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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

United States Attorney H. M. Ray and his staff, Northern District of Mississippi, were commended by Henry E. Petersen, Assistant Attorney General, for his handling of air security matters within his district. In particular, Mr. Petersen commended as an example for other U. S. Attorneys to follow, Mr, Ray's agreement with the local authorities for the latter to patrol airports within his district during all flight arrivals and departures.

United States Attorney James M. Sullivan, Jr., and his staff, Northern District of New York, were commended by Henry E. Petersen, Assistant Attorney General, for fostering the active cooperation of state, county, and Syracuse City police in order to secure the Syracuse airport and effectuate operation of the FAA "Airport Plan" at that airport. They were also commended for their generally keen interest and cooperation in the implementing of the Anti-Hijacking Program.

POINTS TO REMEMBER

Assaults on Federal Officers

The Criminal Division has noted a substantial increase in the number of incidents in which Federal officers have been assaulted while performing their official duties. Such assaults occur on a frequent basis and involve employees and agents of Federal agencies having jurisdiction to investigate a wide variety of Federal violations. As the regulatory powers of these agencies expand, we can expect that enforcement and investigative activities will also increase.

In order to insure that such enforcement activities will continue to function in an orderly and unhampered manner, it is the Department's policy to vigorously prosecute persons who assault, intimidate, or interfere with a Federal officer who is performing his official duties. General Crimes Section attorneys who are familiar with the relevant statutory violations may be contacted at (FTS) 202-739-2346 for assistance.

Airport Security

The Attorney General, in his telegram of July 14, 1972 to all U.S. Attorneys, requested that when the requirements of airline and/or airport security so demanded, they urge responsible state or local law enforcement authorities to provide uniform police to supplement the efforts of airline and airport personnel in the field of security.

An example of this type of desired cooperation between local authorities and airline and airport personnel has recently occurred at the Cleveland, Ohio airport. A 36 man Ports and Harbors Unit was established to be assigned and quartered at the airport. The establishment of this special unit at the airport is cited as an example for other U. S. Attorneys to consider.

(Criminal Division)

Coordination with Selective Service Regional Attorneys

Our letter of May 10, 1972, to all United States Attorneys pointed out the necessity of contacting the appropriate Selective Service Regional Counsel rather than the State Director to expedite the resolution of litigation matters which may require coordination and consultation with the Selective Service System. We have been advised that some Assistant United States Attorneys handling selective service cases continue to deal directly with State Directors on such matters.

The Selective Service System has advised that a copy of Chapter 642 of the Registrants Processing Manual has been distributed to each United States Attorney. This sets out in detail the responsiblities of the various

elements in the System with respect to violators, and when compared and read in conjunction with our aforementioned letter, should make the guidelines very clear. If additional copies of Chapter 642 are needed in your office, such request should be made to the Regional Attorney.

Military Selective Service Act
Prosecution for Failure to Register

It has been brought to our attention that, in some instances, men who have failed timely to register under the provisions of the Military Selective Service Act have submitted to registration after it seems apparent that their lottery number will not be reached in the order of call.

When an individual is reported for consideration of prosecution for failure to register, it should first be determined whether, if he had timely registered, he would have been assigned a random sequence number under the drawing applicable to his age group that was, or will be, reached in the order of call, and, if so, whether he can now be processed and ordered for induction. If he has avoided processing by not being timely registered and cannot now be processed, criminal proceedings should be initiated. In such instances, you should bring to the attention of the court the fact that the defendant did not register until information disseminated by the Selective Service System indicated that the random sequence number assigned to men born on the date of his day of birth, for all practical purposes, assured him that he would be immune from being called for induction.

The registrant's subsequent compliance with the law does not absolve the initial violation. United States v. Weissman, 434 F.2d 175; cert. denied, 401 U.S. 982; United States v. Owens, 431 F.2d 349; United States v. Moriarity, 319 F. Supp. 177.

(Internal Security Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

TRADE ASSOCIATIONS CHARGED WITH RESTRAINT OF COMPETITION.

United States v. The Material Handling Institute, Inc., et. al. (Civil 22-659; August 10, 1972; DJ 60-369-15)

On August 10, 1972, a civil antitrust suit was filed in the U.S. District Court in Pittsburgh charging six trade associations, headquartered in Pittsburgh, Pennsylvania, with combining and conspiring to restrain competition of material handling equipment manufactured in the United States and foreign countries.

Named as defendants were the Material Handling Institute, Inc., Hoist Manufacturers Institute, the Industrial Truck Association, Rack Manufacturers Institute, Monorail Manufacturers Association, and Crane Manufacturers Association of America, Inc. The defendants are trade associations for more than 350 manufacturers of a wide range of material handling equipment. In 1970, total value of such foreign and domestically manufactured equipment sold in the United States was in excess of $2 billion.

The complaint alleges that the defendants have agreed, in violation of Section 1 of the Sherman Act:

--that members of defendants refrain from manufacturing material handling equipment in foreign countries for sale in the United States and refrain from acquiring for sale in the United States such equipment manufactured in foreign countries;

--that defendants have effected this restraint by restricting eligibility for membership in their trade associations to firms which manufacture within the United States not less than 75 percent of all material handling equipment sold by such firms in the United States; and

--that the members of defendants refrain from exhibiting foreign manufactured material handling equipment at trade shows sponsored by the Material Handling Institute.

According to the complaint, these agreements have suppressed competition between foreign and domestically manufactured material handling equipment and denied domestic customers access to foreign manufactured equipment in unrestricted competitive markets.

The suit asks that the defendants be permanently enjoined from continuing any activities of the type charged in the complaint and that the defendants be directed to eliminate their membership qualifications which restrain members from dealing in foreign equipment or manufacturing such equipment in foreign countries.

Staff: Charles R. Esherick, Richard J. Torre, Kelley V. Rea, and Allan S. Hoffman (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

SELECTIVE SERVICE

THIRD CIRCUIT HOLDS THAT PRE-INDUCTION SELECTIVE SERVICE ACTION ALLEGING PROCEDURAL ERRORS IS BARRED BY SECTION 10(b)(3).

Stropple v. Local Board (C.A. 3, No. 71-1593, August 14, 1972, DJ 25-62-2231)

Stropple was classified I-A by his local board. He appealed to the State Appeal Board, which determined that he should be given a II-A (occupational) deferment. The State Director, however, successfully appealed the Appeal Board determination to the Presidential Board, which reinstated the I-A classification. While the State Director's appeal was pending, Stropple submitted new information to his local board. The local board declined to reopen his classification on the basis of this new information and after being advised of the Presidential Board action, ordered Stropple to report for induction.

Stropple then brought this action in the District Court to enjoin his induction, alleging that procedural error had been committed in numerous respects, and particularly that the local board had erred in failing to reopen his classification. The District Court entered judgment for the Government, and the Third Circuit has now affirmed on the ground that the action was barred by Section 10(b)(3) of the Military Selective Service Act. The Third Circuit extensively analyzed the Supreme Court cases, beginning with Oestereich v. Local Board, 393 U.S. 233, and ending with Fein v. Selective Service, 405 U.S. 365, which have interpreted Section 10(b)(3). The Third Circuit concluded that pre-induction judicial review is only to be permitted in "those exceptional situations where the board has been misled by consideration of 'extraneous circumstances' and it is demonstrated to a reviewing court that the registrant is, with 'objective certainty', entitled to the status his board has denied him." The court found that Stropple's claim failed to meet that standard, and that pre-induction judicial review was hence barred. Judge Gibbons dissented.

Staff: Robert E. Kopp (Civil Division)

VETERANS ACT

NINTH CIRCUIT HOLDS THAT NO-JUDICIAL-REVIEW PROVISION IN V.A. STATUTE BARS ACTIONS BY CONSCIENTIOUS OBJECTORS CHALLENGING CONSTITUTIONALITY OF VETERANS READJUSTMENT BENEFITS ACT.

Hernandez v. Veterans Administration (C.A. 9, Nos. 72-1655; 72-1760, August 9, 1972; DJ 151-11-1441; 151-11-1440)

In these actions, plaintiffs challenged the constitutionality of the Veterans Readjustment Benefits Act on the ground that it impermissibly withholds educational benefits from conscientious objectors who have performed alternative civilian service, while making such benefits available to veterans of the armed forces. The Ninth Circuit has just sustained the District Court's dismissal of these actions, and has held that the no judicial review provision in the Veterans Act, 38 U.S.C. 211(a) (which applies to virtually all claims for non-contractual VA benefits) prohibits assertion by the courts of jurisdiction over the present cases. This holding is particularly significant since it applies the jurisdictional bar of Section 211(a) even where the challenge is to the constitutionality of the Veterans Act itself. Moreover, it appears that the present decision will now control the outcome of two other cases pending within the Ninth Circuit, one of which is now on appeal.

Staff: William Kanter (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

FEDERAL JURISDICTION; CONSTITUTIONAL LAW

CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO REGULATE CONTROLLED SUBSTANCES UNDER THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970; ALSO, A 10 YEAR SPECIAL PAROLE TERM IMPOSED ON A PRIOR DRUG OFFENDER IS NOT CRUEL AND UNUSUAL PUNISHMENT.

United States v. Robert Bryant Scales (C. A. 6, No. 72-1032, July 14, 1972; D.J. 12-72-48)

Appellant was found guilty of the unlawful manufacture and possession with intent to distribute approximately 1,000 pounds of marihuana, in violation of Section 401 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. Section 841 (a) (1). The evidence was more than sufficient to support the jury verdict. Since the appellant had a prior conviction in 1967 for the unlawful possession and transfer of marihuana, in fact at the time of his arrest he was out on parole for this prior offense, the District Court sentenced him under 21 U.S.C. Section 841 (b) (1) (B), which provides for increased punishment of persons with prior convictions for drug related offenses. Under this section the District Court imposed an eight year prison sentence with a subsequent special parole term of 10 years. On appeal to the Circuit Court of Appeals for the Sixth Circuit, appellant made three claims: (1) the evidence was insufficient to support the jury verdict; (2) the Government failed to establish that the marihuana was in any way related to interstate commerce so as to confer federal jurisdiction over the crime; and (3) the sentence imposed by the District Court constituted cruel and unusual punishment. The Court of Appeals rejected these claims and affirmed the conviction.

1. The Court summarily dismissed the insufficient evidence claim and went on to consider the interstate commerce challenge. Since the Court found that it was clear from 21 U.S.C. Section 841 (a) (1) that a relationship to interstate commerce need not be proved in order to sustain the conviction, it considered the appellant's second claim as a challenge to the constitutionality of the Act to the extent that it proscribes intrastate activities. Under that challenge the Court pointed to Congress's conclusions that illegal intrastate activities involving controlled substances were substantially affecting interstate commerce and that the effective control of the interstate problem required that the intrastate, as well as the interstate activities be regulated.

Thus, under the rationale of Perez v. United States, 402 U.S. 146 (1971) the Court found that Congress could validly regulate these intrastate activities in order to regulate the interstate traffic of drugs under the commerce clause. Under this holding the Court found that it was powerless to further inquire whether the manufacture and possession of the marihuana with which the appellant was convicted was, in and of itself, related to interstate commerce.

2. Finally, the Court rejected the appellant's claim that his eight year prison term and subsequent 10 year special parole term was cruel and unusual punishment. The Court noted that the sentence was within the penalties prescribed for a person with a prior drug related conviction and that those penalties fully complied with the "precept of justice that punishment for crime should be graduated and proportioned to the offense" (citing Weems v. United States, 217 U.S. 349, 367 (1910)). Thus, the statutory penalties, and in particular appellant's sentence, were not cruel and unusual punishment.

Staff: United States Attorney Thomas F. Turley, Jr.
Assistant United States Attorney Larry E. Parrish
(W.D. Tenn.)

PETTY OFFENSES

RIGHT TO JURY TRIAL OF PETTY OFFENSE CASES.

United States v. Nicholas J. Merrick (C.A. 4, No. 70-1833, May 18, 1972; 459 F. 2d 644; DJ 95-017-16)

Merrick was twice arrested for the unauthorized operation of a taxi cab at Washington National Airport in violation of 14 C.F.R. 159.3 (1971). He declined to be tried before the magistrate and elected to be tried by the district court. In the district court, his motion demanding trial by jury was denied. The court consolidated both cases, tried him without a jury, found him guilty, and imposed two concurrent six-month sentences, suspending all but five days' imprisonment. The United States Court of Appeals for the Fourth Circuit affirmed his conviction.

Merrick argued that he had a constitutional and statutory right to a trial by jury. The Court of Appeals stated that neither Article 3, section 2 of the Constitution, which provides, "The trial of all crimes, except in cases of impeachment, shall be by jury," nor the Sixth Amendment which states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," applies to petty offenses. "Consequently, there is no constitutional right to a trial by jury for a petty offense."
(Citing cases).

The Court noted that, although the Supreme Court has never precisely defined a petty offense, Mr. Justice White said in Baldwin v. New York, 399 U.S. 66 (1970) at page 68:

> ". . . we have held that a possible six-month penalty is short enough to permit classification of the offense as 'petty' . . ."

The legislative definition of petty offense also contains a maximum penalty of six months or a fine of $500, or both. 18 U.S.C. 1.

The court also states that 18 U.S.C. 3401 and 3402, as amended in 1968, and Rule 3 of the Rules of Procedure for the Trial of Minor Offenses before Magistrates demonstrate the intent of both Congress and the Supreme Court to provide for the trial of a petty offender without a jury when he elects to be tried in a district court. See also, United States v. Cain, 454 F. 2d 1285 (7th Cir., 1972).

Note, however, that an accused has a right to the assistance of counsel in any case in which he may be deprived of his liberty regardless of the classification of the offense as a felony or misdemeanor and regardless of whether or not a jury trial is required. Argersinger v. Hamlin, Sheriff, _____ U.S. _____ (1972).

Staff: United States Attorney Brian P. Gettings
Assistant United States Attorney Thomas Moore
(E.D. Va.)

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Internal Security Division
Assistant Attorney General A. William Olson

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 USC 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.

AUGUST 1972

During the last half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

The Costa Rican Board of Trade of New York City registered as agent of Camara de Azucareros and the Textile Association of Costa Rica. A yearly budget for the registrant's operating expenses is shared by the foreign principals. Registrant will engage in and attend all meetings of both national and international organizations concerned with sugar and textiles; will analyze new rulings of the U. S. Government and forward suggestions and procedures to the principal. Registrant will also maintain contact with the Commodity Exchanges and Commodity Brokers and will participate, including the giving of testimony if necessary, in any hearings called by Congress or any branch or agency of the U. S. Government. Dina Dellale filed a short-form registration statement as Executive Director and reports an annual salary of $15,000.

DJJ Commmunications, Inc. of New York City registered as communications and marketing agency for:

Sino-American Export-Imports, Inc.,
Washington, D. C.
Tai Wah Hong, Macau
Tai Sung Investment & Construction Co.,
Macau
Develop Electronic Industrial Co.,
Macau
China National Textiles Import
Export Corp., Peking
China National Chemicals, Import
& Export Corp., Shanghai

China National Animal By-Products
Import & Export Corp, Shantung
China National Native Produce &
Animal By-Products Import &
Export Corp., Peking
Beauty View Publishing Company,
Hong Kong

Registrant has been granted exclusive non-theatrical distribution rights to the film Red Detachment of Women and right of first refusal on all other film products received by the Sino-American Export-Imports, Inc. from the People's Republic of China. This agreement covers a three year period beginning July 19, 1972, with an additional two year extension option. The agreement is terminable after one year if gross receipts do not equal or exceed $25,000. Registrant is to collect the gross proceeds, deduct its distribution expenses, deduct its 50% distribution fee from the net proceeds after expenses and forward the balance to the principal. Registrant is to receive 50% of the profits received from the sale of the products furnished by the other foreign principals. Robert Fillet filed a short-form registration statement as Executive Vice President of registrant with a monthly salary $3,000 and David J. Jacobson filed as President of the registrant and states that he will receive a 50% commission on the profit for his activities.

Scandinavian National Tourist Office of Los Angeles registered as agent of the Iceland Tourist Bureau, Reykjavik. Registrant will promote tourism to Iceland by providing travel information and literature and doing promotional work. Registrant reported receipt of $5,500 for the period May 12 to August 14, 1972. Paul Christensen filed a short-form statement as Manager with an annual salary of $1,552.

Ellis Associates of New York City registered as agent of INFRATUR, a Division of the Bank of Mexico, Mexico City. Registrant is to publicize and promote the eventual tourist flow to Cancun and Zihuantaneho by contacts with travel editors, reporters and carriers, as well as the preparation and distribution of news releases, printed promotional material and advertising. L. Daniel Blank and Peter J. Celliers filed short-form registrations as public relations counsellors; each is to receive a fee of $48,000 per year.

Phillip F. Robbins of New York City registered as agent of the General Directorate of Posts, Stockholm, Sweden. Registrant is to act as representative of the principal for the sale of Swedish definitive and commemorative stamps, first day covers, presentation packs, etc. to stamp dealers in the United States and Canada. Registrant's contract covers the period August 1, 1972 through December 31, 1974 and calls for a fee of $1,250 per month plus

reimbursement of expenses at the rate of $2,000 per year; the stimulating clause in the contract calls for an increase to the registrant of $1,000 if the sales exceed $75,000 after one year, an increase of $2,000 if sales reach $100,000 and an increase of $5,000 if sales reach $200,000.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

ENVIRONMENT

INJUNCTIONS; COVERAGE OF NEPA.

Abraham Sherr, et al. v. John Volpe, et al. (C.A. 7, No. 72-1113, Aug. 4, 1971; D.J. 90-1-3-3178)

This action was brought by a number of apartment tenants against federal and state officials to enjoin construction of a section of a federal highway in Waukesha County, Wisconsin, for failure to file a Section 102 NEPA environmental impact statement (42 U.S.C. sec. 4332(2) (c)).

The State had planned to convert U.S. Highway 16 from a two-lane conventional highway to a four-lane freeway over a length of approximately 12 miles in an area which contains lakes, rivers, watersheds, flood plains, county parks, forests, woodlands and wildlife habitats. The project is part of a federal-aid highway program and is jointly financed and supervised by the Federal Highway Administration and the State. The State determined that no environmental impact statement was required, and the federal officials concurred. Plaintiffs filed suit for declarative and injunctive relief and moved for a preliminary injunction.

The District Court issued a preliminary injunction on December 7, 1971, finding that: (1) the parties had standing to sue, (2) the road fell in the category of a major federal project, (3) the construction of the road would have a significant effect on the local environment, and (4) the terms of NEPA had not been complied with.

The State, contending that an environmental statement was not required, moved for an order suspending the preliminary injunction, which was denied. The State appealed, maintaining that: (1) the project was not a "major federal action," (2) there had been substantial compliance, and (3) the construction of the highway would result in no harm to the environment. The Seventh Circuit affirmed the judgment of the District Court, enjoining further construction of the highway until the requirements of NEPA had been complied with. The finding was that the highway fit within the guidelines of major federal action in accordance with Federal Highway Administration and Procedure Memorandum PPM 90-1, that there had been no substantial compliance, that there had been only minimal consideration of environmental ramifications, and that the issuance of a preliminary injunction did not amount to

a rectroactive application of NEPA because federal approval for the project did not occur until over one year after the effective date of the Act.

Staff: (The United States did not participate in this appeal.)

ENVIRONMENT

TRIAL COURT CLEARLY ERRONEOUS IN ENJOINING SECRETARY OF ARMY AND CORPS OF ENGINEERS TO ISSUE DREDGE AND FILL PERMIT PRIOR TO COMPLETION OF ENVIRONMENTAL CONSIDERATIONS.

Bankers Life and Casualty Co. v. Village of North Palm Beach (C.A. 5, No. 71-3519, Aug. 14, 1972; D.J. 90-1-2-877)

In this action, Bankers Life and Casualty Co. sought declaratory, injunctive, and supplemental relief as to its ownership of certain submerged lands in Florida. Bankers also sought an exemption from obtaining permits from the Village of West Palm Beach, the Board of Trustees of the Internal Improvement Fund of Florida and the District Engineer, Corps of Engineers, the Secretary of the Army, and the United States of America to bulkhead, dredge and fill submerged lands in the navigable waters of Lake Worth, in North Palm Beach, Florida. The district court held that, in substance, Bankers was exempt from the requirements of specific Florida laws, that the Trustees of the Internal Improvement Fund of Florida had acted contrary to state law in registering objections with the Corps of Engineers, and that the District Engineer, Corps of Engineers, the Secretary of the Army, and the United States were enjoined and required to issue to Bankers a permit to fill the submerged lands.

The Fifth Circuit vacated the judgment of the district court and remanded the case with directions to dismiss the suit for injunction against the officers of the Army and the Corps of Engineers based on the reasoning that the trial court clearly erred in enjoining the Secretary of the Army in that the matter was not ripe for court action because the Secretary, who was empowered to act, had not been given an opportunity to perform the duties imposed on him by federal statute, citing Zabel v. Tabb, 430 F.2d 199, 214.

Staff: Thomas L. Adams, Jr. (Land and Natural Resources Division); Assistant United States Attorney Kenneth G. Oertel (S.D. Fla.)

PUBLIC LANDS

EQUITABLE REFORMATION OF PATENT; PUBLIC LAND SUBJECT TO DISPOSITION UNDER MINING LAWS; WITHDRAWAL FROM MINING ENTRY; TAKING BY SEIZURE; NONJOINDER OF INDISPENSABLE PARTIES.

Wood, et at. v. United States (C.A. 9, No. 25, 372, Aug. 21, 1972; D.J. 90-4-10-764)

In 1946 the United States acquired an easement over a mining claim in a national forest, and in 1956 completed construction of a road for the Forest Service on the easement. In 1958, at a contest hearing, the claimants stipulated that the grant would not prejudice the Government's easement. The patent, however, failed to reserve the easement to the United States. Normally unencumbered fee title would have passed to the grantee, subject to the Government's equitable right to reform the deed.

In 1966 a mining lessee of the patentee blocked and damaged the road. The Government brought suit charging the lessee with trespass of its easement, seeking an injunction against further obstruction, damages for road repair, and to quiet its title. The District Court held that the road constructed on the easement was not public land subject to disposition under the mining laws and was, therefore, excluded from the patent, and granted the requested relief.

On appeal, the Ninth Circuit determined that the acquisition of the easement did not amount to a withdrawal of the easement from entry. The continued use of the road under claim of right pursuant to the parties' understanding, however, constituted a taking by seizure of any rights adverse to the Government-use by the United States. The United States obtained the right to possession and use of the area seized at the time of taking. Accordingly, that portion of the judgment granting an injunction and damages was affirmed. Nonjoinder of the patentee with the mining lessee, however, precluded the United States from having its title quieted in this action and to that extent the judgment was vacated.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Jack G. Collins (D. Ore.)

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TAX DIVISION
Assistant Attorney General Scott P. Crampton

DISTRICT COURT

CHALLENGE TO CONSTITUTIONALITY OF WAR IN SOUTHEAST ASIA

ACTION IN THE NATURE OF INTERPLEADER FOR INJUNCTIVE AND DECLARATION RELIEF AS TO THE CONSTITUTIONALITY OF THE TELEPHONE EXCISE TAX DISMISSED FOR LACK OF JURISDICTION.

Darling, et al. v. United States, et al., No. Civil 5-2322 (ED Calif.) August 1, 1972; DJ # 5-11E-191

The plaintiffs are trustees of a fund of money created by a group of citizens who refuse to pay the federal excise tax on their monthly telephone service. Instead an amount equivalent to the tax is allegedly paid into the trust fund. The object of not paying the excise tax is twofold. First, it is maintained that Congress levied the tax to raise revenues for the war in Southeast Asia and second the war in Southeast Asia is unconstitutional. Therefore, it is contended the excise tax is unconstitutional.

As part of the trust arrangement, the plaintiff-trustees were directed by the protesting trustors to obtain a determination of the validity of the excise tax.

Therefore, the instant suit in the nature of interpleader was initiated naming the United States and the American Friends Service Committee as defendants. In addition, the District Director of Internal Revenue was named a defendant to enjoin him from seizing the fund. The object of the suit was to obtain a declaration from the Court that the war was unconstitutional and therefore the tax was invalid. The plaintiffs declared that if the tax was found to be valid, the fund would be remitted to the United States and if found invalid the fund would be remitted to the defendant, American Friends Service Committee.

The United States moved to dismiss on the grounds the Court lacked jurisdiction over the subject matter of the action and the person of the United States and because the plaintiffs lack standing to bring the action. The Court agreed.

The Court held that the lack of diversity between the parties and the failure of the plaintiffs to deposit the funds in the registry of the Court was fatal to the interpleader action under 28 U.S.C. 1335.

The Court also held the action for injunctive and declaratory relief was barred by sovereign immunity and Section 7421(a) of

Title 26 U.S.C. which prohibits the maintenance of any suit which seeks to restrain the assessment and collection of any tax. The Court also rejected as without merit, the claims that the telephone excise tax is unconstitutional because it is a burden on free speech; it discriminates against telephone subscribers or that it imposes irreparable injury by taking property without due process of law. Finally, the Court rejected the request for a three-judge panel to hear the constitutional claims on the ground that a single judge did not have jurisdiction of the action.

See also identical lawsuits filed in the Northern District of California which are presently before the United States Court of Appeals for the Ninth Circuit. Kent v. United States, No. C-71-1195-RHS (N.D. Calif., 1971); Whitaker v. United States, No. C-71-1218 RHS (N.D. Calif., 1971); Collins v. United States, No. C-71-1219-RHS (ND Calif., 1971).

Staff: John M. Dowd (Tax Division)
Richard W. Nichols, Assistant United States Attorney (E.D. California)

FEDERAL AGENCIES AND INSTRUMENTALITIES

FEDERAL SAVINGS AND LOAN ASSOCIATIONS AS FEDERAL INSTRUMENTALITIES HELD TO BE FREE FROM DISCRIMINATORY STATE TAXATION AND TO BE FREE FROM INTERFERENCE TO CARRY OUT FEDERAL POLICIES AND PROGRAMS.

United States, et al. v. State Tax Commission of the Commonwealth of Massachusetts, et al. (D.C. Mass., No. 70-652-C, Civil, August 9, 1972; D.J. 236517-22-9)

Chief Judge Caffrey Filed his Opinion and Judgment on August 9, 1972 declaring that Massachusetts General Laws, Chapter 63, Section 11(a)(2)(ii) are unconstitutional and in violation of Title 12 U.S.C., Section 1464(h) as applied to Federal Savings and Loan Associations. The United States brought this action to test the Massachusetts Bank Excise Tax, alleging that the Act interferes with the operations of federally chartered savings and loan associations and that such federal instrumentalities were being discriminatorily taxed. Six federal savings and loan associations were allowed to intervene for the purpose of seeking additional declaratory relief.

The Court held that the Act violates 12 U.S.C., Section 1464(h) because the statute operates in fact to impose a greater tax on federal savings and loan associations than on similar state-chartered institutions by denying the federal institutions a deduction which is available to the state institutions. In addition, the Court held that the Act operates as a barrier to the free flow of capital from Massachusetts federals to other federal savings and loan

associations in violation of express Congressional direction and that the state statute substantially interferes with the powers, and functions of instrumentalities of the United States in violation of the Supremacy Clause of the Federal Constitution, Article VI, Section 2.

Staff: Charles E. Stratton and George F. Lynch
(Tax Division)

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