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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

A. G. ANNOUNCES APPOINTMENTS IN OFFICE OF DEPUTY ATTORNEY GENERAL

February 14, 1969: Attorney General John N. Mitchell announced the appointment of George H. Revercomb of McLean, Virginia, to be the Associate Deputy Attorney General and chief aide to the Deputy Attorney General.

The Attorney General also announced selection of John W. Dean of Akron, Ohio, as Associate Deputy Attorney General for Legislation, joining Donald Santarelli, who previously was appointed Associate Deputy for Criminal Justice, in two other top posts in the office. Mr. Mitchell also appointed Harlington Wood, Jr. of Springfield, Illinois, to be Director of the Executive Office for U. S. Attorneys and R. Richards Rolapp of Los Angeles to be Special Assistant to the Deputy Attorney General. John T. Duffner, executive assistant to the Deputy Attorney General since June 4, 1962, will remain in his position, Mr. Mitchell said.

Mr. Revercomb will be the assistant who acts as Deputy Attorney General when Mr. Kleindienst is absent. A native of Charleston, West Virginia, he was most recently a partner of Reeves, Harrison, Sams & Revercomb of Washington and also associated with Revercomb & Price of Charleston.

Mr. Dean will handle matters dealing with legislation. A native of Akron, Ohio, he was associate director of the National Commission on Reform of Federal Criminal Laws before joining the Department, and also had served as chief minority counsel of the House Judiciary Committee.

Mr. Wood will provide supervision and assistance for the 93 U. S. Attorneys who handle prosecution of all federal offenses in their districts. A former U. S. Attorney for the Southern District of Illinois, he served as a member of the Illinois Crime Investigating Commission and was minority counsel for the Illinois Election Law Commission.

Mr. Rolapp will be responsible for special assignments for Mr. Kleindienst. An associate in Wilkinson, Cragun & Barker of Washington, he served as associate general counsel for the Presidential Inaugural Committee in 1969 and was a special counsel during the presidential campaign.

LOUISIANA ATTORNEY GENERAL INDICTED

February 14, 1969: The Attorney General of Louisiana, Jack P. F. Gremillion, and four other men have been charged with fraud and conspiracy in the bankruptcy of a New Orleans financial institution.

Attorney General John N. Mitchell and United States Attorney Louis C. LaCour said that a federal grand jury in New Orleans returned the indictment after a year-long investigation into the operations of the now defunct Louisiana Loan and Thrift Corporation.

The corporation had about 1400 depositors and deposits of about $2. 5 million.

The five defendants are Attorney General Gremillion, who has served in that post since 1956; Salvador Anzelmo, 45, an attorney and a State legislator from Orleans Parish; Joseph H. Kavanaugh, 35, an attorney and counsel for the state public service commission; Ernest A. Bartlett, Jr., 29, of Fort Smith, Arkansas; and Charles H. Ritchey, 30, an attorney from Metarie, Louisiana.

All the defendants except Kavanaugh were stockholders in the institution. In addition, Ritchey served as president, Anzelmo as a director and legal counsel, and Bartlett as Chairman of the Board of Directors and chief executive officer.

The criminal charges in the indictment stem from the issuance of "bond investment certificates" by the Louisiana Loan and Thrift Corporation. The indictment charges that the defendants caused the certificates to be sold to the public by making false and misleading statements to prospective purchasers about the safety of their investment and the financial stability of the Louisiana Loan and Thrift Corporation.

In addition, the indictment charges that the defendants conspired to sell these certificates without registering them with the Securities and Exchange Commission as required by the federal securities law.

KEVIN PHILLIPS NAMED SPECIAL ASSISTANT TO ATTORNEY GENERAL

February 19, 1969: Kevin P. Phillips, a New York City lawyer, has been named a special assistant to Attorney General John N. Mitchell. Mr. Phillips, 28, will have a variety of assignments as a member of the Attorney General's personal staff. He received his A. B. degree from Colgate University in 1961 and his LL. B. degree from Harvard Law

School in 1964. He then served four years as administrative assistant to Congressman Paul A. Fino (R-N. Y.). From August to November, 1968, Mr. Phillips was a special assistant to Mr. Mitchell, who then was national campaign manager of the Nixon for President Committee.

A. G. ANNOUNCES NOMINEES FOR TOP POSTS IN LEAA

February 24, 1969: Attorney General John N. Mitchell announced that President Nixon will nominate Charles H. Rogovin, an Assistant Attorney General of Massachusetts, to be the Administrator of the Law Enforcement Assistance Administration. Mr. Mitchell also said that Richard W. Velde, minority counsel of the Subcommittee on Criminal Law of the Senate Judiciary Committee, will be nominated to be an Associate Administrator of LEAA.

As head of LEAA, Mr. Rogovin will supervise the program created last year by the Omnibus Crime Control and Safe Streets Act to help state and local governments improve their law enforcement and criminal justice systems. Mr. Rogovin, 38, has held the post in Massachusetts since May 1967 and has been chief of the Organized Crime Section in the State Attorney General's office. Prior to that, he was an Assistant Director of the President's Commission on Law Enforcement and the Administration of Justice from 1966 to 1967 and was head of its Organized Crime Task Force. He was an Assistant District Attorney in Philadelphia from 1960 to 1966, the last two years as Chief Assistant and supervisor of all criminal investigations.

Mr. Velde, 37, has been minority counsel to the Judiciary Subcommittee since September 1966 when it was created. He also served as minority counsel to the Subcommittee on Juvenile Delinquency of the Judiciary Committee in 1965 and 1966.

Mr. Velde will be one of two Associate Administrators of LEAA. The other has not yet been selected.

In this fiscal year, most of LEAA's $63 million budget is being given in grants to help improve the nation's entire criminal justice system.

All 50 states have received planning grants totaling some $19 million, and an additional $29 million in action grants to carry out the plans is available this fiscal year. In addition, $6. 5 million has been given to nearly 500 colleges to finance studies by law enforcement personnel and the FBI received $3 million to expand its police training programs. It also is giving grants for a variety of research programs on crime prevention and control.

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POINTS TO REMEMBER

The Office of Management Support has prepared an English-Spanish edition of Form DJ-35 (Financial Statement of Debtor Submitted for Government Action on Claims Due the United States) which should simplify the procedures for obtaining financial information from Spanish-speaking individuals against whom the Government has a claim. Any United States Attorney desiring such forms should send a request to the Management Office, attention Herman Levy. Also, if there are other forms which your office frequently employs in dealing with Spanish-speaking persons--especially those forms which require the person himself to complete certain portions of it--you should request the Management Office to prepare such bilingual forms for your office.

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

AUTOMOBILE PRODUCERS ALLEGED TO HAVE VIOLATED SECTION 1 OF ACT.

United States v. Automobile Manufacturers Association, Inc., et al. (C. D. Calif., Civ. 69-75-JWC; January 10, 1969; D. J. 60-108-86)

On January 10, 1969, a civil action was filed in the United States District Court for the Central District of California (Los Angeles), alleging that the four major automobile producers and their trade associations have been parties to unlawful agreements which delayed development and installation of anti-pollution devices for motor vehicles in violation of Section 1 of the Sherman Act.

The suit names as defendants:

General Motors Corporation;
Ford Motor Company;
Chrysler Corporation;
American Motors Corporation; and
Automobile Manufacturers Association.

It is alleged that the defendants and others agreed since as early as 1953 to eliminate all competition among themselves in the research, development, manufacture, installation and publicity of motor vehicle air pollution devices and in the purchase of patents and patent rights covering such equipment. The complaint also alleges that the defendants agreed to install such devices only upon a uniform date. It cites three agreements involving attempts to delay installation:

(1) The defendants could have installed "positive crankcase ventilation" on 1962 models sold outside California, but they agreed among themselves to delay this until the 1963 models. Some auto manufacturers said they were willing to start with the 1962 models had there not been an industry-wide agreement.

(2) In late 1962 and early 1963, the defendants agreed to delay installation of an improved "positive crankcase ventilation" device on new motor vehicles to be sold in California. At the time, the California Motor Vehicle Pollution Control Board had indicated it would make the improvement mandatory.

(3) In early 1964, the defendants attempted to delay installation of new exhaust pollution control equipment that could have been scheduled for 1966 models sold in California. The defendants agreed to tell California authorities it would be technologically impossible to install the devices before 1967. Only pressure from competing non-industry device makers forced the defendants to install the equipment on 1966 models.

The defendants also agreed to restrict publicity on advances in air pollution technology. In addition, the defendants agreed among themselves, through a patent cross-licensing agreement, to restrict the price they would pay for patents developed by outsiders. The cross-licensing agreement began on July 1, 1955, and has been amended and renewed periodically.

Named co-conspirators but not defendants in the case were: Checker Motor Corporation of Kalamazoo, Michigan; Diamond T Motor Car Company of Cleveland, Ohio; International Harvester Company of Chicago; Studebaker Corporation of South Bend, Indiana; White Motor Corporation of Cleveland; Kaiser Jeep Corporation of Oakland, California; and Mack Trucks, Inc. of New York City.

The complaint seeks the following relief:

(1) that the cross-licensing agreement be cancelled;

(2) that the defendants be permanently enjoined from continuing or reviving agreements involving (a) restrictions on the installation or publicity of anti-pollution technology, and (b) the joint assessment and licensing of patents relating to such technology on a most-favored-purchaser basis;

(3) that the defendants be barred from responding jointly to regulatory agency requests for information or proposals about air pollution control technology, except when a joint response is asked for by the agency;

(4) that the defendants be required to make available to any applicants unrestricted, royalty-free patent licenses and production know-how affecting all patents now subject to the cross-licensing agreement; and

(5) that an injunction issue ensuring that all future joint arrangements pertaining to the development of air pollution control technology be proportionately limited as to subject matter of joint effort and number of participants.

This civil complaint arose out of a grand jury investigation that was conducted in Los Angeles headed by Sam Flatow, now retired.

The case is assigned to Judge Jesse W. Curtis.

Staff: Raymond W. Philipps, Charles L. Marinaccio and Peter H. Flournoy (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

SELECTIVE SERVICE ACT

PRE-INDUCTION JUDICIAL REVIEW OF DELINQUENCY CLASSIFICATION NOT AVAILABLE TO REGISTRANT DEPRIVED OF GRADUATE STUDENT DEFERMENT; OESTEREICH DECISION HELD INAPPLICABLE.

Kolden v. Selective Service Local Board No. 4 (C. A. 8, No. 19,331; January 28, 1969; D. J. 25-39-653)

A registrant holding a II-S graduate student deferment was reclassified as a I-A delinquent and ordered to report for induction, after turning in his draft card at a meeting protesting the War in Viet Nam. He brought this action to obtain a stay of induction. The district court denied a stay on the basis of Section 10(b)(3) of the Military Selective Service Act, 50 U. S. C. App. 460(b)(3), which prohibits pre-induction review of the "classification or processing" of any registrant. He took an appeal to the Eighth Circuit, and Judge Blackmun granted a stay pending appeal. After the appeal was argued, the Supreme Court decided Oestereich v. Selective Service System Local Board No. 11, 37 L. W. 4053, and Clark v. Gabriel, 37 L. W. 3217. In Oestereich, Section 10(b)(3) was held not to preclude pre-induction review of a registrant's claim that application of delinquency reclassification regulations to him improperly deprived him of a IV-D statutory exemption for divinity students. The Court of Appeals held that Oestereich was inapplicable in the case of a graduate student deferment, on the ground that such a deferment is not required by statute and ruled that "because appellant did not possess a statutorily-required deferment but one granted only by the discretion of the Local Board . . . Section 10(b)(3) bars review at this stage of the Board's actions." The Court went on to say that the undergraduate student deferment "would be more closely analogous to Oestereich's situation" since the undergraduate deferment is required by statute. However, the Court refused to pass on the question of whether Oestereich permits pre-induction review in the case of a registrant with an undergraduate deferment who is reclassified under the delinquency regulations.

Staff: Morton Hollander, Robert V. Zener
(Civil Division)

SELECTIVE SERVICE ACT

PRE-INDUCTION JUDICIAL REVIEW OF DELINQUENCY CLASSIFICATION NOT AVAILABLE TO REGISTRANT DEPRIVED OF AN UNDERGRADUATE STUDENT DEFERMENT; OESTEREICH DECISION HELD INAPPLICABLE.

Timothy J. Breen v. Selective Service Local Board No. 16, etc. (C. A. 2, No. 3245; January 10, 1969; D. J. 25-14-1601)

The question not reached by the Eighth Circuit in Kolden was decided by the Second Circuit in this case. Breen had a II-S undergraduate deferment. As in Kolden his draft board declared him delinquent for giving up possession of his draft card, and reclassified him I-A pursuant to a regulation authorizing reclassification for such delinquency. Breen then filed suit seeking an injunction against his induction. The district court granted the Government's motion to dismiss on the ground that Section 10(b)(3) of the Military Selective Service Act bars pre-induction judicial review.

In affirming, the Second Circuit held that the action was barred by Section 10(b)(3). As in Kolden, the Court distinguished Oestereich v. Selective Service System Local Board No. 11, 37 L. W. 4053, in which pre-induction judicial review of a classification had been permitted. It observed that whereas Oestereich involved a statutory exemption the instant case was concerned with only a deferment. Since Congress provided for undergrate II-S deferments "under such rules and regulations as /the President/ may prescribe" (50 U. S. C. App. 456h(i)), and since an existing regulation plainly authorized reclassification for delinquency, the draft board's action in classifying Breen I-A was not illegal. The Court concluded that as long as the action taken by the board was authorized by the Selective Service Act, pre-induction review would not lie even if the complained of conduct was claimed to be unconstitutional.

Staff: United States Attorney Jon O. Newman (D. Conn.)

STANDING

DATA PROCESSING SERVICE COMPANY HAS NO STANDING TO ATTACK RULING OF COMPTROLLER OF THE CURRENCY THAT NATIONAL BANK MAY PERFORM DATA PROCESSING SERVICES FOR OTHER BANKS AND FOR BANK CUSTOMERS.

Association of Data Processing Service Organizations, Inc., et al. v. Camp (C. A. 8, No. 19218; February 6, 1969; D. J. 145-3-881)

Plaintiffs were a data processing service company and an association of such companies. They brought this action to invalidate a ruling of the Comptroller of the Currency which permitted national banks in general, and the American National Bank and Trust Company in particular, to "make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." The district court granted the Comptroller's motion to dismiss on the ground that plaintiffs' allegations of competitive injury were insufficient to confer standing to sue.

The Eighth Circuit affirmed unanimously. It pointed out that plaintiffs had shown no invasion of a "legal interest" protected by public charter or contract, that they had cited no statute passed for the purpose of protecting them from this type of competition, and that Congress had not seen fit to enact a "person aggrieved" statute which might allow them to represent the public interest. In the absence of any of these grounds for standing, the mere allegation of "illegal competition", i. e. that the Bank's competitive activity violated the National Bank Act, 12 U. S. C. 24, Seventh, was not sufficient to confer standing upon them to attach the Comptroller's ruling. The Court expressly disapproved a contrary ruling of the Fifth Circuit (Saxon v. Georgia Association of Independent Ins. Agents, Inc., 399 F. 2d 1010 (1968) (alternative holding)).

Staff: Stephen R. Felson (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

SPECIAL NOTICE

AIRCRAFT PIRACY

Due to the increasing number of planes being hijacked to Cuba and the public attention being focused on this phenomenon the Criminal Division has taken the position that indictments should be returned against all hijackers as soon as they have been identified.

This position was announced by Assistant Attorney General Will Wilson in a statement presented to the House Committee on Interstate and Foreign Commerce on February 5, 1969. Mr. Wilson stated: "We have instituted the policy of indicting the identifiable individuals so that, when jurisdiction over the person is obtained, we will be able to go forward with the prosecution."

United States Attorneys are requested to seek indictments against hijackers for violations of 49 U. S. C. 1472 committed within their jurisdiction. Such indictments should include all appropriate violations committed during the hijacking, i. e. kidnapping, hijacking, etc.

Any venue problems or other questions that may arise in the implementation of this policy should be discussed with the General Crimes Section.

COURTS OF APPEALS

FEDERAL FOOD, DRUG, AND COSMETIC ACT

EXCLUSION FROM IMPORTATION OF DAMAGED COFFEE BEANS, AS ADULTERATED FOOD, HELD TO BE ACTION "COMMITTED TO AGENCY DISCRETION BY LAW" AND NOT SUBJECT TO HEARING REQUIREMENT OR JUDICIAL REVIEW UNDER ADMINISTRATIVE PROCEDURE ACT.

Sugarman v. Forbragd (C. A. 9, No. 22102; December 31, 1968; D. J. 21-11-281)

The appellant sought, in an action for injunction, to review an order of the Food and Drug Administration excluding from importation, under 21 U. S. C. 381(a), certain fire-damaged coffee beans as unfit for food. Appellant argued that the Administrative Procedure Act required agency

notice and hearing and provided judicial review. The district court held that the order of exclusion was not reviewable; 267 F. Supp. 817. The Court of Appeals affirmed the district court, holding the Administrative Procedure Act inapplicable by its own terms, since exclusion of the coffee beans was action "committed to agency discretion by law". The Court of Appeals agreed that no formal hearing on the exclusion was required and, in addition, held that the determination of unfitness could not be regarded as arbitrary under the facts even in the absence of regulations spelling out standards of fitness for food.

Staff: United States Attorney Cecil F. Poole;
Assistant United States Attorney John J. Bartko
(N. D. Calif.)

NARCOTIC ADDICT REHABILITATION ACT

COMMITMENT PURSUANT TO TITLE II OF NARCOTIC ADDICT REHABILITATION ACT IS A SENTENCING ALTERNATIVE AVAILABLE IN DISCRETION OF COURT.

Ida Watson v. United States (C. A. D. C., Nos. 21, 858 and 21, 860; February 5, 1969; D. J. 12-012-9)

The defendant pleaded guilty to charges of uttering and housebreaking in September, 1967. When the defendant appeared for sentencing, the court granted her request for an examination pursuant to Title II to determine if she was an addict who could be rehabilitated through treatment. 18 U. S. C. 4252.

On the basis of the report of the Attorney General recommending treatment, the defendant was involuntarily committed for treatment of her addiction. The defendant appealed alleging that her consent was a prerequisite to commitment.

The Court of Appeals observed that Section 4253(a) provides that the patient shall be committed for treatment if the court finds him addicted and treatable. The opinion also referred to the legislative history which indicates that a commitment under Title II is a sentencing alternative available in the discretion of the court. The Court held that a district court is not obliged to honor an objection once an eligible offender has been found treatable.

Other charges pending against the defendant were dismissed at the time she was committed for an examination. The Court rejected her

argument that she was ineligible due to pending criminal charges since they were dismissed in the same judicial proceeding.

Staff: United States Attorney David G. Bress;
Assistant United States Attorneys David C. Woll
and Frank Q. Nebeker (Dist. of Col.)

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INTERNAL SECURITY DIVISION
Assistant Attorney General J. Walter Yeagley

DISTRICT COURT

SABOTAGE

BOMBING OF WAR UTILITIES.

United States v. Cameron David Bishop (D. Colo., February 14, 1969; D. J. 146-7-13-163)

In January of this year there was a rash of bombings directed mainly against high voltage line towers belonging to the Public Service Company of Colorado, all in the Denver area. As the result of an intensive investigation of the FBI, a Federal grand jury at Denver was able to return a four-count indictment against Cameron David Bishop, charging him with four separate violations of 18 U. S. C. 2153(a), which is commonly known as the wartime sabotage statute. This Section has been extended to cover a period of national emergency proclaimed by the President.

The indictment charged Bishop with three separate bombings which destroyed high voltage line towers which are war utilities as defined in Section 2151 of Title 18, U. S. C. The remaining count charged Bishop with attempting to bomb another tower which is also a war utility.

A complaint had previously been filed against Bishop on February 7, 1969 in Denver, charging him with one of these bombings which occurred on January 20. The complaint charged, among other things, that as a result of that bombing, there was an interruption of power to the Coors Porcelain Company, a war premise engaged in the manufacture of nose cones for sidewinder missiles and armor plate for military helicopters destined for Vietnam.

This is the second case involving the destruction of "war utilities" filed under this Section since World War II. A case involving an attempt to destroy "war premises" was brought in St. Louis, Missouri in December of last year under Section 2155 of Title 18, U. S. C. The defendant in that case, Michael Sherrod Siskind, who was carrying a membership card in the Students for a Democratic Society (SDS) at the time of his arrest, entered a plea of guilty on February 10, 1969 for his attempted fire bombing of the ROTC building located on the campus of Washington University in St. Louis. On February 20, he was sentenced to five years in prison by Judge Roy W. Harper.

Staff: United States Attorney Lawrence M. Henry; John H. Davitt and Paul C. Vincent (Internal Security Division)

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LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General Glen E. Taylor

COURTS OF APPEALS

SOVEREIGN IMMUNITY

PUBLIC LANDS: TUCKER ACT USED AS JURISDICTION FOR INJUNCTIVE SUIT; WAIVER OF SOVEREIGN IMMUNITY IMPLIED FROM STATUTES.

Tom Jones, et al. v. Orville L. Freeman, et al. (C. A. 8, August 28, 1968; D. J. 90-1-4-149)

The plaintiffs are Arkansas farmers living adjacent to the Ozark National Forest. Their razorback hogs forage on the Forest lands in violation of regulations promulgated by the Secretary of Agriculture. 36 C. F. R. sec. 261.13 (1968). While conceding that the Forest Service has a right to keep the hogs out of the Forest, the farmers objected to the regulations so far as they allow the impoundment of the hogs, charging of expenses, and possible sale of the animals if not claimed. Thus, they sought to enjoin the Forest Service from acting in such capacity.

The district court dismissed the action as an unconsented suit against the United States. The Court of Appeals affirmed. However, in affirming, the Court found jurisdiction to entertain the suit in the district court under the Tucker Act, 28 U. S. C. 1346(a)(2). The Division disagrees on this point. The Tucker Act was never meant to encompass injunctive relief. The Court has plainly misread the statute's provision (that "Any other civil action or claim against the United States" may be brought) to mean that any relief may be requested thereunder. This is plainly not the intent of the statute as expressed by the decided cases and legislative history of the Tucker Act.

While finding this an action against the United States, the Court disagreed with the Government's position that the action was barred by the doctrine of sovereign immunity. It concluded that the statutes authorizing the regulation in question implied the right to judicial review, 16 U. S. C. 551; 7 U. S. C. 1011(f), and stated that such implication will be made, as herein, where neither the legislative history nor the wording of the statute seems to preclude judicial review. Such a statement ignores the long-standing operation of the doctrine of sovereign immunity, i. e., that the sovereign must expressly waive its immunity.

After all this, the Court affirmed the district court's dismissal of the complaint on the basis that the Secretary had implied authority to issue the regulations and the plaintiff farmers had alleged no actions outside the scope of authority given to the Forest Service by those regulations.

Staff: Robert S. Lynch (Land & Natural Resources Division)

INDIANS

INDIAN WILL: NATIONALITY OF INDIAN DEVISEE OF ALLOTTED LAND; DETERMINATION OF SECY. RE RESTRICTIONS ON LAND NOT ARBITRARY OR CAPRICIOUS.

D. Q. (Bill) Couch v. Stewart L. Udall, Secy. of Interior, Dept. of Interior, United States (C. A. 10, December 4, 1968; D. J. 90-2-1-2436)

A Mexican Kickapoo Indian died testate, leaving her allotted land in Oklahoma to certain Kickapoo beneficiaries who were, in addition, Mexican nationals. The beneficiaries appealed the determination of their nationality by the examiner of inheritance to the Secretary. The examiner had also determined, in approving the will, that the allotted lands passed to these Mexican nationals stripped of its trust or restricted character. Before and while such appeal was pending, the appellant herein acquired seven warranty deeds covering the devised lands from four of the six beneficiaries. The Secretary reversed the examiner on the issue of the restrictions on the property and held that the devised lands retained their trust character because the Mexican Kickapoo were a class Congress sought to protect. Bailess v. Pakune, 344 U. S. 171, 173 (1952). Appellant then sued to reverse the Secretary's decision on the basis that it was arbitrary and capricious in applying a different rule to Mexican Kickapoo than to Canadian Indians who are devised property in the United States. The district court granted the Secretary summary judgment.

In affirming the district court, the Court of Appeals held that the Secretary's decision was neither arbitrary nor capricious and that the Mexican Kickapoo were a class Congress sought to protect. They dismissed appellant's contention that all Indians who are foreign nationals must be treated alike by saying:

> it must be recognized that the "American Indians" are not a homogenous group. The variation in treatment accorded some tribes and the emancipation of various other groups, is evidence of the government's recognition of these differences. It

further appears that the Kickapoo Indians, who are the heirs of the land herein involved, are a group which is particularly ill-adapted to function with responsibility or maturity in our modern society.

Staff: Robert S. Lynch (Land & Natural Resources Division)

COURT OF CLAIMS

TUCKER ACT

FLOODING ON NON-NAVIGABLE STREAM; WHETHER TEMPORARY FLOODING CONSTITUTES TAKING; INTERPRETATION OF NEGOTIATIONS TO DETERMINE WHETHER CONTRACT EXISTS.

National By-Products, Inc. v. United States (C. Cls., January 24, 1969; D. J. 90-1-23-1219)

Plaintiff owned and operated an animal products plant on the right bank of Papillion Creek, which is a non-navigable tributary to the Missouri River, near Omaha, Nebraska. Offutt Air Force Base was located on the left bank. Offutt is the headquarters of the Strategic Air Command. In 1960, there was a flood on Papillion Creek which flowed over Offutt Field. Because of the necessity of maintaining Offutt in an operable condition at all times, the Air Force requested the Corps of Engineers to construct a levee which would protect Offutt from all future floodings.

The Army Engineers recommended a program of Flood control for the benefit of both sides of the Creek bed. The Air Force considered its appropriation limited to work on military installations only. The negotiator for the Corps secured an option to purchase some land which plaintiff owned on the left bank. Plaintiff was interested in protection for the right bank and the Corps negotiator stated that plans had been made for a right bank levee but did not state who was going to construct it. Plaintiff executed a document addressed "To Whom It May Concern", giving permission to construct a levee on the right bank, and submitted it at the same time it executed the option for its land on the left bank.

The Corps was also negotiating with the C B & Q RR, whose right of way crossed the flood plain immediately downstream from Offutt Field and plaintiff's plant. C B & Q contended that if the Offutt levee were improved, the floods would wash through the right bank levee at plaintiff's plant and wash out the railroad tracks. C B & Q wanted $85,000 to raise the grade of its tracks. It was agreed that if the right bank levee were strengthened to avoid a break, the railroad bed would be

protected. C B & Q was persuaded to take $16,500 and reconstruct the right bank levee. Because of fear of lawsuits, difficulty of getting a local sponsor to do the job, and other matters, this work was delayed. Meanwhile, the work on Offutt levee was completed, after which two floods rushed down Papillion Creek within a few days of each other, washing through the right bank levee and washing out C B & Q's tracks.

The plaintiff sued for the taking of a flowage easement and for the breach of a contract to build the right bank levee based on the "To Whom It May Concern" document to constitute a contract for the Corps to build the levee. The court reviewed the facts and determined that the Corps never misled the plaintiff. The court found there was actually no meeting of the minds as to the existence of this contract.

As to the question of the taking of a flowage easement, the court discusses and distinguishes the several groups of cases on temporary flooding and responsibility arising from constructing levees. In order for there to be a taking from a flooding, there must be either a permanent intrusion or a regularly reoccurring flooding, whereas one or two floodings do not constitute a taking. The damage which the plaintiff suffered is a "consequential" damage. The cases involving the construction of levees on the Mississippi River were discussed in a footnote and held to be inapplicable as being cases involving work done in aid of navigation.

Staff: Howard O. Sigmond (Land & Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

COURTS OF APPEALS

ENFORCEMENT OF INTERNAL REVENUE SUMMONS

PARTY SUMMONED TO PRODUCE DOCUMENT MAY NOT REFUSE ON GROUND OF SELF-INCRIMINATION UNLESS HE HAS RIGHTFUL POSSESSION OF DOCUMENT.

Zakutansky & Johnston v. United States (C. A. 7, No. 16790; August 22, 1968; D. J. 5-26-829)

Zakutansky, an accountant, had prepared Johnston's tax returns. A special agent who was examining the returns served a summons upon Zakutansky for production of his work papers. Knowing that the summons was outstanding, Zakutansky turned the work papers over to Johnston and reported to the agent that he could not comply. A summons was then served upon Johnston who claimed that the work papers belonged to him and that they would incriminate him. In an enforcement proceeding the district court held that the papers legally belonged to the accountant; that the transfer to the taxpayer was solely designed to thwart the investigation; and that the taxpayer did not have rightful possession of the papers. Compliance with the summonses was directed. 278 F. Supp. 682; see prior note in Bulletin for March 29, 1968, p. 239.

The Seventh Circuit affirmed on the basis of the district court's opinion. A petition for certiorari was denied by the Supreme Court on January 13, 1969.

Appellants in this case relied upon the Ninth Circuit's opinion in a recent case in which the facts were quite similar. United States v. Cohen, 250 F. Supp. 472 (D. Nev.), affirmed 338 F. 2d 464 (C. A. 9). The present case is distinguishable, since in Cohen the district court found that the work papers had been transferred by accountant to taxpayer in good faith before the issuance of a summons, and that the taxpayer thereby gained rightful possession. It should be noted that the Cohen opinion also states, by way of dictum, that mere possession, rightful or not, justifies invocation of the privilege. This is contrary to a long line of authority. Boyd v. United States, 116 U. S. 616, 623-624; Deck v. United States, 339 F. 2d 739 (C. A. D. C.), certiorari denied 379 U. S. 967; In re Fahey, 300 F. 2d 383 (C. A. 6); United States v. Pizzo, 260 F. Supp. 216 (S. D. N. Y.); United States v. Boccuto, 175 F. Supp. 886 (D. N. J.), appeal dismissed 274 F. 2d

860 (C. A. 3); Application of House, 144 F. Supp. 95, 101 (N. Cal.); Application of Daniels, 140 F. Supp. 322, 327 (S. D. N. Y.).

Staff: Earl Kaplan, John M. Brant, Joseph M. Howard (Tax Division)

APPEAL BECOMES MOOT WHEN THERE IS COMPLIANCE WITH SUMMONS AFTER STAY PENDING APPEAL IS DENIED.

Baldridge, et al. v. United States and Nettles, Special Agent (C. A. 5, No. 26,153; January 16, 1969; D. J. 5-74-1332)

The facts in this case were very similar to those in Zakutansky and Cohen. The district court, as in Zakutansky, found that the work papers at all times belonged to the accountant, and that the transfer to the taxpaper was a sham designed to put the papers beyond the Government's reach. The court concluded that the taxpayer never had rightful possession of the papers, and could not assert the privilege against self-incrimination as to them. 281 F. Supp. 470 (S. Tex.).

Both the district court and the Fifth Circuit refused to grant a stay pending appeal and a new date was set for production of the papers. When appellants still refused to comply, a hearing was held and they were found to be in civil contempt and were sentenced to imprisonment for one year, unless the papers be produced within one hour. They were turned over within fifteen minutes.

The Government then filed a suggestion of mootness which the Fifth Circuit accepted as follows:

> There is nothing on this appeal for this Court to decide. The case is moot. Grathwohl, et al. v. United States, et al., 401 F. 2d 166 (C. A. 5th); Lawhon v. United States, 390 F. 2d 663 (C. A. 5th).

The Court also quoted its prior opinion in Lawhon:

> This motion, in effect, seeks to have this court give an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial.

The judgment of the district court was vacated and the case remanded with instructions to dismiss the proceedings as moot. See United States v. Munsingwear, 340 U. S. 36.

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DISTRICT COURT

ENFORCEMENT OF INTERNAL REVENUE SUMMONS

STATE DOCTOR-PATIENT PRIVILEGE NOT VALID DEFENSE TO INTERNAL REVENUE SERVICE ESTATE TAX EXAMINER'S SUMMONS FOR HOSPITAL RECORDS.

United States, et al. v. Kansas City Lutheran Home & Hospital Assn., et al. (W. D. Mo., No. 17020-1; January 10, 1969; D. J. 5-43-893)

In order to determine if certain transfers of property by a decedent within three years of his death were made in contemplation of death within the meaning of Section 2035of the Internal Revenue Code of 1954, an Internal Revenue Service Estate Tax Examiner issued a summons to the defendant-hospital for production of its records of the decedent's visits and confinements.

Both the hospital and the intervening executor of decedent's estate resisted compliance with the summons on the basis of the Missouri physician-patient privilege, V. A. M. S. Section 491. 060. The same defense was raised in the ensuing judicial enforcement action.

Ordering compliance with the summons, the court interpreted Reisman v. Caplin, 375 U. S. 440 (1964), to hold that federal law controls in judicial summons enforcement proceedings and that while an evidentiary privilege created by state law may be recognized as a matter of federal common law, such recognition is not controlled by either the statutes or the decisional law of the state in which the federal court sits. Noting the existence of a federal common law attorney-client privilege, the court refused to extend the principle to the physician-patient relationship:

> As noted in Wigmore, the considerations which underlie recognition of the two privileges are entirely different. The considerations which relate to physicians and their patients do not require that an exception should be made

> to the general liability of all persons to give testimony upon all facts that are the subject of legitimate inquiry in the administration of justice. Congress has not seen fit to recognize a physician-patient privilege in any case. This Court will not create such a privilege as a matter of federal common law in a case which involves the enforcement of a summons in an Internal Revenue investigation of estate tax liability.

The defendants have indicated they will not appeal.

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