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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

ATTORNEY GENERAL NAMES DIRECTOR OF BNDD

July 12, 1968: The Attorney General has appointed John E. Ingersoll, 38, as the first Director of the new Bureau of Narcotics and Dangerous Drugs. Mr. Ingersoll, formerly Chief of Police in Charlotte, North Carolina and Executive of the International Association of Chiefs of Police, joined the Department of Justice in April of this year as Assistant Director of the Office of Law Enforcement Assistance. In making the appointment, Attorney General Ramsey Clark said, "Control of narcotics and dangerous drugs is an important challenge to America's future. Jack Ingersoll will bring youth, vision, experience, leadership, and toughness to the task."

DEPARTMENT SEEKS STATE UNIVERSITY DESEGREGATION

July 22, 1968: The Department filed its first civil rights complaint seeking desegregation of a state-supported university system. The motion, seeking permission to intervene in a private suit against the State of Tennessee, was brought in district court in Nashville. The complaint alleged that the State agencies are operating a racially based dual system of higher education, with Tennessee A & I being almost entirely Negro and the other five state universities being almost totally white.

DEPARTMENT FILES FIRST SUIT UNDER FAIR HOUSING ACT

July 22, 1968: The Department filed its first suit under the fair housing section of the 1968 Civil Rights Act, charging housing discrimination against Negroes in three subdivisions in Baton Rouge, Louisiana. The civil suit, which was brought in district court in New Orleans, asserted that defendants -- various realty firms and development corporations -- have sold houses in certain subdivisions only to white persons and "have engaged in a pattern or practice of racial discrimination" in their sales.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

CLAYTON ACT

INDUSTRIAL LAUNDRY CORPORATION CHARGED WITH VIOLATING SECTION 7 OF ACT.

United States v. Work Wear Corp. (Civ. C68-467; June 28, 1968; D. J. 60-0-37-859)

On June 28, 1968 a civil suit was filed in the United States District Court for the Northern District of Ohio, Eastern Division, against Work Wear Corporation, Cleveland, Ohio, alleging violation of Section 7 of the Clayton Act.

Work Wear is the largest manufacturer of work clothes sold to industrial laundries. It competes with about thirty manufacturers, of which the six largest enjoy about 68% of the industry sales. Work Wear's share of the market is approximately 24%. Industrial laundries purchased about $105 million of work clothes in 1966 to rent to their large industrial and commercial customers. There is a rapidly growing demand for work clothes by industrial laundries.

In 1957 Work Wear began a series of twenty-five acquisitions of industrial laundries. These acquired laundries obtained from Work Wear in 1966 work clothes valued at about $7 million. At present Work Wear operates at least forty-three industrial laundry facilities in eleven sections of the country which had sales of $37.5 million in 1966. During the period 1964-1966, Work Wear also acquired three manufacturers of work clothes whose combined sales exceeded $3.5 million. Only ten work clothes manufacturers had annual sales exceeding $3 million in 1966.

The complaint charges that the foregoing acquisitions by Work Wear violates Section 7 of the Clayton Act because:

(a) Competing manufacturers have been and will be precluded from a substantial share of the market;

(b) The trend of work clothes manufacturers in acquiring industrial laundries will be given impetus;

(c) Entry into the work clothes industry may be discouraged or prevented;

(d) Actual or potential competition in the manufacture and sale of work clothes has been and will be surpressed; and

(e) Concentration in the manufacture and sale of work clothes has been and will be increased.

The prayer of the complaint requests that Work Wear divest itself of such stock and assets of work clothes manufacturers and industrial laundries as the court may deem necessary to restore competition; and that for a period of ten years, except with court approval, Work Wear be enjoined from acquiring the stock or assets of any industrial laundry or manufacturer of work clothes.

Staff: Carl L. Steinhouse, Robert M. Dixon, Charles E. Hamilton, Mary Coleen T. Sewell and Robert A. McNew (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

OFFICIAL IMMUNITY

STATEMENTS OF ARMY OFFICER DURING INVESTIGATION OF CHARGES OF IMPAIRMENT OF SERVICEMEN'S MORALS ARE ABSOLUTELY PRIVILEGED UNDER BARR v. MATTEO, 360 U.S. 564.

Paul Sulger v. B. H. Pochyla, et al. (C.A. 9, No. 21,874; June 26, 1968; D. J. 145-4-1535)

Plaintiff's slander action against two Army officers was removed to the federal district court, which granted defendants' motion for summary judgment. The Ninth Circuit affirmed.

The Court of Appeals held that, under the undisputed facts of the case, plaintiff's suit was barred by the doctrine of Barr v. Matteo, 360 U.S. 564. The record showed that plaintiff conducted a transportation service between the Army military base and the Tucson International Airport; that charges had been brought against plaintiff for soliciting soldiers stationed at the base to go to Mexican border towns for immoral purposes; that a hearing to revoke plaintiff's license was held before the Arizona Corporation Commission, in which the Army participated; and that, in connection with that hearing, the defendant Colonel Ryan, at the direction of the defendant General Pochyla, Commander of the base, interviewed certain witnesses and made statements concerning plaintiff which were allegedly defamatory. The Court of Appeals stated that General Pochyla acted in line of duty when he ordered the investigation of plaintiff's activities, and that Colonel Ryan acted within the scope of his duties when he made the alleged defamatory statements. Thus, since both defendants acted "within the outer perimeter" of their duty, the Court held that their conduct was absolutely privileged despite allegations of malice.

Staff: United States Attorney Edward E. Davis; Assistant United States Attorney Jo Ann Diamos (D. Ariz.)

OFFICIAL IMMUNITY; SUITS BY SERVICEMEN AGAINST SUPERIOR OFFICERS

DOCTRINES OF BARR v. MATTEO, 360 U.S. 501, and FERES v. UNITED STATES, 340 U.S. 135, BAR LIBEL SUIT BY RADARMAN

IN NAVY AGAINST COMMANDING OFFICER AND EXECUTIVE OFFICER OF HIS VESSEL.

Robert N. Pagano v. Martin & Miniter (C. A. 4, No. 12,234; July 1, 1968; D. J. 145-6-852)

Plaintiff, a radarman in the Navy, brought this libel suit against the Commanding Officer and Executive Officer of the vessel on which he served. The alleged defamation appeared in a Report of Enlisted Performance Evaluation issued by the defendants upon Pagano's detachment from the ship. The report downgraded Pagano sharply, stating that he had been bad for morale and had broken the chain of authority on occasion. It recommended that he not be accepted for re-enlistment in the future. The district court dismissed the action, and the Fourth Circuit affirmed.

The Court of Appeals held that report was absolutely privileged under Barr v. Matteo, 360 U.S. 564. The Court also relied upon Feres v. United States, 340 U.S. 135, apparently accepting the Government's alternative contention that the rationale of the Feres rule -- that a soldier cannot sue the Government under the Federal Tort Claims Act -- also precluded a suit against his superior officers.

Staff: Walter H. Fleischer (Civil Division)

STANDING TO SUE

FARMERS HAVE NO STANDING TO SUE TO CHALLENGE DEPARTMENT OF AGRICULTURE REGULATION EXPANDING FARMERS' RIGHT TO ASSIGN FEDERAL PAYMENTS TO LANDLORDS.

Clemon Barlow, et al. v. B. L. Collins, et al. (C. A. 5, No. 24,886; July 16, 1968; D. J. 136-2-250)

Plaintiffs, farmers who rent their land, commenced this action to challenge the validity of a 1966 amendment to a regulation of the Department of Agriculture permitting farmers to assign federal farm subsidy payments to landlords as security for cash rent. The regulation, prior to its amendment, expressly prohibited assignment to landlords for rent. The district court dismissed the complaint and the Fifth Circuit, one judge dissenting, affirmed on the ground that plaintiffs have no standing to challenge the validity of the regulation.

The Court of Appeals noted that a plaintiff does not have standing to challenge administrative action unless some legally protected right possessed by him has been infringed by the Government. The Court concluded that

plaintiffs had shown no legally protected right, either at common law or by statute, to be restrained from being permitted to assign their payments to their landlords for rent.

Staff: Norman Knopf (Civil Division)

SUPREMACY CLAUSE - LOCAL INTERFERENCE WITH AIRWAYS

ENFORCEMENT OF TOWN NOISE ORDINANCE AFFECTING FLIGHT PATHS OF AIRPLANES ENJOINED AS BEING IN CONFLICT WITH FLIGHT PATHS ESTABLISHED BY F. A. A.

American Airlines, Inc., et al. v. Town of Hempstead (C. A. 2, No. 31,790; July 17, 1968; D. J. 145-173-37)

Defendant, the Town of Hempstead, enacted an ordinance against unnecessary noise which applied to airplanes using Kennedy International Airport, located adjacent to the town. The F. A. A., various airlines, and other plaintiffs, sued to enjoin the enforcement of the ordinance against air traffic. The district court entered a preliminary injunction against enforcement of the ordinance and the Second Circuit affirmed.

The Court of Appeals noted that the flight paths used by planes at Kennedy were established by the F. A. A. under a broad statutory authority conferred upon it to regulate air navigation. The Court further noted that a majority of the planes using the F. A. A. flight paths violated the town ordinance and that, in order to comply with the ordinance, the planes would have to change their flight paths. Therefore, the Court concluded, the ordinance, in effect, regulated flight paths of airplanes in direct conflict with the regulatory scheme established by the Federal Government through the F. A. A. Accordingly, the Court held, the ordinance must yield to paramount federal law and thus the preliminary injunction was properly granted.

Staff: Norman Knopf (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

PRIVILEGE AGAINST SELF-INCRIMINATION NOT A DEFENSE TO PROSECUTION FOR SELLING NARCOTIC DRUGS WITHOUT MANDATORY WRITTEN ORDER FORM REQUIRED BY 26 U. S. C. 4705(a).

United States v. Minor (C. A. 2, decided July 3, 1968, D. J. 12-51-1396)

The defendant was convicted of selling heroin hydrocholoride without the prescribed Treasury Department written order form. On appeal the defendant claimed that the prohibition against the transfer of narcotics in the absence of a written order form violates the Fifth Amendment privilege against self-incrimination. The defense relied on Marchetti v. United States, 390 U. S. 39 (1968); Grosso v. United States, 390 U. S. 62 (1968); and Haynes v. United States, 390 U. S. 85 (1968); where the Supreme Court held that certain comprehensive statutory schemes directed against proscribed activities and requiring, at the same time, information which could be employed as a basis for prosecution violated the Fifth Amendment.

Under Section 4705(a) the purchaser of narcotics and not the seller is under compulsion to obtain the order form. The Court found that a seller of drugs is not required to register or in any other way to incriminate himself in order to comply with the requirements of Section 4705(a). The privilege afforded by the Fifth Amendment is personal and, even if available to the buyer in this situation, is not transferable to the seller.

The defendant contended that Section 4705(a) must be examined in the context of the regulatory scheme. The Court held that the section prohibits the transfer of narcotic drugs to unauthorized purchasers or to those who are likely to evade payment of taxes. As Section 4705(a) serves a distinct Congressional purpose, it can be enforced apart from other sections of the Internal Revenue Code which the petitioner alleged violate the Fifth Amendment.

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

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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

APPOINTMENTS

Alabama, Middle - RALPH O. HOWARD; University of Alabama, LL.B., and formerly in private practice and Assistant United States Attorney for the Southern District of Alabama.

Alaska - Miss MARY A. NORDALE; George Washington University, LL. B., and formerly a staff attorney for U. S. Senator Bartlett.

District of Columbia - SANDOR FRANKEL; Harvard Law School, LL.B., and formerly a staff member of the White House Task Force on Crime.

District of Columbia - ROGER E. ZUCKERMAN; Harvard Law School, LL.B., and formerly in private practice.

California, Southern - HARRY R. McCUE; University of San Diego Law School, J.D., and formerly in private practice.

Kentucky, Western - M. RONALD CHRISTOPHER; University of Kentucky Law School, J.D., and formerly in private practice.

New York, Southern - ARTHUR A. MINISTERI; Yale University Law School, LL.B., and formerly in private practice and law clerk to federal judge.

South Carolina - ROBERT G. CLAWSON, JR.; University of South Carolina Law School, J.D., and formerly in private practice

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

DISTRICT COURTS

INDIANS

INVESTIGATING AUTHORITY OF DEPARTMENT OF INTERIOR; VALIDITY OF DEPARTMENT'S REGULATION FORBIDDING EMPLOYEES TO TESTIFY WITHOUT PERMISSION OF SECRETARY; FEDERAL COURT'S REMOVABILITY OF SHOW CAUSE ORDER IN CONSERVATORSHIP PROCEEDING IN STATE COURT.

Agua Caliente Conservatorship and Guardianship Proceedings (C. D. Cal., D. J. 90-2-1-2450)

By the Act of September 21, 1959, 73 Stat. 602, Congress authorized the completion of allotments on the Agua Caliente (Palm Springs) Indian Reservation in California. Congress also provided for the appointment of state court guardians or conservators for all minors and for those adults who in the judgment of the Secretary of the Interior were in need of assistance. More than 80 estates have been made the subject of guardianships or conservatorships involving property valued at several million dollars. Some of the property is restricted (i.e., subject to federal limitations) and some unrestricted.

Last year, Secretary Udall determined that an investigation should be made of the administration of the conservatorships and guardianships and he created a Task Force for that purpose. The Task Force submitted its report in March 1968 and it was quite critical of several local lawyers and also of the administration of the estates by certain state court judges.

Two local lawyers filed in four proceedings before the state court petitions for orders to show cause why the Secretary and members of the Task Force should not be enjoined from continuing their alleged libelous activities. They also subpoenaed Mr. Cox, a member of the Task Force as a witness in these and other proceedings with the stated purpose of inquiring into the Task Force Report. They refused to comply with the regulations of the Department of the Interior, 43 C.F.R. 2.6. The state court issued orders to show cause directed to Secretary Udall and the members of the Task Force.

The actions in which orders to show cause were issued by the state court were removed to the district court and orders to show cause obtained requiring the attorneys to show why the orders issued by the state court should not be dismissed. The district court remanded the actions as to all matters

except the orders to show cause, upheld the Department's contention that the orders to show cause were properly removed as new proceedings, and after hearing on May 27, 1968, dismissed the orders issued by the state court. The subpoenas served on Mr. Cox remained outstanding. On June 14, a motion to quash them was heard before a substitute judge, the judge who normally hears these cases having been disqualified, and the subpoenas in all but one case were quashed. It is expected the outstanding subpoena also will be quashed when it comes before the court at a later date. In quashing the subpoenas, the court upheld this Department's contention that a government employee cannot be required to testify before a state court where he has been directed not to do so by the Secretary or his delegated representative and the moving party has not met the requirements of Interior's regulations.

Staff: United States Attorney Wm. Matthew Byrne, Jr.; Assistant United States Attorneys Frederick M. Brosio, Jr., James R. Dooley, Loyal E. Keir, and James R. Akers, Jr. (C.D. Calif.)

SOVEREIGN IMMUNITY

INJUNCTIONS SEEKING TO RESTRAIN SECRETARY OF DEFENSE AND SECRETARY OF NAVY FROM ACQUIRING 5,021 ACRES OF LAND; CONSTITUTIONALITY OF AUTHORIZATION AND APPROPRIATION ACTS OF CONGRESS RELATING TO ACQUISITION OF PLAINTIFFS' LANDS UPHELD EVEN THOUGH THREE CHEMICAL MANUFACTURING PLANTS IN THE AREA WERE EXCLUDED FROM PROPOSED TAKING.

Daniel Colchico, et al. v. United States (Civ. No. 49106), and Bay Point Projects, Inc. v. United States, et al. (Civ. No. 49118, N.D. Cal.; D.J. 90-1-4-171 and 90-1-4-172)

These actions were brought by residents of the unincorporated town of Port Chicago, Contra Costa County, California, to obtain preliminary and permanent injunctions restraining the United States, the Secretary of Defense and the Secretary of the Navy from acquiring some 5,021 acres of land within two miles of the loading piers behind the ammunition facility of the Naval Weapons Station at Port Chicago for the purpose of creating a buffer safety zone around the station. The lands to be acquired include almost all of the town of Port Chicago, a community of about 800 people. The acquisition was authorized under P.L. 90-110, 81 Stat. 279, 288 (1967), known as the Military Construction Act of 1968. The Congress appropriated the sum of $19,500,000 for the proposed acquisition under P.L. 90-180 (December 8, 1967).

In 1944 during World War II, a terrific explosion took place at the Naval Weapons Station resulting in the death of at least 320 persons and the destruction of and serious damage to buildings within a radius of 30 miles. The purpose of the proposed acquisition was to create a buffer safety zone.

Approximately nine and one-half million tons of high explosives are stored at the Naval Weapons Station and are loaded onto naval vessels going to Vietnam.

The plaintiffs claimed that (1) the authorization and appropriation acts referred to above are unconstitutional in that they deny the plaintiffs equal protection of the laws because the plan of acquisition excludes three chemical plants within the general area; (2) the proposed taking is unreasonable and arbitrary in that it includes a town of 800 people without providing for adequate relocation of the residents under comparable town conditions; (3) the storage of nine and one-half million tons of highly explosive munitions is contrary to naval regulations; and (4) the purpose of the congressional authorization and appropriation acts for the acquisition of the properties in question is to prevent activities of anti-Vietnam war demonstrators who have been picketing the Port Chicago Naval Weapons Station as a symbol of their opposition to the Vietnam War.

The Government moved to dismiss the complaints for lack of jurisdiction. Following oral argument early in May 1968, the court rendered a memorandum decision on May 23, 1968, denying the plaintiffs' motion for a preliminary injunction and granting the defendants' motion to dismiss.

The court held that the legislation authorizing the acquisition of the plaintiffs' properties was constitutional since the proposed taking was obviously for a public purpose and the necessity for the taking and the particular area of property to be taken is for the Congress to determine, subject only to the constitutional requirement that just compensation be paid. The court further held that the question whether the three chemical plants were needed was a matter which the Congress considered and negatively resolved after balancing the factors of safety and cost, citing United States v. Welch, 327 U.S. 546, 554. The court said: "A reasonable determination concerning what property should be taken and what property should be excluded is not a denial of the equal protection of the laws. This court cannot say that the Congressional determination was arbitrary or not reasonably related to the Congressional purpose."

So far as the plaintiffs' contention that the purpose of the legislation was to eliminate anti-Vietnam picketing of the Naval Weapons Station, the court stated that it had no power to consider mere possible motivation of the Congress for its legislative action and that in fact there was no basis in the record for finding that such was the motive. On the contrary, the court found that the record indicated that the expansion of the Naval Weapons Station was authorized, among other reasons, because there exists a great danger to nearby residents from explosion of ammunition handled at the station.

The court held that these actions were unconsented suits against the United States and that the individual defendants were acting within the scope of the

authority conferred by the legislation authorizing the acquisition of the properties involved, citing Delaware Valley Conservation Association v. Resor, 392 F. 2d 331 (C. A. 3, 1968) and Larson v. Domestic & Foreign Corp., 337 U. S. 682.

Staff: Assistant United States Attorney Rodney H. Hamblin (N. D. Cal.); David D. Hochstein (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

SUIT TO RESTRAIN COLLECTION OF TAXES

INJUNCTION DENIED WHERE TAXPAYER-WIFE ALLEGED THAT HER SIGNATURE ON JOINT TAX RETURNS WAS FORGED AND/OR COERCED AND THAT SENDING OF A SINGLE JOINT NOTICE OF DEFICIENCY UNDER SUCH CIRCUMSTANCES VIOLATED DUE PROCESS OF LAW.

Stephanie Bauer v. John E. Foley, District Director of Internal Revenue; United States of America (W. D. N. Y., Civil No. 11830; May 15, 1968; D. J. 5-53-2753) (68-1 U. S. T. C., par. 9408)

The plaintiff instituted an action to enjoin the defendants from seizing and selling her residence, and to have federal tax assessments declared void. A single joint notice of deficiency had been sent to Stanley J. Bauer and Stephanie Bauer on October 2, 1963, at their last known address, pursuant to Section 6212(b)(2) of the Internal Revenue Code of 1954. Thereafter, on January 24, 1964, tax deficiencies, including penalties totalling $135, 425. 89 were assessed against Stanley J. Bauer and Stephanie Bauer for the years 1950 through 1957, inclusive.

The plaintiff's complaint alleged that (1) she had earned no taxable income during the years in issue; (2) that Stanley J. Bauer signed her name on the federal tax returns or if any returns were signed by Stephanie Bauer the signatures were made under duress and in ignorance of the contents of the returns, and (3) seizure of her residence was made without notice and in violation of the Fifth and Eighth Amendments of the United States Constitution. Stephanie Bauer further alleged that she was without funds to pay the tax and sue for refund and that her health had been impared and aggravated by the Government's actions to collect the tax liabilities.

The Government filed a motion to dismiss the complaint on the basis, inter alia, of the prohibitions of Section 7421(a) of the Internal Revenue Code of 1954. The plaintiff's argument that a single joint notice of deficiency was improper since the forged and/or coerced signatures of Stephanie Bauer meant that there was no joint return was summarily rejected. The Court refused to impose a duty upon the District Director to anticipate the possibility of forgery or coercion in regard to signatures on an ostensibly valid joint income tax return. The Court also concluded that the plaintiff was not denied due process of law on the grounds that she never actually received the notice of the deficiency. Neither the Internal Revenue Code nor

fundamental concepts of constitutional due process require actual receipt of the notice. See Pfeffer v. Commissioner, 272 F. 2d 383 (C. A. 2d); Brown v. Lethert [66-1 U. S. T. C., par. 9418] (C. A. 8th).

The question of the availability of the equity power of the Court to enjoin the collection of the taxes was controlled by Enochs v. Williams Packing Co., 370 U. S. 1, as interpreted and applied by the Second Circuit in Botta v. Scanlon, 314 F. 2d 392 (C. A. 2d). The Court observed that there was no question but that the assessments were made in good faith and stated: "Moreover, the convenient alternative claims of forgery and/or coercion would appear substantially disputed by the government." The Court held that the requirement of Botta v. Scanlon, supra, that the plaintiff show "that under no circumstances could the government ultimately prevail", had not been satisfied. Having determined that the plaintiff was not entitled to an exception to the statutory prohibition to Section 7421, the Government's motion to dismiss was granted.

The plaintiff has filed a notice of appeal in this proceeding.

Staff: Acting United States Attorney Thomas A. Kennelly; Assistant United States Attorney C. Donald O'Connor (W. D. N. Y.); John S. Kingdon (Tax Division)

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