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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Special Assistant United States Attorney Arthur Vance, Central District of California, has been commended by Joe D. Jamieson, FBI Assistant Director in Charge, for his outstanding trial performance during the recent court trial of Albert Bishansky.

Assistant United States Attorney John B. Wlodkowski, District of Maine, has been commended by the First Coast Guard District for his handling of litigation involving oil spills in Portland, Maine.

POINTS TO REMEMBER

Conducting Official Acts in Switzerland

The United States Embassy in Bern, Switzerland, has asked this Department to bring to the attention of United States Attorneys certain sections of the Swiss Penal Code which, in substance, prohibit agents acting on behalf of foreign Governments from conducting "official acts" on Swiss soil. These sections, 271 through 274 of the Federal Penal Code, can lead to serious criminal penalties. They prohibit such things as sending official notices through the mails to Swiss citizens or business entities, as well as the actual conducting of civil or criminal investigations on Swiss soil on behalf of the United States Government.

Copies of the texts of the subject Swiss statutes, as well as advice concerning their interpretation, can be obtained from the Fraud Section, Criminal Division. United States Attorneys and Departmental personnel in their employ are instructed to obtain prior approval from the Criminal Division before they make any attempt to conduct an official act or investigation on Swiss soil.

(Criminal Division)

Discovery of Examination Reports and Records of the Office of the Comptroller

The Comptroller of the Currency has advised that in several recent cases, on motion of defense counsel, courts have ordered disclosure of the files of his office. Such action was taken without notice to his office and consequently there was no opportunity for response. It is indicated that the files in question are voluminous and contain information which in the main is unrelated and irrelevant to these law suits. These files are also considered by Congress and the courts to be unavailable to the public and protected by various privileges. (5 U.S.C. 552(b)(8), 12 U.S.C. 481, 12 C.F.R. 4.16(b), Walled Lake Door Company v. United States, 31 FRD 258; Bank of America National Trust and Savings Association v. Douglas, 105 F.2d 100 Overby v. United States Fidelity and Guaranty Co., 224 F.2d 158).

Accordingly, in view of his interest in protecting the confidentiality of the records of his office, the Comptroller requests that United States Attorneys notify the Enforcement and Compliance Section of his office when they become aware that motions or subpoenas have been filed relating to these records.

The United States Attorney will then be supplied with appropriate pleadings relating to the requested discovery.

(Criminal Division)

Necessity of prompt notification to Tax Division of any appeal by defendants in criminal tax cases

All United States Attorneys are advised that prompt notice to the Tax Division of any appeal by a defendant in a criminal tax case continues to be required. It is an established policy to hold related civil tax proceedings in abeyance until the criminal case is closed. As long as the criminal case is on appeal, the Tax Division cannot properly close its criminal file or advise the Internal Revenue Service that it may proceed with the civil tax case. A space for reporting the appeal, as well as the criminal tax conviction, will be found on the Tax Division's status reporting Form TX-22 for use in criminal tax cases.

(Tax Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

COURT AGAIN DENIES REQUEST TO APPOINT A SPECIAL MASTER TO REOPEN 1971 CONSENT JUDGMENT.

United States v. International Telephone and Telegraph Corporation, et al. (Hartford) (Civ. 13-320; January 14, 1974; DJ 60-169-073-3)

On January 14, 1974, Chief Judge M. Joseph Blumenfeld of the District of Connecticut denied the request and suggestion of Messrs. Ralph Nader and Reuben Robertson as amici curiae that the Court, on its own motion, appoint a Special Master to reopen the 1971 consent judgment and examine the circumstances surrounding the negotiation and submission of the settlement.

Judge Blumenfeld noted that two previous challenges to the validity of the judgment had been rejected by the Court and re-affirmed his prior holding that the judgment had been rejected by the Court and reaffirmed his prior holding that the judgment was "carefully tailored to eliminate the aspects of the acquisitions, which the original (Government's) complaints alleged to be illegal." The Court also noted that former Attorney General Richardson, former Special Prosecutor Cox and Assistant Attorney General Kauper, respectively, as well as Judge McLaren had expressed opinions that the consent decree represented a favorable judgment for the Government and was in the public interest.

With respect to the reliance of the amici on disclosures by the Watergate Committee "indicating that certain officials of ITT may have taken steps beyond the limits of propriety in order to persuade members of the Justice Department to enter into negotiations for settlement --", the Court stated: "At this stage, the allegations that the settlement was tainted by an alleged link between the conduct of ITT officers and the terms of the settlement does not impress this Court as having any substance in fact or in law. In spite of being perhaps the most thoroughly scrutinized antitrust settlement ever made, its terms will support absolutely no inference of fraud - none at all."

The Court further observed that it would not be desirable to undertake the "experiment of substituting judicial for political

review of conclusory allegations that elected public officials and their agents have betrayed the public trust" and that Special prosecutor Jaworski had recently stated that his office is "vigorously pursuing the investigation into what has been commonly referred to as the 'ITT matter'."

Judge Blumenfeld concluded by terminating the permission of Messrs. Nader and Robertson to appear as amici curiae.

Staff: Charles F.B. McAleer, Joseph H. Widmar, Elliott H. Moyer and Stanley M. Gorinson (Antitrust Division)

CIVIL DIVISION
Acting Assistant Attorney General Irving Jaffe

COURT OF APPEALS

FREEDOM OF INFORMATION ACT: EXEMPTION 5

C.A.D.C. HOLDS STAFF SUMMARIES OF EVIDENCE IN AGENCY ADJUDICATORY PROCEEDINGS EXEMPT FROM FORCED DISCLOSURE UNDER EXEMPTION 5.

Montrose Chemical Corp. v. Environmental Protection Agency (C.A.D.C., Nos. 73-1443, 73-1444, January 21, 1974, D.J. 145-185-7)

In this Freedom of Information Act case, the C.A.D.C. reversed a district court disclosure order and held that summaries of evidence introduced in agency adjudicatory proceedings, prepared by the agency staff to assist the agency head in reaching his decision, are exempt from forced public disclosure under Exemption 5 of the Act. The case arose out of the Environmental Protection Agency's proceedings to cancel use of DDT. The cancellation hearings produced a record in excess of 10,000 pages. Rather than review the record in its entirety, Administrator Ruckelshaus asked his staff to prepare summaries of the evidence in order to aid him in reaching his decision. The Court of Appeals agreed with the government's contention that the staff summaries were part of the deliberative process protected from disclosure under Exemption 5.

Staff: Stephen F. Eilperin (Civil Division)

NEGOTIABLE INSTRUMENTS: CONTROLLING LAW

EIGHTH CIRCUIT REJECTS CONTENTION THAT U.C.C. SUPPLANTS FEDERAL LAW GOVERNING LIABILITY OF PRESENTING BANK ON GOVERNMENT CHECKS.

United States v. City National Bank (C.A. 8, No. 73-1015, January 21, 1974; D.J. 77-43-466)

The Army Finance Office, without notice of a veteran's death, continued to remit checks to the veteran's commonlaw wife for thirteen years. The widow forged the veteran's endorsement on the checks and cashed them. When the fact of the veteran's death was eventually communicated to the Army following an anonymous tip, Treasury asked that the Justice Department recover from the presenting bank as to all items not barred by the six year statute of limitations. The district court entered judgment in the Government's favor.

On appeal, the bank contended that the U.C.C., which has now been adopted in forty-nine states, should govern rather than general Federal law. The bank argued that the Government had notice of the veteran's death since he died in a VA hospital and his widow was granted a burial allowance. Thus, it contended, the VA's failure to notify the Army Finance Center was negligence which contributed to a forgery, relieving the bank of liability pursuant to §3-406 of the U.C.C. The Eighth Circuit, without deciding whether or not there was negligence on the part of the Government, ruled that Federal law still controlled the bank's liability. See National Metropolitan Bank v. United States, 323 U.S. 454 (1945); United States v. Bank of America National T & S Assn., 438 F.2d 1213 (C.A. 9, 1971). The Court of Appeals gave particular weight to Treasury regulation 31 C.F.R. 202.27(a), which requires the warranty of prior endorsements by the presenting bank.

Staff: Robert Mandel (Civil Division)

UNION ELECTIONS

UNION HELD TO WAIVE 60-DAY TIME LIMIT THROUGH ITS CONDUCT; UNION RULE REQUIRING CANDIDATE FOR OFFICE TO BE AN EMPLOYEE HELD UNREASONABLE AS APPLIED TO AN EMPLOYEE ACTIVELY CONTESTING HIS DISCHARGE.

Peter J. Brennan, Secretary of Labor v. Independent Lift Truck Builders Unicn (C.A. 7, No. 73-1065, January 18, 1974, D.J. 156-24-345)

The Union's constitution and by-laws limited candidacy for office to employees of the Hyster Company. Arthur Wolfe, a union member, was discharged as an employee of Hyster. He timely challenged the discharge and prosecuted an unfair labor relations complaint with the NLRB. While Wolfe's complaint before the NLRB was pending, the Union conducted an election. The Union ruled Wolfe ineligible to be a candidate because it determined he was not at that time an employee of the Company.

On February 1, 1971, Wolfe filed a complaint with the Secretary of Labor contesting his disqualification from union office. On February 3, 1971, the Secretary requested the Union to produce all its records concerning the election. The Union refused and, after the Union declined to honor a subpoena, the Secretary brought an action to enforce the subpoena. On July 8, 1971, the district court entered an order requiring compliance with the subpoena.

On September 7, 1971, the Secretary brought the instant action, asserting that Wolfe had been denied the right to be a candidate in violation of 29 U.S.C. 481(e) of the Labor Management Reporting and Disclosure Act. The district court entered judgment for the Union on the alternative grounds that the complaint was not timely filed within the 60-day limit of 29 U.S.C. 482(b), and that the Union's rule limiting candidacy to employees was reasonable.

The Court of Appeals reversed. The Court found that the Union, through its conduct in wrongfully refusing to provide the records, had tolled the statute of limitations, until at least July 8, 1971, the date of the order enforcing the subpoena. Taking into account the time of the tolling (and the fact that September 7, 1971, occurred following a holiday week-end) the Court found that the complaint had been filed within 60 days. Turning to the merits, the Court held that 29 U.S.C. 481(e) was violated because Wolfe had been denied the right to be a candidate for union office. To the extent the Union's rule barred a discharged employee actively contesting his discharge from eligibility for office, it constituted an unreasonable qualification upon the right to be a candidate.

Staff: Robert E. Kopp (Civil Division)

UNION ELECTIONS

EIGHTH CIRCUIT RULES THAT SECRETARY OF LABOR HAS DISCRETION TO REFUSE TO BRING LAWSUIT UNDER THE LMRDA, NOTWITHSTANDING HIS FINDING OF AN ELECTION VIOLATION OF THAT ACT.

Howard v. Hodgson (C.A. 8, No. 73-1220, January 21, 1974, D.J. 156-42-147)

The Eighth Circuit in this case affirmed the district court's decision, refusing to mandamus the Secretary of Labor to bring an action under the LMRDA to set aside a local union election. The Secretary had investigated a union member's complaint and found a violation of the Act. He had determined, however, that the violation did not effect the outcome of the election, and he therefore declined to bring suit to set aside the disputed election. The Court of Appeals held that mandamus did not lie, because the Secretary has discretion to determine whether a violation of the Act affected the outcome of the election. The court found that the Secretary's exercise of discretionary authority was supported by both the legislative history of the LMRDA and the Department of Labor's regulations, and that "[n]o useful purpose would be served by requiring the Secretary to bring frivolous suits."

Staff: Michael H. Stein (Civil Division)

FEDERAL AGENCY RULEMAKING PROCEDURES

C.A.D.C. UPHOLDS USE OF INFORMAL PROCEDURES BY F.A.A. FOR PROMULGATION OF GENERALLY APPLICABLE RULE INVOLVING COMPLEX TECHNICAL ISSUES.

O'Donnell v. Shaffer, Outland v. Volpe (C.A.D.C., Nos. 71-1892, 72-1511, January 17, 1974, D.J. 88-16-363, 88-16-395)

These consolidated cases tested the F.A.A.'s decision to retain its requirement that commercial air line pilots retire at age sixty. The F.A.A. reaffirmed the "age sixty" rule in March 1972, after conducting informal public hearings in which formal cross-examination was not allowed, although written questions were permitted, together with opportunity for each witness to make additional comments or rebuttal after the opening round of oral statements. Plaintiffs expressly conceeded that these procedures satisfied the A.P.A. and the Federal Aviation Act. They contended, however, that the Due Process Clause required the F.A.A. to conduct an "evidentiary hearing" with formal rights of cross-examination, because the "age sixty" rule rested on complex technical issues about the effects of aging and it had an immediate impact on the livelihood of individual pilots.

The C.A.D.C. disagreed and found that the F.A.A.'s informal rulemaking procedures were constitutionally adequate. The court placed particular emphasis on the fact that the age sixty rule was a generally applicable standard which did not "single out any particular [party] for special consideration based on its own peculiar circumstances." United States v. Florida East Coast Railway, 410 U.S. 224, 246 (1973). The presence of technical issues, a common occurrence in agency rulemaking, did not in and of itself create a need for cross-examination. The Court of Appeals' narrow holding was that in the circumstances of this case, the F.A.A.'s procedures were adequate, since they provided a "framework for principled decision-making."

Staff: Robert E. Kopp (Civil Division)

DISTRICT COURTS

REVIVAL OF UNITED STATES JUDGMENT IN ANOTHER DISTRICT

THE REGISTRATION OF A UNITED STATES DISTRICT JUDGMENT FROM ONE DISTRICT TO ANOTHER DISTRICT CONSTITUTES AND EFFECTIVE REVIVAL OF THE ORIGINAL JUDGMENT.

United States v. Thomas Boyd Kellum and Jane K. Kellum, (S.D. Mississippi, Jackson Division, Civil Action No. 73J-86(N), December 19, 1973, D.J. 105-40-30)

The United States brought this civil action, seeking to revive and renew an original judgment which was entered in the United States District Court for the Northern District of Mississippi on October 28, 1964. The judgment was registered in the S.D. of Mississippi on October 28, 1971, pursuant to 28 U.S.C. 1963. Defendants filed a motion to dismiss on the basis of various statutes of limitation, federal and state, including 28 U.S.C. 2415(a).

The Government contended that its registration of the judgment in the S.D. of Mississippi pursuant to 28 U.S.C. 1963 was tantamount to a judgment on a judgment rendered in a plenary action. We also maintained that the judgment, whether by consent or otherwise, was nonetheless a judgment and that no statute of limitations ever bars a claim of the United States when reduced to judgment.

The district court concluded that the registration of the judgment constituted an effective revival of the original judgment rendered in the Northern District of Mississippi and that defendants' motion to dismiss should be overruled. The court states that its decision on the effects of registration under 28 U.S.C. 1963 was one of initial impression, but that its conclusion was inescapable.

Staff: Joseph E. Brown, Jr. (Assistant United States Attorney)
John A. Jenkins (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

FIREARMS - RECENT DEVELOPMENTS

FIFTH AND SEVENTH CIRCUITS DISTINGUISH BETWEEN "RECEIPT" AND "POSSESSION" OFFENSES UNDER 18 U.S.C. APPENDIX 1202(a).

Two recent Court of Appeals cases, United States v. Walker, (No. S-CR-72-21, decided 11/28/73, 7th Cir.) and United States v. Thomas, (485 F.2d 557, 5th Cir.) point up the continuing importance of distinguishing between "receipt" and "possession" offenses under 18 U.S.C. Appendix 1202(a). This distinction was first made by the Supreme Court in United States v. Bass, 404 U.S. 336 (1971).

In Bass, the Supreme Court held that Section 1202(a) does not make it a crime for a convicted felon merely to possess a firearm. Rather, said the court, the statute requires the prosecution in each case to allege and prove a nexus between receipt or possession of a firearm and commerce. The Court then went on to establish a lower requirement of proof for receipt than possession by stating:

> "The government can obviously meet its burden [of proof] in a variety of ways. We note only some of these. For example, a person 'possesses ...in commerce or affecting commerce' if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of 'receiv[ing]' ...for we conclude that the government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce." 404 U.S. 350.

Thus, under Bass, if the firearm has at any time previously traveled in interstate commerce (typically by crossing a state line) and if the defendant obtained it after June 19, 1968 (the effective date of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968), a receipt under Section 1202(a) is established. This is true even though the gun, after moving in interstate commerce, stops and moves several times in intra-state commerce. See: United States v. Mullins, 476 F.2d 664 (4th Cir. 1973); United States v. Brown, 472 F.2d 1181 (6th Cir., 1973); United States v. Mancino, 474 F.2d 1240 (8th Cir., 1973); United States v. Giannoni, 472 F.2d 136 (9th Cir., 1973). On the other hand, a possession offense under Section 1202(a) can be

proved only with further evidence linking the gun directly to commerce, such as actual possession on an interstate carrier or facility.

In United States v. Walker, the Court of Appeals for the Seventh Circuit, in its first Title VII case, found sufficient commerce nexus for a receipt offense under Section 1202(a) even though "there was no suggestion that defendant had any connection with the interstate shipment" of the firearm. In Walker, the firearm was shipped from Florida to a gun dealer in Illinois. Thereafter, it was sold intrastate on two separate occasions and then stolen from the second buyer. Later, it was found in Walker's possession. In such a case, under the Bass doctrine, a receipt charge can be proved but a possession charge cannot.

In United States v. Thomas, the Court of Appeals for the Fifth Circuit held in that Circuit's first Title VII case, that a revolver which once has traveled in foreign commerce from Germany to the United States has "previously traveled in commerce" for the purposes of a receipt offense under Section 1202(a). Said the Court, "We see no reason to treat foreign commerce differently [from domestic commerce]." 485 F.2d at 558.

For further details regarding the impact of the Bass decision, see U.S. Attorneys Bulletin, Vol. 19, No. 24, November 24, 1971; and Vol. 20, No. 10, May 12, 1972.

Staff: David J. Muchow (Criminal Division) (Tele: 2745); U.S. Attorney Donald B. Mackay (S.D. Ill); U.S. Attorney John L. Briggs; Assistant U.S. Attorney Jeffry R. Jontz (M.D. Fla.)

NARCOTICS

CONTROLLED SUBSTANCES ACT

CONTINUING CRIMINAL ENTERPRISE PROVISIONS UPHELD: FAILURE TO MINIMIZE ELECTRONIC SURVEILLANCE HELD UNIMPORTANT.

United States v. Joseph La Cosa, et al. (C.A. 2, November 23, 1973; D.J. 12-017-51)

Joseph La Cosa, a large scale narcotic trafficker, was convicted in the Southern District of New York of violating the continuing criminal enterprise provisions of the Controlled Substances Act, 21 U.S.C. 848. He was sentenced to imprisonment for 30 years and fined $100,000. On appeal he argued that §848 is void for vagueness. In rejecting this contention and affirming La Cosa's conviction, the Court of Appeals remarked," . . . the

statute might have been more artfully drawn but no language has occurred or has been suggested to us that better expresses the Congressional purpose." La Cosa also contended that wiretapping conducted under authority of a New York state statute at his heroin operation's headquarters was illegal since no attempt had been made to minimize interception of conversations on the two telephones tapped. The Court also rejected this contention, noting that the surveilling agents had made a good faith effort to minimize. In view of the complex, far-flung narcotic conspiracy involved, the Court could not see how any screening procedures could have been effective. (The La Cosa decision is reported (sub nom. United States v. Manfredi) at 14 Crim. L. Rp. 2288 (January 9, 1974.)

Staff: United States Attorney Paul J. Curran
Assistant United States Attorney Walter M. Phillips, Jr.

NARCOTICS

WARRANTLESS ENTRIES FOR ARREST AND SEARCH

United States v. Francisco Bustamanet-Gamez and Abelardo Garcia-Ramirez Criminal Nos. 72-318809; (9th Cir. October 24, 1973; D.J. 12-12-6364).

On August 9, 1972, Customs agents seized 40 pounds of marijuana hidden in a 1964 Pontiac station wagon which had been driven into the United States from Mexico. The driver said he was hired to drive the car to a parking lot near the San Diego Zoo. Agents accompanied him to that location, and set up watch. A short time later the Pontiac was driven to the 11000 block of Calle Jalapa in San Diego by two Mexican-appearing men, who parked the car on the street. Customs agents along with other local law enforcement officials positioned themselves for a discrete surveillance of the Pontiac. After a twenty minute wait, an agent found, to his chagrin, that the Pontiac had disappeared. A check with the other surveillaning officers indicated that the Pontiac had not left Calle Jalapa. An intensive search ensued.

Prior to the Pontiac's disappearance, agents had noticed that the garage doors of three homes on the block were open when they arrived at the scene. Now two of the doors were closed. The owner of one of the garages, at 11262 Calle Jalapa, which was located directly across the street from where the Pontiac was parked, Barsby,[1] had been seen watering his lawn and conversing with a Mexican male who fitted the description of the person who drove the Pontiac to the Calle Jalapa street address.

[1]Barsby was acquitted of similar charges brought against the defendants herein. The defendants were convicted of 21 U.S.C. §§841 (a)(1) and 846.

Barsby had been seen earlier making a U-turn while driving in an apparent attempt to watch the officers position themselves for the surveillance of the Pontiac. Neighbors informed the agents that Barsby was usually at work during that time of day, and that young Mexican males were known to frequent a house near where the Pontiac had been parked. This house could not be identified with any particularity, nor had anyone seen the car driven into a garage.

Finally, one of the agents walked up a short driveway to the garage door at 11262 and heard sounds which he described as "cloth dragging on the cement floor, a grunt, groan and a tool hitting the floor." He notified the other agents, knocked on the front door, and announced that he was a federal officer who was there to make an arrest. Simultaneously, another agent opened the garage door, which was unlocked, revealing the Pontiac, the defendant Bustamante, and several kilo bricks of marijuana. Defendant Garcia was later found hiding in a doghouse in the back yard.

The defendants contended that the agents did not have probable cause to believe the Pontiac was in the garage at 11262 Calle Jalapa; however, assuming that the officers had probable cause to believe the Pontiac was in the garage, their entry upon the driveway to listen and the entry into the garage were illegal because no search warrant was obtained and, as to entering the garage, because the requirements of 18 U.S.C. 3109 were not met.

With Judge Duniway writing for the three judge panel and stating that question of probable cause was a close one, the Court went on to hold that the officers had probable cause to believe the Pontiac was inside the garage at 11262 address, prior to the officer's act of eavesdropping which corroborated their information. The Court found that the agents had probable cause to believe that the car was in one of the two closed garages--because it could not have been any place else-and the activities of Barsby, including his conversation with a man fitting the description of the driver of the car, gave them reason to believe that Barsby was in the plot, and his garage rather than the other garage contained the Pontiac. The subsequent eavesdropping merely confirmed that belief.

When discussing the warrant issue, the Court discovered that the entry upon the driveway and the later entry into the garage raised somewhat different problems. Since the officers were only aware that the Pontiac was inside the garage and not whether anyone was inside the garage and house, the entry upon the driveway was for the purposes of a "search"--i.e., to overhear. Katz v. United States, 389 U.S. 347, 353 (1967). Because the Pontiac contained contraband and could be seized at any time, the noise heard by the officers supported their belief that someone might be inside the garage with the Pontiac and, therefore, their entry into the garage was for the purpose of an arrest. Beginning with

the speculation that a driveway may not be such a place to support a reasonable expectation of privacy and that an arrest entry absent a warrant is invalid, the Court found both the search (entry upon the driveway) and the arrest (entry into the garage) fell within a well recognized exception to the warrant requirement, without deciding whether one has a reasonable expectation of privacy of one's driveway. Although declaring it was not deciding a rule regarding a warrantless arrest entries, the panel held that the exigent circumstances of his case justified both entries and militated against a recourse to judicial channels. Here, they knew the Pontiac was in the area prior to its disappearance, furious combing of the neighborhood caused them to believe it was in the garage at 11262 Calle Jalapa, they had reason to believe Barsby had discovered their stakeout, and time was of the essence if they were to thwart a possible destruction of the contraband or escape of the culprits. In other words, the Court held the exceptions of search and seizure applicable to the warrantless arrest entry.

Section 3109 provides, in part, that an officer may break open any outer door of a house if, after notice of his authority and purpose, he is refused admittance. The defendants argued that, notwithstanding the fact that a proper announcement was made at the front door of the house, a second announcement at the garage was necessary. The Court prefaced its discussion with the statement that a justified claim under section 3109 depends upon the particular circumstances surrounding the entry. Here, the front door was not more than twenty-five feet from the garage, and it was highly likely that a proper announcement, as in this case, could be heard by persons in the garage. Therefore, officers are not required to announce at every place of entry; one proper announcement under section 3109 is sufficient.

Devoting a large amount of the decision to the little spoken about refusal of admittance requirement of section 3109, the Court, after analyzing the case law and policy bases of the rule of announcement, stated that once a proper section 3109 announcement has been made: entry is permissible simultaneously with or shortly after announcement if there is a likelihood that the occupants will attempt to escape, resist, destroy evidence, or harm someone within and if a non-forcible entry is possible; more specific inferences of exigency are necessary if entry may be obtained only by the physical destruction of property; and explicit refusal admittance or lapse of a significant amount of time is necessary if the officers have no facts indicating exigency. In the instant case, the Court found, in affirming the district courts ruling, the officers were in hot pursuit of a contraband vehicle, the officers could well believe the occupants knew of the officers' presence and were making an attempted flight, and that no force was used to get into the garage since it was unlocked.

Staff: U.S. Attorney Harry D. Steward
Southern District of California

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Unit of the Criminal 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.

DECEMBER 1973 - JANUARY 1974

During the month of December 1973 and the first half of January 1974 the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Austrian National Tourist Office, Los Angeles registered as agent of its parent in Vienna. Registrant is funded by the parent and its sole purpose in the United States is the promotion of tourism to Austria. Registrant reports receipt of $650 per month as office allowance. Dr. Egon Winkler filed a short-form registration statement as Director rendering his services on a full time, honorary basis and reporting no compensation.

Surrey, Karasik and Morse of Washington, D.C. registered as agent of the Embassy of the Socialist Republic of Romania. Registrant is to preserve the interests of Romania in any trade legislation now being considered by Congress and any special legislation introduced relating to trade relations between the United States and Romania, with particular reference to the most-favored-nation treatment. Registrant's fees will be based on an hourly rate of between $30 and $150 plus out of pocket expenses. The following attorneys filed short-form registrations as individuals working directly on the Romanian account: George P. MacDonald; Walter Sterling Surrey; David A. Morse; Norman R. Vander Clute; Marguerite S. Owen; Richard H. Demuth; Seymour J. Rubin; Ronald G. Precup; and Benjamin P. Pishburne, III.

Georgetown Associates, Inc. of Washington, D.C. registered as agent of the Government of Tunisia. Registrant will engage in public relations activities in persuading prominent U.S. molders of public opinion to travel to Tunisia, the purpose of the trip is to encourage a dialogue between the U.S. citizens and President Bourguiba and members of the Tunisian Parliament. Registrant's fee for its services is to be $15,000. The following public affairs consultants filed short-form registration statements as individuals engaged directly on the Tunisian account: Charles R. Barr; Walter J. Wood; M.A. Lockhart; Jon Rademacher; and John H. Shaffer.

Richard G. Kleindienst of Washington, D.C. registered as agent of the Minister of Industry and Energy, Algiers, Republic of Algeria. Registrant will engage in legal counsel for business circles, congressional relations, and relations with various official government bodies through out the United States. Registrant is to receive a monthly fee plus expenses.

Mailing List Systems, Ltd. of Lorton, Virginia registered as agent of the Royal Mint of Great Britain, London. Registrant receives, stores and distributes commemorative coins. Registrant also receives orders and remittances for the coins and mails order forms and brochures to customers in the United States. Arthur J. Liedel filed a short-form statement as President and reports receipt of $.40 per each coin set.

Peter Gustaf Sandlund of Alexandria, Virginia registered as agent of the Council of European and Japanese National Shipowners' Associations (CENSA), London. Registrant will represent the foreign principal's interest with respect to legislative, administrative and regulatory activities of the United States Government including making representations to members of Congress, Congressional Committees and other agencies, departments and officials of the United States Government. For these activities registrant is to receive a salary of $45,000 per year plus expenses.

Mr. Kent M. Harrington of Washington, D.C. registered as agent of the Embassy of Japan. Registrant is to act as Research Counsel to the Embassy staff which will include the preparation of a digest of American domestic and foreign policy developments, the preparation of research papers on American affairs and provide editorial assistance in the preparation of speeches, remarks, and general communications to be delivered by official representatives of the Embassy. For these services, which will be performed on a part-time basis, Mr. Harrington is to receive a fee of $10,800 payable in 12 equal installments at the end of each month.

The Nova Scotia Information Office of New York registered as agent of the Province of Nova Scotia, Department of Tourism. Registrant's purpose in the United States is to promote tourism to Nova Scotia. Catherine A. Shediac filed a short-form registration as Office Manager reporting a salary of $12,832.20 per year.

Leah Siegel of New York City registered as agent of Mehdunarodnaya Kniga, Moscow; Fotokhronika Tass, Moscow; Novosti Press Agency, Moscow; Czechopress, Prague; Agerpress, Bucharest; Centralna Agenja Fotograficzna, Warsaw; Interfoto, MTI, Budapest; Zentrale Bildstelle Allgemeiner Deutscher Nachrichtendienst, East Germany; Zentralfoto, Sofia; Yugofoto, Belgrad; Agensia Telegrafika, Albania; Soviet Life, Embassy of the USSR, Washington, D.C. and China Photo Service, Peking, Peoples Republic of China.

Registrant contacts various U.S. news agencies, newspapers, magazines and book publishers in connection with reproduction rights on news photographs received periodically from the foreign principal. When photos are used registrant receives a fee and in turn transfers a portion of that fee to the foreign principal.

Henry E. Gardiner of Washington, D.C. registered as agent of the Chilean Government. Registrant will handle such contacts and dealings with members of Congress and their staffs and with various Departments and agencies of the United States Government as the Chilean Embassy may request. This will be done through personal contacts and the distribution of such memoranda and pamphlets as are furnished by the Embassy.

Activities of persons and organizations already registered under the Act:

Package Express & Travel Agency, Inc. of New York filed a copy of its contract with Vneshposyltorg, U.S.S.R. Registrant sends licensed parcels with gifts to recipients in the USSR and collects the duties on such parcels for forwarding to the foreign principal.

Intourist, New York filed exhibits in connection with its representation of Intourist, Moscow. Registrant's purpose in the United States is the promotion of tourism to Moscow and registrant is funded by the foreign principal.

Haseltine, Lake & Waters of New York filed exhibits in connection with its representation of Polservice, Warsaw, Patent Bureau of the USSR Chamber of Commerce, Moscow and the Commonwealth of Australia, Department of Supply. Registrant acts as patent agents in the preparation, filing and prosecution of applications for U.S. patents. Registrant charges normal patent service rates on a case-by-case basis.

Ruder & Finn, Inc. of New York filed exhibits in connection with the French Industrial Development Agency. Registrant will arrange one press conference in Chicago on November 29, 1973 and several private press meetings in various U.S. cities in connection with the pending visit to the U.S. of several French industrialists. Registrant is to receive $1,000 plus out of pocket expenses for these services.

Chinese Investment & Trade Office of New York filed exhibits in connection with its representation of the Ministry of Economic Affairs, Republic of China, Taiwan. Registrant is a field office of the principal and promotes trade between the United States and the Republic of China. Registrant is funded by the foreign principal.

Max N. Berry of Washington, D.C. filed exhibits in connection with his representation of OEHEG (Austrian Hard Cheese Export Association). Registrant will keep foreign principal advised of current information in the United States concerning dairy products specifically imports and will represent the principal at hearings before the U.S. Tariff Commission, or other government agencies. For these services registrant is to receive a retainer of $6,000 for the calendar year 1974.

Warren Weil Public Relations of New York filed exhibits in connection with its representation of the Mission to the U.N. of the Khmer Republic. Registrant will serve as public relations consultant for the purpose of bringing the position of the Khmer Republic to the attention of the press, radio and TV media. This contract will be for a three month period and registrant is to receive a fee of $10,500 plus expenses.

Shaw, Pittman, Potts & Trowbridge of Washington, D.C. filed exhibits in connection with their representation of the Committee of Foreign Owned Banks. Registrant will perform professional and legal services for the foreign principal in connection with pending and future legislative and administrative proposals or matters affecting foreign owned banks. Registrant will bill the foreign principal for the time required at its normal hourly rates.

Inported Publications, Inc. of Chicago filed exhibits in connection with its representation of Kiltura Hungarian Trading Company, Budapest. Registrant will distribute books on behalf of the foreign principal. Registrant's charge to the foreign principal is $1.75 per book less a 6% discount.

The German American Chamber of Commerce, San Francisco filed exhibits in connection with its representation of German National Chamber of Commerce, Bonn, West Germany and the Central Marketing Board of German Agriculture, West Germany. Registrant is engaged in the promotion of trade between the United States and West Germany. Registrant's activities are partially funded by the foreign principals.

Short-form registrations filed in support of registration statements already on file:

On behalf of the German National Tourist Office of New York: Walli J. Fuertjes as Director of Public Relations reporting a salary of $2,139 per month, Ralph C. Warren as Director of the San Francisco Office reporting a salary of $1,269.96 per month and Hans J. Baumann as Director of the Chicago Office reporting a salary of $2,100 per month.

On behalf of United States Navigation, Inc. of New York whose foreign principal is the Federal Republic of West Germany:

Augustine E. Downey as Controller and regular salaried employee of registrant.

On behalf of the Tourist Organization of Thailand: Staport Sirisinha as Assistant Chief engaged in tourist promotion and reporting a salary of $895 per month.

On behalf of Georgetown Associates, Inc. whose foreign principal is the Government of Tunisia: John L. Humphreys as Public Affairs Consultant engaged in attempting to persuade influential Americans to visit Tunisia to meet President Bourguiba and members of the Tunisian Parliament for informal discussions regarding the Tunisian viewpoint on world matters directly effecting the United States. Mr. Humphreys reports his compensation as "potential dividends to be derived from equity held in registrant."

On behalf of Beveridge, Kraus, Robbins & Manning, Inc. whose foreign principal is the Government of Mexico: H. Zane Robbins reporting a fee of $2,000 per month plus expenses; Nancy B. Newman, same compensation; Catherine Kraus, same compensation; Herbert M. Kraus, same compensation. All are engaged in public relations activities to promote tourism to Mexico.

On behalf of Mc-Cann-Erickson, Inc. of New York whose foreign principals are Communications Affiliates (Bahamas), Ltd. and the Australian Tourist Commission: Harold L. Leddy as Media Supervisor engaged in marketing consultation through media evaluation and reporting a salary of $18,000 per year.

On behalf of Max N. Berry of Washington, D.C. whose foreign principals are the Austrian Trade delegate in the United States and OEHEG (Austrian Hard Cheese Export Association): Fred Gipson as attorney calling on members of Congress, their staffs and officials of the Executive Branch in the interest of the foreign principals. Mr. Gipson reports a salary of $2,000 per month.

On behalf of the Amtorg Trading Corporation of New York which is the official Soviet Purchasing Agency in the United States: Lugovtsov Anatoliy Fadeevich as Representative of V/O "Sovinflot" engaged in shipping activities and reporting a salary of $577 per month; Eugene Dmitrievitch Scherbakov as Representative for V/O "Sovfracht" engaged in shipping services and reporting a salary of $540 per month; Valentin Pavlovich Kozlov as Vice President of Amtorg and reporting a salary of $608 per month and Zabusov Juriy Alekseyevich as Representative of V/O "Sovinflot" engaged in shipping activities and reporting a salary of $577 per month.

On behalf of the Monaco Government Tourist Office of New York: Christiane A. Dickinson as marketing and travel agent and

reporting a salary of $125 per week and Kathryn P. Thompson as Public Relations Director and reporting a salary of $150 per week.

On behalf of the Korea Trade Center, New York: Suk Mahn Youn as Director reporting a salary of $1,200 per month and Oh Sung Kim as Manager of Market Research reporting a salary of $684 per month. Both are engaged in the promotion of trade between the United States and Korea.

On behalf of Robert W. Schofield & Associates of New York whose foreign principal is the Press & Information Service, Ministry of Foreign Affairs, Paris: John C. Cooper as film producer on a part-time basis reporting a salary of $345 per week.

On behalf of Fred T. Lininger of New York whose foreign principal is the Republic of Liberia: Frank L. Wiswall, Jr. as legal counsel on behalf of the foreign principal on a special basis and reporting no compensation.

On behalf of Needham, Harper & Steers Advertising of New York whose foreign principals are French Government Tourist Office, Italian Line and Infrature: Michael E.G. Kirby as advertising executive reporting a salary of 4,600 per year; Diane McCardle as Casting-Production Manager on a part-time basis reporting a salary of $300 per year; Mel Gottlieb as Art Director on a part-time basis and reporting a salary of $3,000 per year; Peter Stassi as Time Buyer on a part-time basis and reporting a salary of 5% of $750 per year; Jack Hubler as Radio-TV Producer on a part-time basis reporting a salary of $1,000 per year; Sydelle Rangell as Producer on a part-time basis and reporting a salary of $1,000 per year; Robert Widholm as Time Buyer-Media Department on a part-time basis and reporting a salary of $125 per year; John R. Kraus as Time Buyer on a part-time basis and reporting a salary of 5% of $600 per year and Joseph J. Jacobs as supervisor on a part-time basis and reporting a salary of $840 per year. All are engaged in the preparation and placement of advertisements on behalf of the foreign principals.

On behalf of Chinese Information Service, Los Angeles (Republic of China, Taiwan): Tsui Pao-ying as Deputy Director engaged in informational activities and reporting a salary of $990 per month.

On behalf of Shannon Free Airport of New York whose foreign principals are Shannon Free Airport Development Co., Ltd. and Shannon Free Airport, Co. Clare, Ireland: Joseph Power as Manager - Group Tours and reporting a salary of $15,000 per year; Mary S. Fitzbibbon as Public Relations Manager and reporting a

salary of $15,580 per year; John Kevin Imbusch as Travel Sales Manager and reporting a salary of $17,440 per year and Noel MacGowan as Manager Western Region reporting a salary of $25,000 per year.

On behalf of the Tea Council of the USA, Inc. whose foreign principals are seven African members: William F. Treadwell as public relations counsel promoting the consumption of tea in the United States. Mr. Treadwell renders his services on a special basis and reports a fee of $2,000 per month.

On behalf of the Swiss National Tourist Office of New York: James J. Neville as Account Executive reporting a commission of 17.65% of media and production costs.

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

SUPREME COURT

INDIANS

DISTRICT COURT HAS JURISDICTION TO HEAR ACTION CHALLENGING SALE OF TRIBAL LANDS IN VIOLATION OF SPECIFIC TREATIES AND NON-INTERCOURSE ACT OF 1790.

Oneida Indian Nation of New York, et al. v. County of Oneida, New York, et al. (S.Ct. No. 72-851, Jan. 21, 1974; D.J. 90-2-20-512)

Two Indian tribes sued two counties in New York State seeking two years' fair rental for tribal lands and claiming that 1795 sales of these lands violated various treaties between the United States and these tribes and the five other tribes known as the Six Nations, confirming their right to possession and the Indian Non-Intercourse Act of 1790 (now 25 U.S.C. sec. 177). The district court dismissed the complaint for lack of jurisdiction. A divided panel of the Second Circuit affirmed, holding principally, that under the "well pleaded complaint" rule, the Indians' action presented no federal question, because a complaint, essentially seeking relief on the right to possession of real property, did not present a federal question. The Solicitor General filed an amicus brief recommending denial of certiorari, which, however, the Supreme Court granted.

The Supreme Court reversed, holding that the complaint, asserting a current right to possession conferred by federal law, wholly independent of state law, satisfied the "well pleaded complaint" rule and thus stated a controversy arising under the Constitution, laws, or treaties of the United States sufficient to invoke the district court's jurisdiction under 28 U.S.C. secs. 1331 and 1362. Normally, once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts. Federal jurisdiction, then, is absent even when ownership or possession is claimed under a United States patent. The possessory right of Indians, however, is a federal right, which federal law now protects and has protected from the formation of the United States.

Staff: Erwin N. Griswold (formerly Solicitor General)

COURTS OF APPEAL

CIVIL PROCEDURE

RIGHT TO AMEND COMPLAINT.

The West Augusta Historical and Genealogical Society, a corporation v. The Urban Renewal Authority of Parkersburg, Inc., a corporation, et al. (C.A. 4, No. 73-2062, Jan. 22, 1974; D.J. 90-1-4-685).

A local historical society filed suit against local authorities and the Secretary of Housing and Urban Development to enjoin demolition of a county courthouse for an urban renewal project until the environmental impact statement required by NEPA was filed. The district court dismissed the action for lack of standing and refused to permit plaintiff to amend its complaint on oral motion.

The Court of Appeals reversed, holding that since the Secretary of HUD, as the principal defendant, at oral argument voiced no objection on appeal to plaintiff's right to amend, and since the proposed amendment would clarify the complainant's justiciable interest in the litigation, leave to amend should be granted under F.R.Civ.P., Rule 15(a), as "justice so requires." Although the motion to amend should have been in writing, since the district court did not require this formality, but instead considered and denied it on its merits, the Court of Appeals should not be barred from also considering its merits. The Court of Appeals did not reach the issue of standing in light of the proposed amendment.

Staff: United States Attorney James F. Companion (N.D. W.Va.); Glen R. Goodsell (Land and Natural Resources Division)

CONDEMNATION

JURY AWARDS.

United States of America v. Jack T. and Gloria B. Fischbach, et al. (C.A. 4, Nos. 73-1323, 73-1324, 73-1325, Nov. 30, 1973; D.J. 33-21-474-825-3 and 33-21-474-825-6)

The Fourth Circuit affirmed, per curiam, the judgment of the United States District Court for the District of Maryland entered on a jury verdict fixing the just compensation

for certain parcels of land condemned for the Assateague Island National Seashore. The Fourth Circuit held that the district court's actions with respect to admissibility of evidence and jury instructions were properly within its discretion. The court also held that it would not disturb the jury awards since they were within the range of the evidence and supported by substantial evidence.

Staff: Lawrence E. Shearer, Phillip M. Zeidner, Stanley J. Fineman (Land and Natural Resources Division)

TAX DIVISION
Assistant Attorney General Scott P. Crampton

DISTRICT COURT

INTERNAL REVENUE SUMMONS

SUMMONS SEEKING CORPORATE RECORDS IN HANDS OF ATTORNEY ENFORCED WHERE ISSUED AFTER INDICTMENT OF TAXPAYER ON GAMBLING CONSPIRACY CHARGES BUT PRIOR TO ANY RECOMMENDATION OF PROSECUTION FOR TAX FUND.

United States and James G. Murphy, Special Agent, Internal Revenue Service v. Thomas Joseph (ED Mich.) Civil No. 73-10006; decided January 9, 1974; D.J. No. 5-37-2888

After the taxpayer had been indicted on Federal gambling conspiracy charges, an investigation into his Federal income tax liabilities was begun. The Special Agent conducting the investigation sought the books and records of eleven closely held corporations in which the taxpayer had an interest in order to ascertain whether funds had been transferred to or from the corporations and the taxpayer. The books and records had been placed in the hands of the taxpayer's attorney, allegedly for use in his defense of the gambling conspiracy charges. The attorney refused to make the records available since the Special Agent would not agree that they would not, under any circumstances, be used in the gambling case. A summons was served upon the attorney and this action was commenced to obtain judicial enforcement.

The District Court rejected the respondent-attorney's argument that the summons was intended to obtain evidence for use in prosecution of the gambling conspiracy case holding that the possibility of such evidence being derived from the corporate books and records involved was purely speculative. It further held that, while the Supreme Court has held in Donaldson v. United States, 400 U.S. 517 (1971), that to be enforced, a summons must be issued prior to a recommendation for criminal prosecution, the clear intent of Donaldson is "to make unenforceable an Internal Revenue Service summons issued after a recommendation for prosecution for tax fraud was made." [Emphasis in original.] Accordingly, the Court ordered enforcement of the summons.

The Court also rejected the respondent's argument that the corporate records were subject to an attorney-client privilege by virtue of their transfer to him by his client, holding that otherwise unprivileged records do not acquire by virtue of their transfer to an attorney a privilege which they did not formerly possess.

Staff: Richard A. Scully (Tax Division)

COURTS OF APPEAL

COLLECTION BY ADMINISTRATIVE LEVY

RIGHT OF WIFE TO ENJOIN SALE OF TAXPAYER'S REAL PROPERTY UNDER LOCAL HOMESTEAD EXEMPTION.

Doris Herndon v. United States of America (C.A. 8, No. 73-1609, January 24, 1974; D.J. 5-9-951)

On January 24, 1974, the Eighth Circuit, affirming the decision of the District Court for the Government, held that the Arkansas homestead exemption statute did not entitle the taxpayer's wife to an injunction prohibiting the Government's sale of real property titled solely in the taxpayer's name in satisfaction of his delinquent taxes, even though the property was used as the couple's residence.

Section 6321 of the Internal Revenue Code of 1954 imposes a lien in favor of the United States "upon all property and rights to property" belonging to any person for unpaid delinquent federal taxes. This lien, which arises from the date of assessment, continues until the liability is either satisfied or becomes unenforceable due to the passage of time. Section 6322 (26 U.S.C.). Until one of these two circumstances occurs, the Government may enforce the collection of delinquent and unpaid taxes by levying upon "all property and rights to property" except those specifically exempt by federal statute. Sections 6311 and 6334 (26 U.S.C.). A homestead is not among those specifically exempted by federal statute (Section 6334(c)), nor is the Government required to recognize or respect state notions of a homestead exemption in its search for "property or property rights" of a delinquent taxpayer to satisfy his tax liability.

The Eighth Circuit Court of Appeals recognized that the generally accepted method by which federal courts must determine whether specific property is within the meaning of "property and rights to property" is to look to state law only for the purpose of determining what property rights the taxpayer holds to which a tax lien can attach. Aquilino v. United States, 363 U.S. 509, 512-514 (1960). The court further clarified this position by stating:

> * * * we have not determined whether the Arkansas homestead exemption law creates a property interest in the plaintiff. The resolution of that issue is not necessary for this case. The Government here is only claiming the right to sell [the taxpayer's] * * * right, title, and interest in the instant property,

> leaving any purported interest held by Mrs. Herndon unimpaired.

Relying upon case law as found in the Fifth, Ninth, and its own circuit, the court made it clear that, as against federal tax liens, homestead exemptions prescribed by state laws are ineffective. Broday v. United States, 455 F. 2d 1097 (C.A. 5, 1972); United States v. Overman, 424 F. 2d 1142 (C.A. 9, 1970); United States v. Heasley, 283 F. 2d 422 (C.A. 8, 1960). Citing from the Fifth Circuit, the court rejected the contention that a homestead is immune from forced sale to satisfy a federal income tax lien (Shambaugh v. Scofield, 132 F. 2d 345, 346 (C.A. 5, 1942):

> The Federal statute authorizes the seizure and sale of real estate to satisfy unpaid income taxes when sufficient personalty is not found. * * * Homesteads are not exempted. * * * These statutes, enacted to effectuate a constitutional power, are the supreme law of the land. If they are in conflict with State law, constitutional or statutory, the latter must yield.

Finally, the court stated, as a matter of fairness, that where the Government sells real property pursuant to levy for unpaid taxes it might be advisable that the Government inform all prospective purchasers that the real property is being sold subject to any homestead interest that the wife may have under state law.

Staff: Robert G. Burt (Tax Division)