# United States Attorneys

# Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

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## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Philip H. Modlin, Director

Federal law (Commonly referred to as the "Hatch Act") not only limits the political activities of Federal employees, but is also applicable to State and local employees whose principal employment is in connection with an activity financed in whole or part through Federal assistance, either by loans or grants, to their State or local government. Grants made by the Law Enforcement Assistance Administration, under the Omnibus Crime Control and Safe Streets Act (P.L. 90-351, as amended) to State and local governmental units, subjects their employees to the political activity provisions of the Hatch Act (Title 5, section 1501 et seq. of the United States Code).

The Civil Service Commission has adopted the following rule of jurisdiction:

> "An officer or employee of a State or local agency is subject to the Act if, as a normal and forseeable incident to his principal job or position, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not."

It is not possible to give precise guidelines for determining the applicability of the Hatch Act in all cases. This can only be determined on a case by case basis after evaluation of the duties and functions performed by an individual employee in connection with the Federally funded activity. As a general rule, if the employee occupies a full-time position and it is his only employment and his department receives Federal loans or grants, he would probably be covered by the Act. Any questions regarding a particular situation should be addressed to:

The Office of the General Counsel
U.S. Civil Service Commission
1900 E. Street, N.W.
Washington, D.C. 20415

## POINTS TO REMEMBER

### Return of Civil Judgment Cases to Agencies

Civil Division Directive No. 17-71 (36 F.R. 12739, 7/7/71) necessitates certain changes in Title 3 of the United States Attorneys Manual which are in the hands of the printer. Among them the following is considered of sufficient importance to bring to your immediate attention. At page 31, Section 7 is re-numbered as Section s and a new Section 7 is inserted, as follows:

> 7. Return of Civil Judgment Cases to Agencies. Section 7 of Civil Division Memo No. 374, supra, (as amended 7/7/71, 36 F.R. 12739) authorizes conditional, post-judgment closing of certain types of cases upon their return to willing referral agencies for limited purposes.
>
> (a) Judgments may be returned to agencies for direct collection of agreed-to installment payments if the U.S. Attorney feels that, as practical matter, there is insufficient likelihood of need for his further litigative services to warrant the expense of his keeping an open file on the case. Thus, depending on the needs of the particular case: (1) he may continue to maintain an active file and conduct all collection activity or arrange for specified, non-litigative functions to be performed by the agency; (2) he may suspense his file during periods between periodic reports from the agency concerning performance by the latter of specified, non-litigative collection functions; or (3) he may conditionally close his file until the agency informs him that full collection has been made and the judgment should be satisfied of record or that other action on his part is needed. Where appropriate, the third, or conditional closing, procedure should be used because it avoids the unnecessary time and expense of dual handling of collections, reporting, and record-keeping. In such case, as a measure of the effectiveness of his litigation and negotiation efforts, the U.S. Attorney may at once take credit for full collection provided any unpaid balance, at the time the case is re-referred to him, must be deducted from the total amount of his collections for the reporting period in which the re-referral is received.
>
> (b) In lieu of transferring a judgment to an inactive or suspense status (see supra, pp. 24-26, infra, pp. 37-38), it may be returned to the referral agency for purposes of surveillance if the U.S. Attorney is not in a better position

than the agency to perform that function. In such case, of course, no collection credit may be taken by the U. S. Attorney in the meantime unless and until it is re-referred to him.

As a general rule, for the purposes mentioned in (a) and (b), supra, cases may be returned only to those referral agencies having local or regional field offices, and unless they specify otherwise, the arrangements for returns should be made directly with such offices. Unless special arrangements are made through the Civil Division, a judgment may be returned only to an agency entitled to receive all collections of principal and interest thereunder. Also, nothing in Civil Division Memo No. 374 may be construed to authorize the general assignment of any judgment that has been taken in the name of the United States to any agency or person without the specific approval of the Civil Division, and it must be borne in mind, and made clear to each agency, that the functions of final settlement, reduction, or release of judgments and conduct of executions and other judicial enforcement proceedings, remain with and must be performed by the Department of Justice, as required by law (§5, Ex. Order No. 6166, 5 U.S.C. § 90ln; 28 U.S.C. §§509, 510, 516 & 519).

The Manual changes do not supersede the statements on this subject in the Bulletin issues of August 20 and November 12, 1971 (19 U.S.A. Bul. pp. 673-674 & 898).

(Civil Division)

Collateral Estoppel in Criminal Trials

The recent case of Harris v. Washington, 92 S. Ct. 183 (1971), reaffirms Ashe v. Swenson, 90 S. Ct. 1189 (1970), in holding that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth Amendment.

In Harris the defendant was tried in a state court for the murder of one of three bomb victims and acquitted by a jury. He was immediately rearrested and charged with the murder of the second victim and assault upon the third. The Washington State Court of Appeals granted a writ of prohibition on the grounds of collateral estoppel, finding that retrial of the defendant would require relitigation of the same fact determined adversely to the State in the previous trial -

i.e., whether it was the defendant who had mailed the bomb. The Supreme Court of Washington reversed, noting that since certain additional evidence would be admissible in the second trial the issue of identity had not been "fully litigated."

The United States Supreme Court reversed, holding that the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence.

Another case, United States v. Nash, 447 F. 2d 1382 (4th Cir., 1971), held that where during her trial for mail theft the defendant claimed that she had obtained the marked quarters from a change machine and not from a letter as testified to by the postal inspectors, and she was acquitted, the government was estopped from prosecuting her for perjury in respect to her testimony concerning the source of the quarters.

These cases suggest that prosecutors should be alert to the applicability of the doctrine of collateral estoppel to relitigation of adjudicated issues, whether they emerge in subsequent trials for the same or distinct offenses.

Right to Representation by Retained Counsel in Indian Tribal Courts

The United States district court for the District of Idaho, in Towersap v. Fort Hall Indian Tribal Court, et al, Civ. No. 4-70-37, held that Indians are entitled to retain professional counsel of their choice when appearing before tribal courts on criminal charges. The Court reasoned that the limitations imposed on tribesby 25 U.S.C. 1302 are essentially the same as those imposed on the United States and the state governments. Under the Sixth Amendment, counsel has been defined as a member of the bar in good standing. Thus, plaintiffs and all other persons similarly situated are entitled to the assistance of retained professional counsel of their choice when appearing before the tribal court on criminal charges.

(Criminal Division)

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN AND CLAYTON ACTS

GYPSUM WALLBOARD COMPANIES CHARGED WITH VIOLATION OF SECTION 1 OF THE SHERMAN ACT AND SECTION 4A OF THE CLAYTON ACT.

United States v. United States Gypsum Company, et al., (Civ. C-71-2467; December 30, 1971; DJ 60-12-141)

On December 30, 1971, the United States filed a complaint in the United States district court for the Northern District of California under Section 4A of the Clayton Act (15 U. S. C. §15a) against seven major manufacturers of gypsum products to recover damages resulting from an alleged price-fixing conspiracy in violation of Section 1 of the Sherman Act (15 U. S. C. §1). Named as defendants were United States Gypsum Company, National Gypsum Co., Kaiser Gypsum Co., The Flintkote Co., Fibreboard Corp., The Celotex Corp. and Georgia-Pacific Corp.

The complaint charges that beginning some time prior to 1960 and continuing thereafter until at least January 1, 1968, the defendants conspired to raise, fix, maintain and stabilize the prices of gypsum wallboard and plaster. As a result of the illegal conspiracy, the complaint asserts that the United States has been compelled to pay substantially higher prices for gypsum wallboard and plaster and for buildings containing these products than it would have paid but for the conspiracy. The complaint also asserts that as the result of the conspiracy the United States has had to provide state and local governments with greater funds for the purchase of gypsum wallboard and plaster or for the purchase of buildings containing these products than would have been paid under competitive conditions. The complaint prays for damages in an amount which is presently undertermined. The case has been assigned to Judge Zirpoli.

Staff: John C. Fricano, Rodney O. Thorson, William G. Kelly, L. John Schmoll and Gordon Noe (Antitrust Division)

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## CIVIL DIVISION
Assistant Attorney General L. Patrick Gray, III

## COURTS OF APPEALS

### CONSTITUTIONAL LAW -- ESTABLISHMENT CLAUSE

COURT OF APPEALS REFUSES TO SUMMARILY REVERSE DISTRICT COURT DECISION UPHOLDING CONSTITUTIONALITY OF CHRISTMAS PAGEANT.

Allen v. Morton (C. A. D. C., No. 71-1909, December 17, 1971, D. J. 145-7-394)

This suit was brought by the ACLU to enjoin, on Establishment Clause grounds, the use of a creche scene in "The Christmas Pageant for Peace" which is co-sponsored by the National Park Service and the Washington Board of Trade. Each Christmas season the Pageant presents a variety of displays -- a National Christmas Tree, fifty-seven smaller trees, representing fifty states and seven territories, a burning Yule log, a pen of eight live reindeer, a stage for carolers, and the disputed creche scene. Illuminated plaques accompanying the displays state that the government has no intention to foster or profane any religion. The district court entered judgment for the government, finding that the religious impact of the creche was insubstantial and that no stamp of official approval attaches to its religious content.

The District of Columbia Circuit denied the ACLU's motion for summary reversal of the district court's decision. In so doing, the Court declined to pass on the case in time to affect the 1971-1972 Pageant. The ACLU's appeal, which presents a recurrent controversy, is now pending in the Court of Appeals.

Staff: Alan S. Rosenthal (Civil Division)

### REVIEW OF MILITARY CORRECTION BOARD'S DECISION

THIRD CIRCUIT DENIES RELIEF TO SERVICEMAN SEEKING REVIEW OF AIR FORCE'S REFUSAL TO CHANGE HIS UNDESIRABLE DISCHARGE.

Haines v. United States, (C. A. 3, No. 18-511, decided December 30, 1971, D. J. 145-14-635)

The plaintiff, Haines, had been given an undesirable discharge from the Air Force in 1956, predicated upon his poor service record, including two convictions in civil courts, two in military courts, five reported

reprimands for disorderly conduct, and two punishments for fighting. In lieu of facing disciplinary board action, Haines signed an application for a discharge acknowledging the existence of the charges against him and stating that he realized the discharge would be under other than honorable conditions.

In 1968, plaintiff sought review of his discharge before the Air Force Review Board, and then before the Correction Board, alleging that he had been coerced into signing the application for a discharge and that he had signed it while intoxicated. Following rejection of his contentions, Haines brought this action in the district court. The district court denied relief, and the Court of Appeals affirmed.

The Court of Appeals held that review of the decisions of the Correction Board is limited to a consideration of whether the Correction Board's action was arbitrary or capricious. The Court concluded that the plaintiff had not shown, on the basis of the evidence he submitted to the Correction Board, that the Correction Board had indicated it was willing to accept any further evidence plaintiff might present.

Staff: Robert Kopp (Civil Division)

## TORTS -- INDEMNITY

INDEMNITY PROPERLY AWARED UNITED STATES AGAINST STATE OF ILLINOIS EVEN THOUGH ORIGINAL PLAINTIFFS COULD NOT HAVE SUED STATE DIRECTLY.

United States v. Illinois v. Lloyd's of London, (C. A. 7, Nos. 18558, 18559, decided December 8, 1971; D. J. 157-23-984; 157-25-82; 157-25-87; 157-25-88)

This tort action was brought on behalf of four individuals killed or injured at the 1966 Illinois State Fair, when a portion of a catwalk atop the grandstand was pulled free from the roof during a performance by the Army's Green Berets. The United States filed a third- party claim against the State for indemnity, contending that the Green Berets had been at most passively negligent in their performance, whereas the State's employees had (1) erroneously represented that the catwalk was welded to the roof, (2) refused to permit inspection of the connection, and (3) denied the Green Berets' permission to anchor the rope elsewhere. The district court awarded the plaintiffs $650, 000, held Illinois liable to indemnify the Government, and ordered Lloyd's of London (which had insured the auto races at the fair) to indemnify Illinois for $5000, 000.

On appeal by the State and Lloyd's, the Seventh Circuit affirmed the judgment of indemnity against the State, but reversed the judgment against

Lloyd's holding on the latter point that the Green Beret performance has no relation to the insured auto races. The Court rejected Illinois' arguments that the United States could not sue the state because the Eleventh Amendment and the Illinois Constitution would bar the original plaintiffs' suit against the State. The Court then found that the record supported the factual findings on which indemnity had been based under Illinois law.

Staff: William D. Appler (Civil Division)

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## CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

## COURTS OF APPEALS

### FLAG DESECRATION

COURT UPHOLDS FEDERAL FLAG DESECRATION STATUTE AGAINST CONSTITUTIONAL ATTACKS ON VAGUENESS, OVERBREADTH, AND THE FIRST AMENDMENT; FEDERAL INTEREST DEFINED. 18 U.S.C. 700.

Joyce v. United States (C.A. D.C., No. 23,784, Oct. 26, 1971; D.J. 95-763-15)

The Court of Appeals for the District of Columbia affirmed a flag desecration conviction, which the defendant had attacked on the grounds that the statute is unconstitutionally vague, overbroad, and violative of the First Amendment and that the evidence did not support the verdict. The prosecution arose out of an incident at a public parade where the defendant ripped a small American flag to insert it on his finger and wave his hand in a V-sign.

The Court ruled that Congress intended to give the critical words in the statute their common dictionary meanings. The statute prohibits anyone from knowingly casting contempt upon the flag by publicly mutilating, defacing, defiling, burning, or trampling upon it. A person of ordinary intelligence could easily understand the physical conduct which is prohibited, said the Court, in reaffirming its earlier holding on the vagueness issue in Hoffman v. United States, 445 F. 2d 226, 229 (1971). In regard to the overbreadth argument, the Court ruled that the statute is aimed at proscribing conduct alone and is not made overly broad by the possibility that the conduct it prohibits frequently may be accompanied by speech. The Court saw no real threat of the criminal sanction deterring the protecting right since the statute is very narrowly drawn and it can be assumed it will be reasonably enforced according to its terms. The Court also expressly rejected the idea that the First Amendment guarantees everyone the freedom to desecrate the flag if he intends to convey some idea in so doing.

The Court also ruled that the defendant's First Amendment rights were not abridged. In so holding, the Court found that there is a valid, definable federal interest in protecting the American flag which is sufficient to overcome any minimal restraints that might be placed on the defendant's actions. The Court concluded that Congress has the power to enact legislation to protect the national flag as an incident of sovereignty which inheres in the

Government of the United States as a nation. The power to legislate is an exercise of the implied powers of the "necessary and proper" clause of the Constitution. The government's power to further the people's interest by designation of the flag as the nation's symbol also implies the power to protect it against public acts which physically damage and degrade it. In balancing this interest against any possible restraints on free speech, the Court found that Congress had acted properly. Since the Act is not aimed at the suppression of speech and since it imposes only the smallest restraints upon "communication," the fact that those who utilize the flag in a prohibited manner do so with the purpose of conveying a particular idea was found to be irrelevant. In arriving at its decision, the Court at the outset recognized that the incident involved in the case did not involve pure speech and reiterated prior decisions which have held that physical acts do not necessarily invite the same broad protection under the First Amendment.

Turning to the facts of the case, the divided court voted to affirm the conviction. The majority sustained the jury verdict on the basis that ripping of the flag in public under the circumstances was alone sufficient to constitute a public, contemptuous mutilation of the flag, without reference to the fact that the defendant later inserted the small flag on his finger and waved it.

Staff: Former United States Attorney Thomas A. Flannery; Assistant United States Attorneys John Ellsworth Stein, John A. Terry and John F. Evans (D. D. C.)

## NARCOTICS AND DANGEROUS DRUGS

### COMPREHENSIVE DRUG ABUSE AND PREVENTION ACT SENTENCING PROVISIONS NOT APPLICABLE TO CONVICTION OBTAINED PRIOR TO MAY 1, 1971

United States v. Anthony Fiotto, et al. (C. A. 2, January 4, 1972 Nos. 71-1651, 71-1689, 71-1690; D. J. 12-51-1687)

On January 4, 1972 a panel of the Second Circuit affirmed the conviction of Fiotto for violation of 21 U. S. C. 173, 174 and for conspiracy to violate these sections. Also affirmed was Fiotto's sentence imposed pursuant to 26 U. S. C. 7237 for a violation of 21 U. S. C. 173, 174.

Fiotto was convicted for violations of 21 U. S. C. 173, 174 that occurred between December, 1966 and May, 1970. He was sentenced after May 1, 1971, at which time 21 U. S. C. 173 and 174 and 26 U. S. C. 7237 had been repealed by the Comprehensive Drug Abuse Prevention and Control Act of May, 1971. (21 U. S. C. 801 et seq.)

On appeal Fiotto claimed he should have been sentenced under the provisions of 21 U.S.C. 841 for a violation of 21 U.S.C. 173 and 174 rather than under 26 U.S.C. 7237. The Second Circuit did not agree with this contention, which is supported by the result reached in United States v. Stephens (9th Cir., Docket No. 71-1884 (Sept. 29, 1971)).

In holding contrary to Stephens, the Court found that the Act repealing 26 U.S.C. 7237 and 21 U.S.C. 173, 174 provided:

> "Prosecution for any violation of law occurring prior to . . . [May 1, 1971] shall not be affected by the repeals . . . [of former 173, 174 and 7237] . . . or abated by reason thereof."

Thus, if a defendant is tried and convicted for violation of 21 U.S.C. 173, 174 he must be given a mandatory minimum sentence under 26 U.S.C. 7237.

Staff: United States Attorney Whitney North Seymour, Jr.
Assistant United States Attorney Charles B. Updike
(S.D. New York)

## PERJURY

A HALF-TRUTH CONTAINING A LIE MAY SERVE AS THE BASIS FOR A CHARGE OF PERJURY UNDER 18 U.S.C. 1621.

United States v. Samuel Bronston, (C.A. 2, No. 71-1533, December 10, 1971; D.J. 51-51-1040)

In the Bronston case, the Second Circuit held that a charge of perjury may be predicated upon an unresponsive answer to an unambiguous question where that answer contains both a truth and a lie.

During a hearing before a referee in bankruptcy seeking an accommodation of Bronston's film producing company under Chapter XI of the National Bankruptcy Act, Bronston had been asked whether he had ever had any accounts in Swiss banks. To this question, Bronston replied, "No, sir, (but) the company had an account there for six months, in Zurich." At trial, the prosecution established that Bronston had opened a personal account at the International Credit Bank in Geneva in October 1959, and that this account had remained open until 1964. Bronston was convicted and appealed.

The Second Circuit, distinguishing several cases, first held that the question "Have you ever had ---" adequately put Bronston on notice that the referee was interested in knowing of the existence of personal accounts, and accordingly the Court held that this question was sufficiently unambiguous to support a charge of perjury. The Court then went on to hold that the fact

Bronston had included in his reply a truthful assertion concerning the existence of a corporate Swiss account in Zurich did not take the case outside the scope of 18 U. S. C. 1621 in view of the fact that this reply also contained, either expressly or by implication, a lie concerning the existence of personal Swiss accounts.

Staff: United States Attorney Whitney N. Seymour, Assistant United States Attorneys Walter M. Philips, Jr. and Harold F. McGuire, Jr. (S. D. N. Y.)

## RECEIPT AND CONCEALMENT OF A STOLEN MOTOR VEHICLE (18 U. S. C. 2313)

UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT

United States v. Baker, (C. A. 5, No. 71-1351, November 30, 1971; D. J. 26-17-180)

Appellant Baker contested the admissibility of evidence disclosing the vehicle identification number (VIN) where such evidence was obtained by a Government agent using a pen knife to open the locked door of a truck. 1/

In August of 1969 a 1969 pickup truck was stolen in Foley, Alabama, and immediately delivered to one Messick in Florida who had knowledge of its having been stolen. Appellant Baker has recently had his own 1966 automobile stolen and had asked Messick to secure for him a 1970 truck. In November of 1969, Messick sold the stolen truck to Baker for $500 cash with no documents of title included.

In March 1971 a local F. B. I. agent contacted Baker to inform him his stolen automobile had been recovered, it being routine for the F. B. I. to talk with the owner-victim upon recovery. Baker was reluctant to talk with the agent and asked that the interview be put off until the following day.

After that interview, the agent spoke with Baker's ex-wife and learned Baker had been driving a pickup truck. The agent then spoke with Baker's girlfriend who advised Baker had told her he was to be visited by someone and that he did not want that individual to see his truck. Baker requested that the girl follow him to a super market lot where he parked the truck and had the girl drive him home, advising her to tell anyone who might ask that she had taken him to see his children.

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1/ The VIN appears on a removable plate, usually attached to the front left door post of a vehicle, and contains digits designating the manufacturer, model, year, and serial number of a vehicle.

The agent had recently been investigating stolen trucks of the same type and proceeded to the supermarket lot. He found the truck and a check on the license number revealed it was registered to an Alabama owner. The truck was locked but, by inserting a pen knife in the vent window, the agent was able to open the door and obtain the VIN. A check with NCIC disclosed that the vehicle bearing that number had been reported stolen.

Baker was indicted for receiving and concealing a stolen motor vehicle, knowing it to have been stolen, in violation of 18 U.S.C. 2313. A jury found him guilty as charged and he was sentenced to 18 months imprisonment.

The appellant contended the opening of the locked truck constituted an unreasonable search and seizure in violation of the Fourth Amendment and as a consequence that the district court erred in failing to grant his motion to suppress the evidence obtained in that search.

The Court cited previous cases holding that inspections of motor vehicles performed by police officers entitled to be on the premises and which in no way damaged the vehicles, limited to determining the correct identification numbers, were not searches within the meaning of the Fourth Amendment and that, alternatively, if such inspections did constitute Fourth Amendment searches, no search warrant was necessary because such inspections were reasonable, United States v. Johnson, 5th Cir., 1969, 413 F. 2d 1396, aff'd en banc, 431 F. 2d 441 (1970). The Court noted that the case have explicitly avoided passing on the Fourth Amendment status of a vehicle identification check of a locked vehicle.

The Court went on to say that assuming, but not deciding, that a check of the VIN of a locked vehicle constitutes a "search" protected by the Fourth Amendment, this search was not conducted in violation of the Fourth Amendment. The Court held that the procedure involved in this case, even assuming it to be a search, was based on probable cause.

The facts of the case gave the agent reliable information that the vehicle had been stolen and gave him probable cause to enter the vehicle for the limited purpose of checking the VIN in order to identify the vehicle. First, the agent became suspicious when Baker was reluctant to be interviewed concerning the recovery of his automobile. Secondly, the agent had been investigating stolen pickup trucks for some time. Also, the agent's conversation with Baker's girlfriend revealed an attempt by Baker to conceal a pickup truck from the agent. Finally, a check of the license number on the truck revealed that the plates were registered to one other than Baker. With this fact pattern giving the agent probable cause to enter the vehicle to check the VIN, the motion to suppress was properly denied and the judgment was affirmed.

Staff: United States Attorney William Stafford (N. D. Florida)

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## INTERNAL SECURITY DIVISION
Assistant Attorney General Robert C. Mardian

DISTRICT COURT

### EXECUTIVE ORDER 11605

COURT GRANTS GOVERNMENT MOTION TO DISMISS ACTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION CLAIMING EXECUTIVE ORDER 11605 AND ATTORNEY GENERAL'S LIST ARE UNCONSTITUTIONAL.

American Serviceman's Union, et al. v. John N. Mitchell, et al. (Civ. 1776-71; District of Columbia; D. J.)

Executive Order 11605, signed by President Nixon on July 2, 1971, amends Executive Order 10450 pertaining to the security requirements for Government employment. The new Order delegates to the Subversive Activities Control Board the function of conduction administrative hearings and making determinations concerning which organizations should be added to or removed from the so-called Attorney General's List.

The complaint before the district court was brought by nine different organizations seeking a preliminary injunction and a declaratory judgment that the entire listing procedure is unconstitutional and that the delegation to the Subversive Activities Control Board violated the separation of powers doctrine in that the President did not have authority to confer such responsibilities on a quasijudicial body set up by Congress. Six of the organizations had never been proceeded against under the provisions of Executive Order 10450 or as amended by Executive Order 11605. Three organizations had been designated under Executive Order 10450 prior to the amendment.

The court noted that the enforcement policies under the Order have not yet "jelled" and that legislative authority is presently being sought for the Board to secure subpoena power in implementation of the Order and for appellate court review. Within this posture and absent an adequate showing of irreparable injury or a valid "chilling effect" to any of the complainants, the court held that the adjudication should be stayed until the controversy develops at least to a point where a judgment can be based on something more than mere speculation and in adequate factual context.

Staff: Oran H. Waterman (Internal Security Division)
Jack Goldkland (Office of Legal Counsel)

# FOREIGN AGENTS REGISTRATION ACT

## OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S.C. 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

During the first half of January of this year the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Cylon Tourist Board, New York City, registered as agent of its parent Board in Colombo. Registrant will engage in public relations and promotional activities to promote Ceylon's tourist attractions and facilities.

Sales Northwest of Australia, Kent, Washington, registered as agent of Government Aircraft Factories, Victoria, Australia. Registrant will act as general representative in the United States in connection with aerospace manufacturing sales.

Nierenberg, Zeif & Weinstein, New York City registered as agent of the Bangla Desh Government, Dacca. Registrant will act as public relations and legal counsel.

Porter International Company, Washington, D.C., registered as agent of TASS, official news agency of the Soviet Union. Registrant will act as editor and publisher of the publication ECOTASS.

Gleason Associates, Inc., San Francisco, registered as agent of El Salvador Institute of Tourism and SITCA. Registrant will conduct a public relations and advertising campaign to promote tourism.

Berger, Olson, Beamont Inc., New York City, registered as agent of the Irish Tourist Board and the Government of Israel Tourist Office. Registrant will conduct an advertising campaign to promote tourism.

New Zealand Government Tourist Office, Los Angeles, registered as agent of its parent in Wellington. Registrant will, through public relations and advertising, conduct a tourist promotion campaign.

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## LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

## COURTS OF APPEALS

### ENVIRONMENT

REFUSE ACT'S "DISCRETION" REFERS TO SENTENCING, NOT REWARD, PROVISION; ENTITLEMENT TO INFORMER'S FEE IS FACTUAL ISSUE.

Arnold D. Miller, et al. v. United States (C.A. 4, No. 71-1370, Dec. 15, 1971; D.J. 90-5-1-1-236)

Plaintiffs reported an oil spill into the Kanawha River by the Chesapeake and Ohio Railroad Company to the Army Corps of Engineers. The spill had, however, been previously reported by the Coast Guard. The railroad was subsequently prosecuted and fined $500 on its plea of nolo contendera. At the hearing, in the absence of the plaintiffs, the trial court ruled that no part of the fine should be awarded to them. Thereupon, plaintiffs made a motion to receive additional evidence to support their claim and a motion to reconsider its denial. The motion to submit further evidence was granted but the motion to reconsider was summarily denied, resulting in the appeal.

The Fourth Circuit reversed, construing the reward provision of the Refuse Act, 33 U.S.C. sec. 411, as not being discretionary in nature. The Court held that the phrase "in the discretion of the Court" in the Refuse Act refers to the sentencing provisions, not to the reward provision. The Court stated that, when a fine is imposed under the Refuse Act, the trial court's only function is to determine the factual question of whether the person claiming one-half of the fine as reward gave information which led to the conviction. If so, then one-half the fine must be paid to such person; if not, then the entire fine goes to the Government.

In reversing, the Court noted that a claim to the reward under the Refuse Act requires the protection of both procedural and substantive due process under the Fifth Amendment and therefore remanded the case for a hearing on the factual issue of whether the claimants' information led to the conviction in the instant case.

Staff: United States Attorney M. Warren Upton; Assistant United States Attorney Wayne A. Rick, Jr. (S.D. W.Va.)

## SOVEREIGN IMMUNITY

### SOVEREIGN IMMUNITY NO BAR TO JUDICIAL SALE TO SATISFY MORTGAGE LIEN ON PROPERTY PATENTED BY MISTAKE AND SUBSEQUENTLY RECOVERED IN QUIET TITLE PROCEEDINGS

United States v. Desert Gold Mining Co., et al. (C.A. 9, Nos, 71-1356 and 71-1499, Aug. 11, 1971; D.J. 90-1-18-605)

Edwards loaned $100,000 to Desert Gold Mining Co. (now defunct) and accepted as security a mortgage covering eight patents issued to Desert Gold by the United States. The United States thereafter successfully quieted title first against Desert Gold on the stipulated ground of mistake in the issuance of the patents and thereafter against Edwards, who claimed bona fides, on the ground of usury in the mortgage transaction. United States v. Desert Gold Mining Co., 282 F. Supp. 614 (D. Ariz. 1968). Edwards appealed on several grounds. The Ninth Circuit held that the United States was not entitled to raise the defense of usury in the noted and mortgage since the Federal Government as patentor was not, under Arizona law, in privity with Desert Gold. United States v. Desert Gold Mining Co., 433 F. 2d 713 (1970). The Court remanded the case to the district court, saying (433 F. 2d at 716):

> We therefore reverse and remand to the district court with the direction that judgment be entered quieting title in the United States subject to the mortgage held by appellant Marlin K. Edwards.

On remand, the Government successfully opposed the entry of a judgment calling for sale of the subject property to satisfy the mortgage lien. The district court entered judgment in the language of the Court of Appeals opinion, supra. Edwards again appealed and also filed a petition for writ of mandamus. While denying the petition, the same panel of the Ninth Circuit entered a per curiam order which: (1) vacated the district court judgment; (2) declared Edwards mortgage lien to be superior to the United States' title to the subject property; (3) quieted title to the property in the United States save for Edwards' lien; (4) declared Edwards' right to cause judicial sale of the property if the United States does not otherwise satisfy the mortgage debt within 120 days; (5) prescribed the manner in which such sale should be conducted; (6) provided for delivery of deeds and distribution of proceeds from the sale; and (7) quantified the amount (in excess of $125,000) Edwards could recover under the mortgage lien. No opinion was written and the order did not discuss the doctrine of sovereign immunity. While the decision is believed to be wrong (see United States v.

Alabama, 313 U.S. 274 (1941)), certiorari was not sought, primarily because of the unusual nature of the case.

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## INDIANS; JURISDICTION

TRIBAL ENROLLMENT PRACTICES; JURISDICTION UNDER INDIAN BILL OF RIGHTS; SUFFICIENCY OF JURISDICTIONAL FACTS

Slattery v. Arapahoe Tribal Council, et al.; Pinnow v. Shoshone Tribal Council, et al. (C.A. 10, Nos. 583-70, 584-70, Dec. 30, 1971; D.J. 90-2-4-149, 90-2-4-147)

The Arapahoe and Shoshone Indian Tribes enacted ordinances requiring that one must possess at least one-quarter degree of Indian blood in order to be enrolled as a member of either tribe. The Secretary of the Interior approved the enrollment ordinances. Subsequently, two tribeswomen applied for the enrollment of their children. Both possessed one-quarter Indian blood but were married to non-Indians. Consequently, the children were of one-eighth Indian blood. Their enrollment was denied.

In consolidated actions in federal court, the Indian mothers sued their tribal governing bodies and the Secretary, alleging that to deny their children's enrollment was "arbitrary" because each tribe had on other occasions enrolled persons of less eligibility under the quarter-blood enrollment standard. The relief sought was in the nature of mandamus compelling the tribes, under the Secretary's supervision, to "institute and implement fair, just, and legal Tribal ordinances, laws and rulings whereunder fair and impartial treatment shall be given to all * * *."

In the complaint, federal jurisdiction was predicated on the 1968 Indian Bill of Rights, 25 U.S.C. secs. 1301-1303. After considering affidavits submitted by both sides detailing various enrollment decisions by each tribe, the district court dismissed the actions for lack of federal jurisdiction on.

The Court of Appeals affirmed, stating that prior to the 1968 enactment of the Indian Bill of Rights, the federal courts unquestionably lacked jurisdiction over an Indian tribe's determination of its own membership. But after passage of the Indian Bill of Rights, it "may well be that tribal enrollment practices are not subject to the statutory requirements of equal protection and due process as provided in 25 U.S.C. § 1302(8)." However, the Court declined to decide this issue, because the allegations of fact in

the record disclosed no denial of equal protection or due process to "bring into play the Indian Bill of Rights." The Court observed that the record showed that both tribes, in acting on enrollment applications, complied with enrollment ordinances conceded as valid, and that no overall arbitrary or discriminatory pattern in granting or denying enrollment had been shown. Consequently, on the facts alleged, the Court of Appeals concluded that federal jurisdiction did not exist.

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DISTRICT COURT

MANDAMUS

DISMISSAL OF ACTION SEEKING CONCESSIONER'S PERMIT; DISCRETION.

Harley J. Snyder v. Rogers Morton, et al. (D. Colo., No. C-3168, Dec. 10, 1971; D. J. 90-1-4-327)

The plaintiff in 1968 was issued a concessioner's permit to operate a marina within a federal recreational area which provided that it could be revoked at any time in the discretion of the Superintendent of the recreation area. The permit was issued for four years and no right of renewal was granted.

The permit was cancelled, and this action was filed seeking an order directing the issuance of a new permit. In granting the federal defendants' motion to dismiss, the court held that the superintendent's action of cancellation was a discretionary (and not a ministerial) action and an action in the nature of mandamus under 28 U.S.C. sec. 1361 was not proper.

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