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POINTS TO REMEMBER

Statement by Attorney General John N. Mitchell

"I regret that recent actions by the Department of Justice involving subpoenas for members of the press and property of the press may have been the subject of any misunderstanding and of any implication that the Department of Justice is interfering in the traditional freedom and independence of the press.

It has been the policy of the Department in the past to issue subpoenas in order to obtain information held by the press which might be of some aid in both criminal and civil investigations.

Prior to my taking office, these subpoenas had been served on, and complied with by, members of the press from various media and had covered pictorial and written information, both published and unpublished.

The Department has always recognized the particular sensitivity of the press in this area, especially with regard to confidential informants, and the special place occupied by the press under the Constitution.

Because of these considerations, the Department has had in the past, and continues to have today, a policy of negotiating with the press prior to the issuance of any subpoenas. These negotiations have generally taken two forms: negotiations on the actual scope of the subpoena prior to its issuance; or a clear understanding prior the issuance of the subpoena that the government would meet with the press and would be willing to modify the scope of the subpoena.

The point of these negotiations is an attempt to balance the rights of the press with the rights of the grand jury making an investigation. Several subpoenas have been served and complied with this year under this policy of pre-subpoena negotiations.

For example, a broad subpoena was served on one news publication to obtain information about a grand jury investigation in Chicago because there was no time to have a detailed negotiation on the scope of the subpoena prior to its issuance. However, the news publication was informed prior to the issuance of the subpoena that the Department would modify its request. In subsequent negotiations, the request was substantially modified.

Several Washington area news media were given broad subpoenas for information involving university disturbances. Prior to the issuance of the subpoenas, the media were informed that the Department would be willing to modify its request. In subsequent negotiations, the request was substantially modified.

Unfortunately, in other instances, this policy was not followed and the subpoenas were served without any prior negotiations. When this was brought to our attention, we promptly ordered our attorneys to enter into negotiations in an attempt to reach an acceptable compromise. It is my understanding that these negotiations are now proceeding satisfactorily and that, in some instances, the government has dropped some of its requests.

We realize the peculiar problems that subpoenas raise for the press. We also realize that we have an obligation to the courts to attempt to obtain information which may be of value in an investigation.

We are taking steps to insure that, in the future, no subpoenas will be issued to the press without a good faith attempt by the Department to reach a compromise acceptable to both parties prior to the issuance of a subpoena.

I believe that this policy of caution, negotiation and attempted compromise will continue to prove as workable in the future as it has in the past."

Bail Reform Act Forms

On April 24, 1969, Memorandum No. 619 was distributed to all United States Attorneys directing that a copy of Form DJ-130 (Report of Persons in Custody Pending Indictment, Arraignment, or Trial, etc.) no longer be sent to the Department. To date many districts continue to send copies to the Department. As presently structured, copies of the form no longer produce information useful to the Department and thus sending them to Washington merely results in wasted time and effort. However, as Rule 46(h) of the Federal Rules of Criminal Procedure still exists, a bi-weekly report such as the DJ-130 must still be filed with the court. Please discontinue sending copies of Form DJ-130 to the Department until the form can be redesigned and new instructions issued.

In addition Memorandum No. 619 requested a listing of the number of defendants held in pretrial detention for the two week period ending May 19, 1969. This was intended as a one time request only. Some districts continue to send this information to the Department every two weeks and this practice should be discontinued.

Bail Reform Act Form No. 2 (AO-199), which is a U.S. District Court order specifying methods of conditions of release, contains a carbon copy for submission to the Department. Until further instructions

please discontinue forwarding this copy to the Department. You are, however, reminded that this form should be filled out in every case of a release under the Bail Reform Act and a copy retained in the case files. Bail Reform Act Forn No. 2 has proven invaluable in bail jumping prosecutions under 18 U.S.C. 3150.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

BANK MERGER DOES NOT VIOLATE SECTION 7 OF ACT.

United States v. The First National Bank of Maryland, et al. (D. Md., No. 19801; January 13, 1970; D. J. 60-111-1317)

Judge Frank A. Kaufman, in an opinion filed on January 13, 1970, ruled that the Government failed to prove that the merger of the two defendant banks violated Section 7 of the Clayton Act. First National Bank of Maryland, the second largest bank in Maryland, proposed to acquire The First National Bank of Harford County, which held approximately 30 percent of the deposits and loans held by the eight banks operating in Harford County. The Government attempted to prove the merger would (1) eliminate First National Bank of Maryland as a probable de novo entrant into Harford County; (2) eliminate the restraining influence of The First National Bank of Maryland on the competitive behavior of banks in Harford County; (3) entrench the First National Bank of Harford County's dominant market position and raise barriers to entry; and (4) be more anticompetitive than a so-called foothold acquisition in Harford County.

All parties stipulated that Harford County, Maryland, was the relevant section of the country. The court said that the relevant line of commerce should not be limited to commercial banking but went on to hold that even if commercial banking were the relevant line of commerce, the merger would not lessen competition in Harford County.

The court did not accept the Government's potential competition arguments. It found that The First National Bank of Maryland was not a likely potential de novo entrant into Harford County because, in the "foreseeable future", it was not likely that the bank would be able to make a profit entering de novo into Harford County. The court also accepted the contentions of the bank that it would instead use its resources to enter de novo into other counties in Maryland, notably the counties between Baltimore and Washington, D. C.

The court found the current restraining influence of First of Maryland upon First of Harford to be minimal at most, so that the loss of that influence cannot be said substantially to lessen competition. The court also found no evidence that the merger will create a barrier to entry into the Harford County banking community.

The court also considered whether under the Bank Merger Act of 1966, the proposed merger would so serve the convenience and needs of the community as to outweigh an assumed violation of Section 7 of the Clayton Act. The court felt that the entrance of First National Bank of Maryland by merger into Harford County would provide competition for the one large, Baltimore-based bank now offering "big city bank" services in Harford County. The court felt that this would serve the convenience and needs of Harford County and outweigh whatever anticompetitive effects that might arise out of the merger itself.

Finally the court stated that the problem of similar, confusing names simply adds negative icing to the Government's contention that First National Bank of Maryland is a reasonably probable de novo entrant into First National Bank of Harford County's territory. The court held that First of Maryland would be buying name litigation from First of Harford if it entered into the latter's territory without changing its name.

Staff: William P. McManus, Thomas P. Ruane, Eugene V. Lipkowitz and Gordon A. Noe (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

SUPREME COURT

MILITARY SELECTIVE SERVICE ACT

SECTION 10(b)(3) OF THE SELECTIVE SERVICE ACT OF 1967 DOES NOT PRECLUDE PRE-INDUCTION JUDICIAL REVIEW OF DELINQUENCY RECLASSIFICATION OF AN UNDERGRADUATE COLLEGE STUDENT.

Timothy J. Breen v. Selective Service Bd. No. 16 (Sup. Ct., No. 65; January 26, 1970; D.J. 25-14-1601)

Breen, an undergraduate student classified II-S, was declared to be a delinquent and was reclassified I-A for failing to maintain his draft cards in his personal possession at all times as required by the regulations. He brought suit to have this action by his local draft board declared illegal and to enjoin his induction into the armed forces. The Court of Appeals held that Section 10(b)(3) of the Military Selective Service Act of 1967 precluded pre-induction judicial review of Breen's claims. The Supreme Court reversed relying on Oestereich v. Selective Service, 393 U.S. 233 (1968). The Court noted that it failed to see any distinction between one "exempted" and one "deferred" from military service. It therefore held that the draft board's action in reclassifying Breen was a "clear departure" from its "statutory mandate" and, therefore, Section 10(b)(3) did not apply.

Staff: Assistant Attorney General William D. Ruckelshaus; Morton Hollander and Ralph A. Fine (Civil Division)

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

NEGLIGENCE OF FAA CONTROLLER NOT PROXIMATE CAUSE OF AIR CRASH.

Wenzel v. United States (C.A. 3, No. 17805; December 8, 1969; D.J. 157-48-543)

The Third Circuit recently affirmed a judgment of the district court for the District of New Jersey (291 F. Supp. 978) holding that the negligent dissemination of information by an FAA air traffic controller regarding the length of a runway at a private field where a privately-owned C-46 cargo plane was attempting an emergency landing was not a proximate cause of

the crash. The district court had found that the crash occurred a mile and a half from the private field and the immediate cause of the crash was unknown, and that consequently plaintiff had not carried his burden of showing that the misinformation concerning the length of the runway was a proximate cause of the crash.

Staff: Walter H. Fleischer (Civil Division)

SOCIAL SECURITY ACT - DISABILITY BENEFITS

VOCATIONAL TESTIMONY IS UNNECESSARY IN SOCIAL SECURITY DISABILITY HEARING WHEN SUBSTANTIAL EVIDENCE INDICATES CLAIMANT CAN RETURN TO HIS FORMER OCCUPATION.

Forrest Gray v. Robert H. Finch, Secy. of HEW (C.A. 5, No. 28203; January 13, 1970; D.J. 137-17M-67)

The district court, in an action to review the Secretary's denial of Social Security disability benefits, granted the Secretary's motion for summary judgment. Upon appeal, the claimant argued that his medically determined arthritic condition prevented him from performing substantial gainful employment, and that as a result he had been totally incapable of obtaining such employment. Further, the claimant contended that the Secretary erred in not providing expert vocational testimony to show that a claimant can engage in substantial gainful employment.

Upon our argument, the Court agreed that where medical evidence indicates that a claimant is capable of performing his former occupation, vocational testimony is not necessary to support a denial of disability benefits. Since medical evidence merely showed that claimant could not perform heavy physical labor, the Secretary was correct in concluding that claimant could perform his former sedentary occupations of draftsman and estimator without benefit of vocational testimony.

The Court of Appeals further held that the claimant's inability to find work, and his own self-serving testimony are not evidence of inability to engage in substantial gainful employment.

Staff: Thomas J. Press (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Will Wilson

COURT OF APPEALS

EVIDENCE - WIRETAPPING

TIME OF HEARING, ON MOTION FOR DISCOVERY OF ALLEGEDLY TAINTED WIRETAP EVIDENCE AND ITS ADMISSIBILITY, WITHIN COURT'S DISCRETION AND MAY BE HELD BEFORE OR AFTER TRIAL.

United States v. Nolan (C.A. 5, No. 27241; December 29, 1969; D.J. 165-32-70)

In this appeal from a conviction under 18 U.S.C. 224 for bribery regarding a sporting event, the appellants unsuccessfully relied on Alderman v. United States, 394 U.S. 165 (1965), for a rule that inspections of and hearings on the admissibility of allegedly tainted wiretap evidence must occur before trial. Before the trial, the appellants had moved three times for inspection and discovery of all documents and other tangible objects in the hands of the Government. One motion was withdrawn, and the Court denied the other two. However, the trial judge reserved the appellants' right to have a hearing on the admissibility of certain evidence after the trial and also granted a motion to suppress the use as evidence of all documents and tangible objects obtained as a direct result of illegal wiretaps or electronic surveillance.

The Court of Appeals said that the appellants' reliance on Alderman was misplaced. Alderman, it reasoned, simply prohibits the trial judge's in camera screening of surveillance records before they are turned over to a defendant who has standing to object. The Court continued that the fact that Alderman was remanded for a post-trial hearing rather than a new trial indicates that such a hearing need not occur before trial. Furthermore, the trial court had made no in camera inspection of the evidence in question and did not deny that the defendants had the right to examine illegally obtained wiretap evidence.

The Court cited United States v. Birrell, 269 F. Supp. 716 (S.D. N.Y. 1967), aff'd. 399 F.2d 343 (2nd Cir. 1968), rev'd. on other grounds, 400 F.2d 93 (2nd Cir. 1968), for the point that timing is within the trial court's discretion. The prime considerations are the fairness and expediency of the trial. See 269 F. Supp. at 726. The Court of Appeals found that the defendants were not denied an opportunity to inspect the evidence in question and, by implication, that the quantity of evidence involved made it more convenient to postpone the inspection and hearing until after trial.

Staff: Former United States Attorney Louis C. La Cour and Assistant U.S. Attorney Julian R. Murray, Jr. (E.D. La.)

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