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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

RECENT ORDERS AND MEMOS

November 4, 1968: Your attention is directed to Order No. 405-68 amending Title 28 of the CFR by providing that the Assistant Attorney General in charge of the Criminal Division is authorized to approve certain applications by a United States Attorney to a Federal Court for an order compelling testimony or the production of evidence by a witness, where the subject matter of the case for which an order is sought involves a violation of a Federal law over which the Criminal Division has general supervision.

NEW FEDERAL YOUTH CENTER TO BE DEDICATED TO ROBERT KENNEDY

November 10, 1968: Attorney General Ramsey Clark announced that a new federal youth center, built to provide national leadership in the rehabilitation of juvenile delinquents, will be dedicated to the memory of Robert F. Kennedy.

Mr. Clark said the modern $10,250,000 facility near Morgantown, West Virginia will be named the Robert F. Kennedy Youth Center. It will be the first Department of Justice institution named for an individual.

"The center can light the way for the nation for generations to come", Mr. Clark said. "We seek to imbue it with the spirit of Robert F. Kennedy--devotion to youth; faith in the innate goodness of a child given a chance; belief that any problem, even crime itself, can be solved if we care; unqualified commitment to act".

The site, plans and budget for the center were developed and approved by the late Mr. Kennedy while he was Attorney General.

DEPARTMENT FILES ANTITRUST SUIT AGAINST HART SCHAFFNER & MARX

November 13, 1968: The Department of Justice filed an antitrust suit in U.S. District Court in Chicago seeking to force Hart Schaffner & Marx, a major manufacturer of men's clothing, to sell 33 companies operating 48 men's retail clothing stores which it has acquired in the past four years.

The complaint said the effect of Hart's purchases may be to substantially lessen competition or tend to create a monopoly in violation of the Celler-Kefauver anti-merger section of the Clayton Act. In the past

eight years, the complaint said, there has been a growing trend of suit manufacturers purchasing men's clothing stores. It noted that Hart has 68 subsidiaries which operate some 190 men's clothing stores in 65 metropolitan areas. Of that total, 115 stores have been acquired since 1929 and 71 stores purchased since January 1, 1960. The suit challenged Hart's purchase since January 1, 1965 of the 33 companies which operate 48 stores.

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POINTS TO REMEMBER

Your attention is directed to the Administrative Division's Memorandum No. 602, dated November 15, 1968, dealing with a records disposal program to be conducted by United States Attorneys' offices. The memorandum calls for certain steps to be taken in cleaning out files and records of these offices. By taking these steps you should be able to enlarge the work space in your office and enhance its appearance.

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DEPARTMENT OF JUSTICE PROFILES

Warren M. Christopher
Deputy Attorney General

Warren Christopher was born October 27, 1925 in Scranton, North Dakota. He graduated magna cum laude from the University of Southern California in 1945, and received his law degree in 1949 from Stanford University, where he was president of the Stanford Law Review. From 1943 to 1946 he served on active duty with the Naval Reserve. He was a law clerk to Justice William Douglas of the U.S. Supreme Court from 1949 to 1950, and from 1950 until his appointment as Deputy Attorney General in June, 1967, he practiced law with the firm of O'Melveny & Myers in Los Angeles, becoming a partner in the firm in 1958. From 1965 to 1966 he was Vice Chairman of the Governor's Commission which investigated rioting in Los Angeles. He is a member of the Executive Committee and the Board of Directors of the Lawyers Committee for Civil Rights Under Law. Beginning in 1961 Mr. Christopher served as a consultant to the office of the Undersecretary of State. He has also served since 1960 as a public member of the Coordinating Council for Higher Education of the State of California. He was its president from 1963 to 1965.

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Veryl L. Riddle
United States Attorney
Western District of Missouri

Mr. Riddle was born December 6, 1921 in Dunklin County, Missouri. He attended Southeast Missouri State College and the University of Buffalo from 1939 to 1946, and received his LL.B. degree from Washington University School of Law in 1948. He was with the Immigration and Naturalization Service, Department of Justice, from 1943 to 1944 and in 1946. From 1948 to 1950 he was in private practice in Malden, Missouri and from 1951 to 1952 he was prosecuting attorney in Dunklin County. From 1952 until his appointment as U.S. Attorney in 1967 he was in private practice. As U.S. Attorney Mr. Riddle tried and won convictions in the highly-publized case involving the Pipefitters Local Union and its officers. His office also prepared on its own a Sherman Antitrust case against two large manufacturing corporations operating in the St. Louis area for conspiring to submit collusive bids, and an indictment was returned in this case in October of this year.

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OFFICE OF CRIMINAL JUSTICE

Director Daniel J. Freed

BAIL REFORM ACT

A recurring problem under the Bail Reform Act concerns the setting of release conditions for persons charged with violent crimes. In a great many cases, high surety bonds continue to be routinely required and defendants are jailed pending trial. Both before and since the new statute, a number of defendants with serious criminal records have made high bail and obtained release without other restrictions.

A recent Judicial Council Committee report on the operation of the Bail Reform Act in the District of Columbia has recommended several changes in these traditional bail practices. The Committee, headed by District Judge George L. Hart, Jr., urged that

> No person released or desiring release on a traditional money bond should be considered as thereby immunized from the imposition of other relevant and necessary conditions of release under the Bail Reform Act. Courts authorizing release on money bond should in each case consider whether such release should be supplemented by additional conditions, as set forth on Bail Reform Act Form No. 2, to carry out the purposes of the Act.

The Committee suggested that greater attention be given to designing conditions capable of effective supervision, and that when professional bail bondsmen are involved they be held responsible under 18 U.S.C. 3146(a)(1) as third party custodians for defendants released on their bond.

Shortly after submission of the Hart Committee Report, the United States Court of Appeals for the D.C. Circuit formulated a conditional release order which merits wide attention. The case of Ball v. United States, No. 21,963, involved a defendant held in custody for six months, on $5000 cash bond, while awaiting trial on charges of rape, robbery and sodomy. The defendant had a record of arrests for homicide, disorderly conduct and juvenile offenses, no felony convictions, and some community ties. On June 26, 1968, the appeals court agreed to consider nonfinancial release

but indicated that the serious penalties involved required more than minimal conditions of release to reasonably assure appearance. Defense counsel was requested to submit a proposed order incorporating conditions involving daytime release, third party supervision, securing employment, depositing part of future earnings as security, and reporting periodically to the court and the United States Attorney. On July 12, 1968, the court, after considering the defense proposal, ordered Ball released on personal recognizance on the following conditions:

1. Initially, he shall be released from the jail from 9 to 5 to report to the offices of the Offender Rehabilitation Project, 711 - 14th Street, N.W., Room 810, to obtain aid in seeking employment, and to make and keep interviews. On each subsequent day he shall be released from jail only between the hours of 9 to 5, until his attorney notifies the Chief Judge of the District Court that he has in fact obtained regular employment.

Upon the representation of counsel that appellant Ball has obtained regular employment, he shall be released from jail on a full-time basis on the following conditions:

(1) He shall appear in the District Court when required to do so and not depart the jurisdiction of the District Court without leave of Court.

(2) He shall reside with his family at 3339 - 17th Street, N.W., Washington, D.C., and notify the Court of any change of address.

(3) He shall be a party to the following arrangements among him, Mr. Douglas Lindsey, Roving Leader, Department of Recreation, and the Court:

(a) He shall report once a week to Mr. Douglas Lindsey, 3149 - 16th Street, N.W.

(b) Mr. Lindsey will check regularly by phone call or visit on defendant-appellant's employer to assure that he is maintaining his employment satisfactorily.

(c) Mr. Lindsey shall report any failure of appellant to report regularly to him, any failure to maintain employment, and any arrests of appellant of which he learns, to Mr. William Collins, Assistant United States Attorney, ST 3-5700, to Barbara A. Bowman, counsel for appellant, ST 3-5700, Extension 391, and to the Criminal Clerk's Office of the United States District Court, ST 3-5700, Extension 521.

(4) Every pay-period, defendant-appellant shall deposit with his counsel 10% of his net earnings, until this sum reaches $250.00. At that time defendant-appellant, with the aid of his counsel, shall deposit this sum in the Registry of the Court as security for his appearance, to be returned in full when appellant appears for trial, to be forfeited in whole or part, as directed by the trial court, should he fail to appear.

(5) Appellant shall, with his counsel, make a monthly appearance in Assignment Court, at a time to be arranged by his counsel with the Assistant United States Attorney, and counsel shall, after consultation with Mr. Lindsey, Offender Rehabilitation Project, and appellant, represent to the Court that appellant is maintaining the conditions of his release as set forth herein. The aforesaid personal recognizance shall be executed in the United States District Court for the District of Columbia.

As of November 13, Ball was still awaiting trial while on release, having obtained employment and not having been arrested again.

United States Attorneys and their Assistants should be aware of resources of this kind in their own community and should utilize them consistent with the purposes of the Bail Reform Act.

United States Attorneys are urged to forward copies of unusual or noteworthy orders under the Bail Reform Act to the Office of Criminal Justice. This will enable the office to develop a better cross section of the variety of orders being entered and to communicate news of important developments to the field.

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

FEDERAL EMPLOYEES' COMPENSATION ACT--EXCLUSIVITY OF REMEDY

TORTFEASOR WHO IS LIABLE TO GOVERNMENT EMPLOYEE MAY NOT OBTAIN CONTRIBUTION FROM GOVERNMENT

Jerome S. Murray v. United States (C.A. D.C., No. 21,357; October 31, 1968, D.J. 157-16-2250)

Mrs. Alice Johnson was a civilian employee of the Air Force who worked in a building leased by the United States from Jerome S. Murray. Mrs. Johnson was injured in an elevator accident in the building during working hours, for which injury she received compensation under the Federal Employees' Compensation Act. She then sued the lessor, Murray, for negligence. Murray filed a third-party complaint against the United States, seeking, in the event that he was held liable to the plaintiff, recovery from the Government either for contribution, in that the United States was a joint tortfeasor, or for indemnity, in that the United States had breached obligations owed to the lessor under the lease. The Government moved to dismiss the third-party complaint on the grounds (1) that contribution will not lie against the Government in favor of a tortfeasor who has injured a Government employee and (2) that the indemnity claim, which was for more than $10,000, was a contractual claim and therefore within the exclusive jurisdiction of the Court of Claims.

The Government's motion to dismiss the third-party complaint was granted by the district court, and the District of Columbia Circuit affirmed. The Court of Appeals followed the decisions of the Ninth Circuit in Wien Alaska Air Lines v. United States, 375 F.2d 736 (C. A. 9), certiorari denied, 389 U.S. 940, and United Air Lines v. Wiener, 335 F.2d 379 (C.A. 9), certiorari dismissed sub nom. United Air Lines v. United States, 379 U.S. 951. Those cases explained (1) that under 28 U.S.C. 2674 the United States may be held liable for contribution only in circumstances in which a private party would so be liable; (2) that the common-law rule is that no contribution is available from a party who could not be held directly liable in tort to the victim; and (3) that the Federal Employees' Compensation Act abolishes any tort liability of the United States to an injured employee (5 U.S.C. (1964 ed., Supp. III) 8116 (c)). The District

of Columbia Circuit agreed with the Ninth Circuit that under those principles a tortfeasor liable to a Government employee cannot obtain contribution in tort from the United States, for the tortfeasor and the Government do not have concurrent tort liability to the victim.

The Court of Appeals then agreed with our contention that the indemnity claim was based on contract and was therefore within the exclusive jurisdiction of the Court of Claims. In dictum, the Court did suggest that a tortfeasor might base a claim for non-contractual indemnity against the United States for an injury to a federal employee where there had been some duty or relationship existing between the tortfeasor and the United States which had arisen independently of their mere chance connection as joint tortfeasors. The Court held, however, that this question was not sufficiently presented by this case to warrant decision.

Staff: Daniel Joseph (Civil Division)

NATIONAL SERVICE LIFE INSURANCE - BENEFICIARIES

PROPERTY SETTLEMENT AGREEMENT BINDING FORMER HUSBAND'S ESTATE TO MAKE PAYMENTS TO FORMER WIFE DOES NOT, WHERE ESTATE IS INSUFFICIENT TO SATISFY THAT OBLIGATION, ENTITLE FORMER WIFE TO PROCEEDS OF NATIONAL SERVICE LIFE INSURANCE POLICY OF WHICH SHE WAS FORMERLY DESIGNATED BENEFICIARY

Marjorie N. Suydam, etc. v. United States and Jane E. Suydam (C.A. D.C., No. 21,677; October 16, 1968, D.J. 146-55-3942)

During their marriage, Marjorie N. Suydam was the designated beneficiary of Henry W. Suydam's National Service Life Insurance Policy. When they were divorced, a property settlement agreement was incorporated by reference in the divorce decree. That agreement provided that Henry would pay his former wife maintenance and support of $175 per child per month until each of their four children became 21 or earlier married or died. The agreement further provided that if at the time Henry died any children remained eligible under that standard, his estate would be bound to continue the payments, which were to take precedence over any other provision of his will. The settlement agreement did not mention the NSLI policy.

Henry later married Jane E. Suydam and, in compliance with NSLI regulations, substituted her as beneficiary of his NSLI policy. Henry died in 1966 and his estate was insufficient to satisfy the maintenance and support obligations of the property settlement agreement. His first wife brought

this action, individually and as guardian of the children, to recover the NSLI policy proceeds. His second wife, who had been recognized by the Veterans Administration as the beneficiary of the policy, also demanded the proceeds. The Government admitted liability under the policy and requested that the Court determine entitlement to the proceeds.

The district court granted summary judgment awarding the policy proceeds to the second wife. On the first wife's appeal, the District of Columbia Circuit affirmed. The Court of Appeals pointed out that NSLI policies were governed exclusively by federal law and that under federal law the insured had the right to change beneficiaries without the consent of prior beneficiaries. The Court, after noting that insureds have been held to have the right to change beneficiaries even where state court divorce decrees had ordered that the beneficiary not be changed, held that a fortiori, where, as here, the property settlement did not refer to the insurance, the insured decedent had the right to change beneficiaries.

Staff: David V. Seaman (Civil Division)

SMALL BUSINESS ADMINISTRATION - PRIORITY IN BANKRUPTCY PROCEEDINGS

SBA NOT ENTITLED TO PRIORITY UNDER 31 U.S.C. 191 AND SECTION 64(a)(5) OF BANKRUPTCY ACT ON DEFERRED PARTICIPATION LOAN WHERE NOTE WAS NOT ASSIGNED TO SBA PRIOR TO FILING OF PETITION IN BANKRUPTCY

United States v. Brocato (C.A. 5, Nos. 25,687 and 25,747; October 30, 1968, D.J. 105-75-63 and 105-2-32)

The SBA rendered financial assistance under the Small Business Act in the form of "deferred participations" to two small businessmen. Under such an arrangement, a private bank makes a loan from its funds to a businessman, who issues a note payable to the bank. At the same time, the bank and the SBA enter into a "Guaranty Agreement" which provides that in the event of default on the loan or the bankruptcy of the borrower, the SBA shall purchase a fixed percentage of the loan from the bank. According to the Guaranty Agreement, the filing by the borrower of a petition in bankruptcy effectuates "an automatic, simultaneous assignment and transfer" of the note to the SBA, and the SBA's obligation to purchase its share of the loan "simultaneously" arises.

The small businessmen here became bankrupt after receiving this "deferred participation" financial assistance, and the SBA sought priority in the bankruptcy proceedings under Section 64(a)(5) of the Bankruptcy Act and 31 U.S.C. 191, whose combined effect is to give priority in bankruptcy to "debts due to the United States". The referee and the district court denied the claimed priority, and the Fifth Circuit affirmed.

The Court of Appeals based its decision on United States v. Marxen, 307 U.S. 200, in which the Supreme Court stated that the priority granted by Section 64(a)(5) and 31 U.S.C. 191 to debts due to the United States did not extend to debts assigned to the United States "after" the filing of the petition in bankruptcy. The Court of Appeals distinguished Small Business Administration v. McClellan, 364 U.S. 446, in which the Court had allowed the SBA priority on an "immediate participation" loan, on the ground that in McClellan the SBA had disbursed funds prior to the filing of the petition and hence had "beneficial ownership" of the debt prior to bankruptcy. The Court rejected the argument that an assignment specified by the Guaranty Agreement to be "simultaneous" with the filing of the petition in bankruptcy was not one made "after" the filing of the petition for purposes of the rule in Marxen.

Staff: Robert E. Kopp (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

NARCOTICS - PROBABLE CAUSE

SEARCH FOR NARCOTICS /WITHOUT WARRANT/ JUSTIFIED ON GROUNDS OF PROBABLE CAUSE

United States v. Cleaver (C.A. 9, No. 22,558, October 21, 1968; D.J. 12-8-700)

This case involved a search at the border, but because of the way the indictment was framed it became necessary for the Government to justify the search on the grounds of probable cause.

On July 12, 1967, the Customs Bureau received information from a person in Mexico that three American males, who were described with particularity, were attempting to purchase marihuana. Sixty percent of this informant's previous tips had been correct. The informant called and said the suspect trio had jumped the international fence.

A customs agent spotted two men coming from the bush near the border. The appearance of these two fit the descriptions the informer had provided. The agent watched the men get into a pick-up truck, pick up the third suspect, and drive away furtively. A search of the car when it was stopped revealed marihuana.

The defendant argued these facts did not constitute probable cause. Relying on Draper v. United States, 358 U.S. 397, the Court disagreed. A known informant had given information which the agents were able to verify by personal observation. To the counter-argument that Aguilar v. United States, 378 U.S. 108, demands more, demands in fact that the informant himself be reliable, the Ninth Circuit replied that there was a showing here that the informer was reliable, but even had there not been the conviction still would have stood because Aguilar does not add anything to Draper. That is, the Ninth Circuit thought the test of Draper alone was sufficient for a finding of probable cause.

Staff: United States Attorney Edward E. Davis (D. Ariz.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEALS

QUIET TITLE

DELEGATION OF AUTHORITY TO CONVEY PROPERTY OF UNITED STATES; LEASE EXECUTED BY UNAUTHORIZED AGENT OF ECONOMIC DEVELOPMENT ADMINISTRATION WAS INVALID AND NOT BINDING ON UNITED STATES.

United States v. Quickee Food Products, Inc. (C.A. 3, 1968; 396 F.2d 450, D.J. 90-1-10-786)

The United States, through the Economic Development Administration, purchased a cold storage warehouse and food processing facility pursuant to a foreclosure sale. The E.D.A. executed an option for the sale of the property to the United States Steel Corporation for $500,000. This sale would enable the United States Steel Corporation, whose existing plant was adjacent to the subject property, to expand its facilities, creating over 1,000 more jobs in the area, and would operate to save approximately 3,500 other jobs that were scheduled to be phased out.

Appellant, Quickee Food Products, Inc., refused to vacate the premises, claiming a five-year lease of the food processing facility was granted to it by a Morton Chatkin. Chatkin was a principal owner of the defunct Automated Storage, Inc., which operated a business on the subject premises prior to the foreclosure sale. At the time of the foreclosure sale, Chatkin was told by E.D.A. to shut the plant down immediately. Because Chatkin claimed there were several thousand pounds of turkeys in the warehouse and there was no other available storage space in the area, E.D.A. authorized him to continue the operation of the facility. On October 24, 1966, Chatkin was notified by E.D.A. not to accept any new contracts for storage or service until a definite working agreement between himself and E.D.A. had been worked out. On November 15, 1966, Chatkin, acting without knowledge or consent of E.D.A., purported to execute a lease of the food processing facility which was subsequently assigned to appellant. The document was signed by "Morton S. Chatkin, Agent for Economic Development Authority and/or Braddock Cold Storage Company". On May 5, 1967, E.D.A. notified Chatkin that the facility was being closed down and instructed him to advise all customers to remove their merchandise within 30 days. It was not until May 17, 1967, that E.D.A. learned of the Chatkin lease of November 15, 1966, and its assignment to appellant.

The trial below was to the Court and appellant claimed estoppel, ratification and attornment and counterclaimed for over $800,000 in damages. The district court entered judgment in favor of the United States and the Court of Appeals affirmed, saying (p. 451):

> The proofs spell out that at the time Chatkin signed the purported lease of November 15, 1966 representing himself as agent for E.D.A., the only persons who could have validly executed such a lease for the Administration were the Secretary of Commerce, the Assistant Secretary thereof and the Director of Economic Development. It was also overwhelmingly established in the case that after E.D.A. learned on May 17, 1967 of Chatkin's action, it never did or omitted to do anything to countenance Chatkin's arrangement with Dobkin which was assigned to appellant.

This case demonstrates the importance of the control a federal agency must have over its delegation of authority to convey interests in property of the United States.

Staff: Robert M. Perry (Land and Natural Resources Division)

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