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POINTS TO REMEMBER

ARMED FORCES

HABEAS CORPUS ACTIONS BROUGHT BY MEMBERS OF ARMED FORCES.

In addition to its supervisory jurisdiction with respect to criminal cases arising under the Military Selective Service Act of 1967 (50 U.S.C. App. 451, et seq.), the newly formed Government Operations Section of the Criminal Division has such jurisdiction with respect to habeas corpus actions brought by members of the Armed Forces to obtain their release from such "custody" but only on the following two grounds:

1. Induction into the Armed Forces as selective service registrants was not valid.

2. Denial of discharges as conscientious objectors pursuant to regulations of the Armed Forces was arbitrary or a denial of due process.

Correspondence in connection with such actions should be addressed to the Assistant Attorney General, Criminal Division, and to the attention of the Chief, Government Operations Section. Addressing such correspondence to the Department's Civil Division may cause unnecessary confusion and delay in routing.

BAIL REFORM ACT

WARNINGS REQUIRED AT INITIAL BAIL RELEASE AS PREREQUISITES FOR SUBSEQUENT BAIL JUMPING PROSECUTION.

Two recent prosecutions for bail jumping (18 U.S.C. 3150) have been lost because the defendants were not warned at the time of their initial release of the penalties applicable for failure to appear at later court appearances. In both cases (United States v. Campbell, Cr. 68-72, D. Ore. (3/10/69); United States v. Graves, Cr. R-14110, D. Nev. (8/11/69)) the district court interpreted the Bail Reform Act (18 U.S.C. 3146 et seq.) to require that the terms of Section 3146(c) be followed literally:

> The judicial officer authorizing the release of a person under this section shall . . . inform such person of the penalties applicable to violations of the condition of his release; and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

Both courts held that absent such warnings a person is not released pursuant to the Bail Reform Act. Since prosecution under 18 U.S.C. 3150 requires that the person be released pursuant to the Act, both prosecutions failed even though willful failure to appear seemed clear in both cases.

This problem can be avoided in the future by the use of form AO-199 prepared by the Department and issued to all courts several years ago through the Administrative Office of the United States Courts. This form contains within it all the warnings and notices to the defendant required by the Bail Reform Act. A copy, signed by both the defendant and the judicial officer, is given to the defendant and another copy is retained in the case files.

Form AO-199 should be used wherever possible, but whether the form is used or not all assistants are urged to see that such warnings are administered each and every time a person is released on any form of pretrial or post-trial release whether it be personal recognizance, surety bond release, or any other form of release.

(Criminal Division)

NARCOTICS

COCAINE POSSESSION - 21 U.S.C. 174 PRESUMPTION NOT APPLICABLE.

As a result of a challenge in Turner v. United States, cert. granted, 395 U.S. 933 (1969), to the rationality of the presumption in 21 U.S.C. 174 with respect to cocaine, an investigation was made by the Bureau of Narcotics and Dangerous Drugs of the amount of domestically produced cocaine available in the illicit traffic. This investigation showed that there probably is a significant amount of domestically produced cocaine available through illegal channels. BNDD chemists report that there is no way to differentiate between foreign and domestic cocaine since all the samples they have analyzed are cocaine hydrochloride, generally in a refined crystalline powder form.

We have, therefore, concluded that under the Supreme Court's rationale in Leary v. United States, we can no longer rely solely upon the importation presumption in cocaine possession cases. We recommend that no further prosecutions under 21 U.S.C. 174 involving possession of cocaine be undertaken when the evidence of knowledge of illegal importation depends entirely upon the presumption. Prosecution may be instituted under 26 U.S.C. 4704 in possession cases and under 26 U.S.C. 4704 and 4705 in sales cases. If any problem of the rationality of the presumption in 21

U.S.C. 174 in cocaine cases arises on appeal or 28 U.S.C. 2255 motions, contact the Narcotic and Dangerous Drug Section of the Criminal Division for assistance.

(Criminal Division)

APPEALS

FILING OF NOTICE OF APPEAL IS REQUIRED IN EVERY CASE UNLESS DEPARTMENT HAS ADVISED THAT APPEAL IS NOT TO BE TAKEN. UNLESS OTHERWISE INSTRUCTED, APPEAL SHOULD NOT BE FILED SOONER THAN FIVE DAYS BEFORE APPEAL TIME EXPIRES.

The purpose of this notice is to reiterate the instruction in Title 6 of the United States Attorneys' Manual regarding the filing of notices of appeal. The Manual provides (Title 6, p. 3):

Protective Notice of Appeal

> (a) If the time for appeal is about to expire and the United States Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, a notice of appeal--commonly called a "protective" notice of appeal--should be filed in order to preserve the Government's right to appeal, and such action should be reported to the appropriate division of the Department. In order that the Department may have adequate time to consider the case, such notice of appeal should not be filed sooner than five days before the time for appeal expires.

It is important to remember that a notice of appeal must be filed, in strict compliance with this Manual provision, by the office of the United States Attorney in each case unless you are otherwise instructed. Failure to file a notice of appeal as required by the Manual may lead to forfeiture of the Government's right of appeal.

(Civil Division)

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

VIOLATION OF SECTION 7 OF ACT CHARGED.

United States v. International Telephone & Telegraph Corp., et al. (D. Conn., No. 13319; August 1, 1969; D.J. 60-149-037-1)

On August 1, 1969, a civil action was filed in the U.S. District Court for the District of Connecticut against International Telephone and Telegraph Corporation and Grinnell Corporation to prevent the consummation of their pending merger.

The suit claims that the proposed merger would violate Section 7 of the Clayton Act specifically by: (a) encouraging reciprocity; (b) entrenching Grinnell's already dominant position in various markets; (c) discouraging actual and potential competition, and (d) tending to trigger mergers by other companies seeking to protect themselves from the impact of the merger.

ITT is the eleventh largest industrial concern in the United States with consolidated revenues in 1968 of $4,066,502,000 and net income of $192,404,000. It is engaged in a wide variety of business activities in the United States and many foreign countries, including international telecommunications, the operation of overseas telephone companies and various manufacturing and service businesses.

Its holdings include Continental Baking Company, the largest baking company in the United States; Sheraton Corp. of America, one of the two largest hotel chains; Levitt & Sons, Inc., the leading residential construction firm; Avis, Inc., the second largest car rental firm, and Rayonier, Inc., a leading producer of chemical cellulose.

Grinnell ranks number 268 on the 1968 Fortune list of the 500 largest industrial corporations in the United States. It had 1968 sales of $341,282,906 and net income of $14,084,798. Its assets at the end of 1968 were $184,453,229. It is the largest manufacturer and installer of automatic sprinkler fire protection systems in the United States. It is also a leading manufacturer of plumbing and piping hardware - primarily pipe fittings, pipe hangers and valves, and it is believed to be the largest factor in the power piping industry.

In seeking to block the ITT-Grinnell merger the suit claims that the merger will entrench Grinnell's already leading position in several concentrated markets, including the manufacture and installation of automatic sprinkler systems, the fabrication and installation of power piping systems, and the manufacture of pipe hangers and power pipe hangers. The suit further alleges that the power of ITT and Grinnell to employ reciprocity and benefit from reciprocity effect in the aforementioned product lines will be substantially increased and the markets for Grinnell's competitors will be correspondingly narrowed. Thus, it is claimed that the merger will raise barriers to entry, discourage smaller firms from competition in those markets and trigger other mergers by competitors of Grinnell seeking to protect themselves from the impact of this acquisition.

Another factor to be considered was the pending acquisition by ITT of the Hartford Fire Insurance Company (also challenged on August 1, 1969). According to both law suits, the dual acquisitions will enable ITT to utilize and benefit from its insurance business in promoting and increasing Grinnell's already dominant position in the automatic sprinkler market.

Finally, the ITT-Grinnell suit also claims that the acquisition by ITT will further and increase the current trend of acquisitions of dominant firms in concentrated markets by large companies, thereby (i) increasing the concentration of control of manufacturing assets; (ii) increasing the barriers to entry in concentrated markets; and (iii) diminishing the vigor of competition by increasing actual and potential customer-supplier relationships among leading firms in concentrated markets.

A hearing on plaintiff's motion for a preliminary injunction is scheduled for September 17, 1969.

Staff: Joseph H. Widmar, Howard B. Myers, Donald J. Frickel, Gordon A. Noe and Stephen A. Aronow (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

MEDICAL CARE RECOVERY ACT

U.S. HAS INDEPENDENT RIGHT TO RECOVERY AND MAY BRING ITS OWN SUIT EVEN AFTER FAILING TO INTERVENE IN INJURED PARTY'S ACTION BROUGHT WITHIN SIX MONTHS.

United States v. City of Bremerton, Washington (C.A. 9, No. 22,611; August 4, 1969; D.J. 77-82-798)

The daughter of a serviceman was burned by scalding water owing to the negligent plumbing activities by the City of Bremerton, Washington, owner of the housing project in which the serviceman lived. The United States provided medical and hospital care. The daughter (by her father) sued the City within six months of the accident and recovered damages (specifically excluding damages for hospital and medical costs).

The United States did not intervene in that action, but later started its own lawsuit pursuant to the Medical Care Recovery Act, 42 U.S.C. 2651, to recover the cost of medical and hospital care. The district court dismissed our action, ruling that 42 U.S.C. 2651(b) prohibited an independent action by the Government where the injured person had started his action (in which the United States failed to intervene) within six months of the injury.

The Ninth Circuit reversed, holding that the six-month restriction in section 2651(b) means only that the Government must wait until either the injured person sues or six months passes, but then it can either intervene in the injured person's lawsuit or start its own. The Court thus brought itself into line with the Third Circuit's decision in United States v. Merrigan, 389 F.2d 21 and the Sixth Circuit's decision in United States v. York, 398 F.2d 582.

The Court also held that the contributory negligence of the serviceman, if it existed, did not bar recovery because under the Act only the contributory negligence of the person injured bars recovery. Nor could the fact that the parents' contributory negligence would have been a bar to recovery under state law affect the Government's right to recover, for that right arises from federal law, independently of state law and its restrictions.

Staff: Daniel Joseph (Civil Division)

NATIONAL BANKS - STANDING - COMMINGLED INVESTMENT ACCOUNTS

COMPETITORS HAVE STANDING TO CHALLENGE COMPTROLLER'S RULING THAT NATIONAL BANKS MAY OPERATE COMMINGLED INVESTMENT ACCOUNTS - RULING HELD TO BE IN ACCORDANCE WITH APPLICABLE STATUTES.

Camp v. Investment Co. Institute (C.A. D.C., No. 21,662; July 1, 1969; D.J. 145-3-811)

First National City Bank of New York, with the approval of the Comptroller of the Currency, the Federal Reserve Board and the Securities and Exchange Commission, established a "commingled managing agency account" service, under which a customer's frunds would be managed in a common account with the Bank acting as managing agent. The Investment Company Institute (ICI), representing the mutual fund industry, then brought an action to invalidate this activity as violative of various provisions of the banking laws. Concurrently, the National Association of Securities Dealers (NASD) sought direct review of the SEC determination in the Court of Appeals for the District of Columbia Circuit. The district court in the instant case held against the Bank and the Comptroller, and an appeal was taken. The two cases were ultimately decided together by the Court of Appeals.

All three judges agreed that NASD had standing to attack the SEC determination under the "person aggrieved" section of the Investment Company Act of 1940, 15 U.S.C. 80a-42(a). See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). With respect to ICI, Judge Bazelon would have granted it standing "to vindicate the public interest despite the absence of a statutory aid to standing". Judge Burger, with whom Judge Miller concurred, was "unable to join in the rationale underlying Judge Bazelon's basis for standing of Appellees * * *". In fact, he stated his position as "one of reservation amounting to virtual disbelief in any standing in Appellees", and was "unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits". However, he stated that he was "prepared to agree with the result in order to make a majority holding for review of the merits of a subject of such importance".

On the merits, Judges Burger and Miller held that:

> Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds ***. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose. * * *

> Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

Judge Bazelon, after an exhaustive review of every statutory provision said to have been violated, reached the same result.

Staff: Alan S. Rosenthal and Stephen R. Felson (Civil Division)

STANDING

TAXPAYER STANDING - SUIT CHALLENGING CONSTITUTIONALITY OF WAR IN VIETNAM DISMISSED FOR LACK OF STANDING: FLAST v. COHEN HELD INAPPLICABLE.

Velvel v. Nixon, et al. (C.A. 10, No. 158-68; decided August 11, 1969; D.J. 145-1-73)

In this action against the President and the Secretaries of Defense and State, a professor at the University of Kansas Law School challenged the constitutionality of the Government's military operations in Vietnam on the ground that the President lacked authority to conduct such operations absent a Congressional declaration of war. The district court dismissed the complaint on the ground that plaintiff lacked standing; that the complaint presented a political question; and that the action was an unconsented suit against the United States.

The Court of Appeals affirmed on the ground of lack of standing. Plaintiff had alleged standing as a citizen and taxpayer. With reference to his standing as a citizen, the Court of Appeals commented:

> His personal stake in the matter is said to be demonstrated in several ways: the President's "gross breach of the rule of law" jeopardizes "the ultimate liberty of appellant and every other American", contributes to "a serious

> inflation which has harmed appellant and all other citizens", disminishes "the funds available for social welfare", and leads "to the death and wounding of innumerable Americans, including one of appellant's relatives who was shot in the shoulder in Viet Nam." This list of supposed personal effects of the President's action is so patently anything but personal that to pose the question of whether appellant's "citizen standing" is sufficient, is also to answer it. If these connections with the constitutional issue confer standing, then obviously standing to sue can be found in every citizen to contest every congressional or executive action of general import and the doctrine of standing will have lost all meaning.

The Court of Appeals also held that plaintiff had no standing as a taxpayer. The Court noted that under Flast v. Cohen, 392 U.S. 83, taxpayer standing must rest on a challenge to "exercises of congressional power under the taxing and spending clause". (See 392 U.S. at 102.) The Court of Appeals held that this requirement was not met:

> Since congressional appropriations for the war are made under authority of the powers "to raise and support Armies" and "to provide and maintain a Navy", such expenditures are not exercises of the power to spend for the general welfare, but rather, represent exercises of power under the later enumerated powers, powers which are separate and distinct from the grant of authority to tax and spend for the general welfare. United States v. Butler, 297 U.S. 1, 65 (1936). It follows then that appellant has not satisfied the first criterion of Flast and therefore lacks standing to sue.

Finally, the Court pointed to the requirement in Flast that the complaint allege breach of a specific limitation upon the taxing and spending power, rather than "generalized grievances about the conduct of government or the allocation of power in the Federal system" (quoting from Flast, 392 U.S. at 106). The Court of Appeals concluded that the complaint here "is attempting to assert the congressional interest in its legislative prerogatives" and as such did not allege the type of constitutional limitation on spending which would confer standing under Flast.

Staff: Robert V. Zener (Civil Division)

VETERANS' REEMPLOYMENT - RIGHT TO DAMAGES

DIST. CT. CANNOT REFUSE TO AWARD DAMAGES FOR DENIAL OF REEMPLOYMENT RIGHTS WHERE VETERAN'S CONDUCT IN NO WAY CONTRIBUTED TO HIS LOSS. VETERAN MAY RECOVER DAMAGES FOR PERIOD PRIOR TO INSTITUTION OF SUIT EVEN THOUGH SUIT WAS NOT FILED UNTIL A YEAR AFTER DENIAL OF SENIORITY RIGHTS.

Teamsters Local Union 612 v. Helton; Helton v. Mercury Freight Lines (C.A. 5, No. 26,302; July 22, 1969; D.J. 151-1-978)

The veteran on whose behalf this action was brought was, upon his reemployment after military service, denied the seniority to which he was entitled. Suit was not filed until a year after the denial of the veteran's seniority rights; during much of that time, the Department of Labor was attempting to negotiate a settlement of the matter. After a trial, the district court granted the veteran the seniority rights which had been withheld from him, but refused to award him damages, on the grounds that the company had done all it could to grant him his correct seniority status and that the Union's processing of a grievance which resulted in a ruling adverse to the veteran (and purportedly binding upon the company) was in good faith.

The Court of Appeals affirmed, on the Union's appeal, the district court's grant of proper seniority, and, on our appeal, reversed the district court's denial of damages. The Court held that, even if the question of monetary recovery were within the district court's discretion (the Court was "not free from doubt concerning the nature and extent of the district court's discretion to deny recovery of loss"), the district court abused its discretion in denying recovery where the veteran's loss was in no way attributable to his own conduct. The Court rejected the notion that the good faith of the Company and the Union could result in a veteran bearing that loss, for "Congress has said he shall not suffer" that loss.

Although it was not necessary for it to express a view on the issue, the Court went on to reject the Union's argument that, because of the delay in filing suit, the veteran would be entitled to recover damages only for the period after the institution of suit. The Court explained that the result urged by the Union would encourage immediate recourse to the courts instead of negotiation and settlement; in addition, it would encourage companies not to act promptly in reinstating veterans in that monetary recovery against the company would not begin to accrue until suit was filed.

Staff: Michael C. Farrar (Civil Division)

INTERNATIONAL LAW

PREMISES OWNED BY FOREIGN STATES WHICH ARE DEVOTED EXCLUSIVELY TO GOVERNMENTAL USES ARE EXEMPT FROM MUNICIPAL REAL PROPERTY TAXES.

Republic of Argentina v. The City of New York (N.Y. Ct. of Appeals, July 2, 1969; D.J. 118982-145)

The Republic of Argentina owned real property in the City of New York which was used as its consulate. It paid real estate taxes on that property for the years 1947 through 1965. In 1967 it brought suit against the City of New York to recover taxes paid for those years as well as a declaration that the property was tax exempt and a judgment discharging the liens for taxes assessed since 1966. The United States appeared as amicus supporting the position of the Republic of Argentina that in the absence of specific treaty provisions, customary international law established a rule binding on U.S. political subdivisions which prevented the subdivisions from assessing taxes against foreign owned property used for public non-commercial purposes. The Court of Appeals in a unanimous decision written by Chief Judge Fuld, agreed. The Court held that Argentina's property was tax exempt but did not allow the recovery of the taxes which had already been paid because Argentina did not file a Notice of Claim with the Comptroller of the City of New York as required by N.Y.C. Admin. Code Sec. 394a-1.0 subd. 3.

Staff: Bruno A. Ristau (Civil Division)

TORT CLAIMS ACT

GOVT. HELD NOT LIABLE FOR NEGLIGENCE OF CONTRACTOR.

Ted T. Irzyk, d/b/a San Juan Trailer Town v. United States (C.A. 10, No. 10181; June 19, 1969; D.J. 157-49-195)

Plaintiff, the owner of a trailer camp brought suit against the United States when his property was flooded by the bursting of an irrigation canal. In connection with the construction of a dormitory facility by the Bureau of Indian Affairs, its contractor had to install a sewer line across the canal. The installation required that the canal be cut and then repaired ("back-filled"). The United States supplied general specifications for back-filling ditches but did not include specific instructions on how to back-fill water carrying canals. Plaintiff alleged that the United States so supervised the contractor as to be liable for its negligence and, in addition, had supplied inadequate and faulty plans. The district court held that the contractor was indeed negligent and that the U.S. supervisor had failed to adequately inspect

the canal repair. The district court held that the United States was not liable. The Court of Appeals affirmed. It held that (1) the contractor was not so supervised by the United States so as to vitiate its independent contractor status, (2) the Government inspector owed no duty to third persons so that the United States was not liable for damages resulting from his failure to properly do his job, (3) the plans supplied by the United States were not faulty but in any event the "matter of specifications is generally a discretionary function" (see 28 U.S.C. 2680(a), Dalehite v. United States, 346 U.S. 15).

Staff: Ralph A. Fine (Civil Division)

SELECTIVE SERVICE

SELECTIVE SERVICE, ALLEGATION OF PROCEDURAL ERRORS DOES NOT JUSTIFY PREINDUCTION JUDICIAL REVIEW OF DENIAL OF CONSCIENTIOUS OBJECTOR CLASSIFICATION.

Geoffrey W. Sloan v. Local Bd. No. 1 (C.A. 10, August 11, 1969; D.J. 25-49-523)

The Tenth Circuit has held that the allegation of procedural errors in the processing of a selective service registrant's claim to a conscientious objector classification does not warrant ignoring the mandate against pre-induction judicial review. Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3).

Staff: Morton Hollander (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

MILITARY SELECTIVE SERVICE ACT

PROHIBITION ON SOLICITING SIGNATURES ON PROTEST PETITION AT INDUCTION STATION NOT VIOLATIVE OF FIRST AMENDMENT - CONDUCT DESIGNED TO PREVENT INDUCTION CONSTITUTES REFUSAL TO SUBMIT.

William Alan Callison v. United States (C.A. 9, No. 23,014; June 18, 1969; D.J. 25-11-4516)

Defendant reported as ordered to the induction station where he solicited signatures to an anti-war petition. He refused to obey an induction officer's orders to desist, became abusive, and provoked his arrest and removal by the police. The Court held that the governmental interest in maintaining orderly induction processing at a facility dedicated to that purpose permitted the imposition of reasonable restraints on defendant's First Amendment rights. It held that his disobedience of the induction officer's valid order and persistence in a course of conduct designed to prevent his induction constituted a refusal to submit to induction. 32 CFR 1637.14(b)(4, 5).

Staff: United States Attorney Cecil F. Poole and
Assistant United States Attorney Paul G. Sloan
(N.D. Calif.)

REGISTRANT'S MISUNDERSTANDING OF RIGHTS DOES NOT INVALIDATE CLASSIFICATION - EXHAUSTION OF REMEDIES - POST-INDUCTION CLAIMS - SELECTION BY CLERK.

United States v. John William Powers (C.A. 1, No. 7284; July 14, 1969; D.J. 25-36-1669)

In affirming a conviction for disobeying an induction order, the Court rejected the defense that the registrant had been misled by the Form 150 into believing he could not qualify for conscientious objector status. Distinguishing those situations in which registrants had been affirmatively misled by Selective Service personnel, e.g., Powers v. Powers, 400 F.2d 438 (C.A. 5, 1968), and acknowledging that there are instances where the Board has an affirmative duty to advise registrants of their rights, the Court concluded "the instant case does not present such a situation. Were unilateral, subjective, uncounselled misunderstandings of Selective Service

requirements and definitions to be a defense to prosecution, an already laboring vehicle would in all likelihood be completely immobilized".

The Court held that although United States v. McKart, 37 U.S.L.W. 4449 (5/26/69), permitted this defendant to challenge his classification though he had not reported for induction, that case did not permit him to challenge the revocation of his hardship deferment where he failed to either request a personal appearance or appeal.

The local board's refusal to consider a dependency claim filed after the date scheduled for induction was approved.

In the absence of any evidence that the clerk had performed any but ministerial functions in connection with the preparation of the delivery list and issuance of defendant's induction order, the Court found the order valid but warned that the failure of the Board itself to perform these functions risked invalidity under 32 CFR 1604.52a(c).

Staff: Former United States Attorney Paul F. Markahm and Assistant United States Attorney Garrett C. Whitworth (D. Mass.)

FAILURE TO PROVIDE JUSTICE DEPT. HEARING ON APPEAL OF CONSCIENTIOUS OBJECTOR CLAIM PENDING ON EFFECTIVE DATE OF MILITARY SELECTIVE SERVICE ACT OF 1967 DOES NOT INVALIDATE CLASSIFICATION.

Bill Rap Turner v. United States (C.A. 5, No. 25906; April 28, 1969; D.J. 25-17M-56)

In affirming a conviction for refusing induction the Court held that the Department of Justice hearing and recommendation procedure required in conscientious objector cases under Section 6(j) prior to July 1, 1967, the effective date of the Military Selective Service Act of 1967, was a mere procedural right subject to withdrawal by Congress in pending cases.

The registrant had filed his request for appeal on May 26, 1967, and the local board forwarded the case to the appeal board on June 13, when the Justice Department procedure was still available, but the appeal board did not meet to act upon the case until July 12, 1967, when the procedure was no longer in effect.

The Court of Appeals for the Ninth Circuit is in accord, Haughton v. United States, ____F.2d____ (C.A. 9, No. 23556, June 19, 1969) (conviction reversed on another ground).

Staff: United States Attorney Edward F. Boardman; Former Assistant United States Attorney Gary Tullis; and Assistant United States Attorney Joseph W. Hatchett (M.D. Fla.)

SELECTION OF JURORS FROM VOTER LISTS APPROVED - LOCAL BOARD BIAS CURED BY APPEAL - MENTAL PROCESSES OF BOARD MEMBERS NOT SUBJECT TO INQUIRY.

Thomas Darrell Camp v. United States (C.A. 5, No. 25,528; June 26, 1969; D.J. 25-19-794)

In affirming the conviction of a Jehovah's Witness for refusing to obey his local board's civilian work order, the Court sustained the random selection of grand and petit juries from voter lists, despite the fact such selection necessarily excluded his coreligionists, who by reason of their religious beliefs, refuse to register and vote.

Citing its own decision in Clay v. United States, 397 F.2d 201 (C.A. 5, 1968), the Court held that alleged bias and arbitrary action by the local board were cured by fair de novo consideration of the issue by the Appeal Board, and that the mental processes of the Appeal Board members could not be explored on the witness stand at the trial.

It reaffirmed the constitutional validity of the basis-in-fact test, citing Clark v. Gabriel, 393 U.S. 256 (1968), and found basis in fact for denial of defendant's claim to exemption as a minister.

Staff: Former United States Attorney Charles L. Goodson and Assistant United States Attorney Charles B. Lewis, Jr. (N.D. Ga.)

DISTRICT COURTS

MILITARY SELECTIVE SERVICE ACT

HABEAS CORPUS JURISDICTION AND EXHAUSTION OF REMEDIES.

Gregory Laxer v. Brig. Gen. Cushman (D. Mass. No. 69-28-J; June 19, 1969; D.J. 25-36-1673)

The Court held that it was the proper court to exercise jurisdiction over a habeas corpus proceeding brought by a soldier denied release as a conscientious objector who was stationed in Massachusetts though under orders to report to California. It refused relief, however, because petitioner had failed to exhaust his administrative remedies by application to the Army Board for Correction of Military Records, expressly following Craycroft v. Ferrall, 408 F.2d 587, 595 (C.A. 9, 1969), rather than Brooks v. Clifford, 409 F.2d 700 (C.A. 4, March 20, 1969, rehearing denied June 25, 1969).

Staff: Former United States Attorney Paul F. Markham and Assistant United States Attorney Stanley R. J. Suchecki (D. Mass.)

CONSCIENTIOUS OBJECTOR, NOT COMPLYING WITH LOCAL BOARD'S CIVILIAN WORK ORDER, NOT IN "CUSTODY" AND MAY NOT CHALLENGE VALIDITY OF ORDER BY HABEAS CORPUS PROCEEDINGS.

In the Matter of Walter Lee Cook (W.D. Mo., No. 17193-1; July 23, 1969; D.J. 25-43-669)

The Court held that it was without jurisdiction to entertain a petition for habeas corpus challenging the validity of a Selective Service System civilian work order filed by a conscientious objector who was not performing the duties required by the order. Recognizing that the restraints imposed on a registrant obeying such an order might satisfy the "custody" requirement of 28 U.S.C. 2241 under Jones v. Cunningham, 371 U.S. 236 (1962), the Court held that the mere threat of prosecution for failure to comply did not amount to such restraint upon one not complying with such order.

Staff: United States Attorney Calvin K. Hamilton and Assistant United States Attorney Paul Anthony White (W.D. Mo.)

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