and the Teamsters' application must be dismissed. The district court granted its motion for a preliminary injunction, and the National Mediation Board appealed.

The Court of Appeals reversed, and ordered that the Board's motion to dismiss the complaints be granted. It held that, except in "instances of constitutional dimension or gross violation of the statute", "the courts have no jurisdiction to intervene in representation disputes committed by the Railway Labor Act to final Board action." See Switchmen's Union v. National Mediation Bd., 320 U.S. 297; Railway Clerks v. Employees Ass'n, 380 U.S. 650.

Staff: John C. Eldridge and Stephen R. Felson (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURTS OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

GOVERNMENT NOT REQUIRED TO PLEAD AND NEGATE EXCEPTIONS OR EXEMPTIONS CONTAINED IN STATUTE PROHIBITING UNAUTHORIZED SALE OF STIMULANT DRUG.

United States v. Sidney B. Rowlette and Robert Vecelli (C. A. 7, June 17, 1968; D. J. 21-23-532)

The defendants were found guilty of the unlawful sale, delivery and disposition of a quantity of amphetamine tablets, a stimulant drug, in violation of 21 U.S.C. 360a(b). On appeal they alleged, inter alia, that the indictments were fatally defective for failure to negate exceptions or exemptions contained in Section 360a and that the evidence adduced at trial was insufficient to sustain the convictions because of the absence of proof negating the applicability of each exception or exemption.

The statute excludes from its purview the sale, delivery or disposition of a stimulant or depressant drug made in the ordinary course of the business, profession, occupation or employment of specifically designated and enumerated classes of persons including manufacturers, wholesale druggists, pharmacies, hospitals practitioners licensed to prescribe and administer such drugs, common carriers and others whose activities with respect to the drugs are normally proper and abuse free.

The Court rejected these contentions and, relying on McKelvey v. United States, 260 U.S. 353 and United States v. Safeway Stores, 252 F. 2d 99 (C.A. 9), held that an indictment founded on a statute defining the elements of an offense need not negate the matter of an exception contained in the same section or elsewhere and that if a defendant relies on such an exception he must set it up and establish it as a defense.

The Court pointed out that this matter is one peculiarly within the defendants' own knowledge and such an interpretation would not require him to take the stand with the resultant abridgement of his Fifth Amendment right not to incriminate himself since an exempt status, if it existed, could be established by the testimony of others.

In the Court's opinion the Government's case was replete with proof of

furtive conduct on defendant's part which it felt would permit, if not compel, a reasonable inference that the sales were not in the ordinary and authorized course of business.

Staff: Former United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and Gerald M. Werksman (N.D. Ill.)

NARCOTICS AND DANGEROUS DRUGS

CONGESSIONAL DELEGATION OF POWER TO HEW SECRETARY TO DETERMINE DRUGS HAVING "POTENTIAL FOR ABUSE" HELD CONSTITUTIONAL AND STANDARD ADEQUATE.

Gary Robert Iske v. United States (C.A. 10, June 6, 1968; D.J. 21-13-224)

After pleading guilty to the unlawful sale of lysergic acid diethylamide (LSD) in violation of 21 U.S.C. 331(q)(2), the defendant appealed. He claimed that Congress' delegation of power to the Secretary of Health, Education, and Welfare to determine which drugs have a "potential for abuse" because of their depressant or stimulant effect on the central nervous system or their hallucinogenic effect is unconstitutional in that the standard is inadequate.

The Court in holding that the standard "potential for abuse" was sufficient, took note of Congress' intention that a drug's potential should be based on a substantial potential for abuse and not isolated or occasional abuses; the obvious dangers from unsupervised use of LSD; medical studies and the unprecedented rate at which new drugs are discovered.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney Donald E. Cordova (D. Colo.)

DISTRICT COURT

BANKS AND BANKING--MISAPPLICATION; PERSONS LIABLE

CONTROLLING SHAREHOLDERS HELD WITHIN CLASS OF PERSONS COVERED BY BANK MISAPPLICATION STATUTE.

Garrett, et al. v. United States (W.D. Texas, June 13, 1968; D.J. 29-76-375)

The defendants were convicted of wilfully misapplying and conspiring to misapply funds of a national bank in violation of 18 U.S.C. 656. Defendants

had become the controlling stockholders of a national bank by virtue of their acquisition of 55% of the capital stock of First National Bank of Marlin, Texas. The stock was held in the name of corporate and individual nominees. In exercise of that control, defendants elected a majority to the bank's board of directors.

The defalcation with which they were charged arose in connection with the bank's purchase of a $1,000,000 package of real estate mortgages. Defendants arranged for a $1,000,000 deposit to be placed with the bank at a premium to provide funds for the transaction. Subsequently, the seller of the mortgages paid a $187,000 commission to defendants.

Defendants contended that the indictment and the evidence were insufficient since stockholders were not included in the categories of persons specified in 18 U.S.C. 656. The statute prohibits misapplications by officers, directors, agents or employees of the victim bank and persons "connected in any capacity" with such bank. The court stressed the active control which defendants exercised, including such actions as naming a majority of the board of directors and causing an increase in the deposits of the bank to enable the bank to enter into the mortgage transaction. Moreover, the court reasoned, defendants as controlling shareholders had fiduciary responsibilities with respect to the minority stockholders as well as to the bank. The court concluded that the fact of ownership coupled with the activity here engaged in demonstrates a connection with the bank within the statutory meaning.

Staff: United States Attorney Ernest Morgan; Assistant United States Attorney Harry L. Hudspeth (W.D. Texas)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SUPREME COURT OF FLORIDA - CIVIL CASE

PRIORITY OF LIENS

FEDERAL TAX LIEN ACT OF 1966 AFFORDS RELIEF TO CREDITOR WHOSE SECURITY INTEREST WAS HELD TO BE PROTECTED UNDER LOCAL LAW AGAINST JUDGMENT LIEN ARISING AS OF TIME OF TAX LIEN FILING.

Peninsula State Bank v. United States (S. Ct. of Fla., No. 36,702; May 29, 1968; D. J. 5-17M-886)

The Supreme Court of Florida has reversed the Florida District Court of Appeal, in the first decision construing the provisions for commercial transaction financing arrangements under the Federal Tax Lien Act of 1966. The facts, which were not in dispute, are as follows: On July 5, 1963, the bank filed a general notice of assignment with the Secretary of State of Florida, stating that the taxpayer, an interior decorator, had assigned or intended to assign one or more accounts receivable to the bank. Notice of the federal tax lien against the taxpayer was filed on November 29, 1963, at the county of the taxpayer's residence. On December 17, 1963, the taxpayer entered into a written contract to perform services for a restaurant located in an adjacent county. The bank then made additional advances of $1,570.96 to the taxpayer, and as security therefor the restaurant contract was assigned to it on December 29, 1963. Upon completion of the work, the restaurant, faced with the competing claims of the Government and the bank to the contract price, filed an interpleader suit, depositing the sum of $1,004.70 into court and claiming an interpleader attorney's fee. At the time of the trial, the 1966 Act had not been passed, and the Government relied upon the then federal law which, regardless of state law, entitled it to priority over any security interest for advances made for work done after the federal tax lien filing. It also urged that as a matter of state law the bank did not gain any protected security interest in the contract by virtue of its general notice of lien, but only when the contract was assigned to it. The Government further objected to any interpleader attorney's fee to be paid out of the tax liened fund. The trial court held that the general notice of lien, antedating the filing of the federal tax lien, gave the bank a protected assignment under the Florida statute which met the federal test of a choate lien. It accordingly awarded the sum to the bank, subject to an interpleader attorney's fee of $350 and $30 costs. The court also added, as an alternative ground of decision, that notice of the tax lien had to be filed at the residence of the debtor restaurant and not at the taxpayer's residence.

On appeal to the District Court of Appeal, the Government urged that the trial court had erred under the then-existing law. Before the case was reached for argument, however, the Federal Tax Lien Act of 1966 was enacted and made applicable to pending appeals. In a supplemental memorandum before the intermediate appellate court, the Government argued that the crucial proviso of the new Act--that the security interest in question must be protected under state law against a judgment lien arising as of the time of the federal tax lien filing--had not been met. Section 6323(c)(1)(B). Consequently, the fact that the assignment was made within the 45-day grace period was to no avail. Section 6323(c)(2). The District Court of Appeal accepted the Government's argument on this issue, holding that the new Act afforded the bank no relief because its claim was not protected by state law until the assignment of the contract.

The Supreme Court of Florida issued a writ of certiorari and reversed the decision of the District Court of Appeal. The central ground of its holding was that the bank's security interest did meet the terms of the proviso of the new Act because under the then applicable state law (Florida has adopted the Uniform Commercial Code as of January 1, 1968), an account receivable is protected against a judgment until a garnishment proceeding is concluded. According to the Court's interpretation of the prior state law, a judgment lien cannot, by itself, attach to an account receivable. In addition, the Court refused to accept the Government's argument that the term "judgment lien" in Section 6323(c)(1)(B) implies a hypothetical judgment lien which is fully perfected under state law.

In view of this holding as to state law, the Government's lien against taxpayer could not be satisfied out of the interpleader fund, since the bank's interest satisfied the state law proviso of Section 6323(c)(1)(B). The Court did not discuss whether the same considerations would govern a case arising under the new Florida statute, which adopts the Uniform Commercial Code.

Staff: Crombie J. D. Garrett and Stuart A. Smith
(Tax Division)

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