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UNITED STATES DEPARTMENT OF JUSTICE

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United States v. General Dynamics Corp., et al. (N.D. Ill., Civ. 67 C 1632; September 22, 1967; D.J. 60-0-37-920)

This suit which challenges the acquisition by General Dynamics Corporation, New York City, of The United Electric Coal Companies, Chicago, and is based on Section 7 of the Clayton Act, alleges that General Dynamics became a substantial producer of bituminous coal when it acquired, on or about December 31, 1959, Material Service Corporation of Chicago; and that at the time of General Dynamics' acquisition, a Material Service wholly owned subsidiary, Freeman Coal Mining Corporation, operated bituminous coal mines located in Illinois.

The Government's action charges that as a result of General Dynamics' acquisition of Material Service, General Dynamics acquired a stock investment in United Electric equal to over 34 per cent of United Electric's outstanding shares; that by December of 1963, General Dynamics had acquired over 50 per cent of the outstanding shares of United Electric and on October 5, 1966 offered to purchase the remaining outstanding shares; that by December of 1966, General Dynamics had acquired at least 90 per cent of the outstanding shares of United Electric; and that shortly thereafter United Electric became a wholly owned subsidiary of General Dynamics.

The suit alleges that in 1965 Freeman Coal, a wholly owned subsidiary of General Dynamics, produced 7,257,856 tons of bituminous coal from its mines which are all located within Illinois, and ranked second in the production of bituminous coal in Illinois with 12.46 per cent of total 1965 Illinois bituminous coal production; that in 1965 United Electric produced 5,348,641 tons of bituminous coal from its mines which are located within Illinois, and ranked third in the production of bituminous coal in Illinois with 9.18 per cent of total 1965 production; and that if General Dynamics had owned United Electric during all of 1965, General Dynamics would have ranked second in bituminous coal production in Illinois with 21.64 per cent of the total 1965 Illinois bituminous coal production.

The Government's action also charges that a combination of General Dynamics, Freeman Coal, and United Electric would have ranked second in production of coal in the Eastern Interior Coal Province with 11.13 per cent of this area's total 1965 coal production, the Eastern Interior Coal Province being defined as the geologically united coal field which blankets 67 per cent of Illinois and much of southwestern Indiana and western Kentucky.

The Government's complaint states that bituminous coal production in the United States in 1965 and 1966 amounted to 512,088,000 tons and approximately 532,000,000 tons, respectively; that it is estimated that 1967 production of bituminous coal will amount to 545,000,000 tons; that in 1965 Illinois ranked as the fourth largest bituminous coal producing state with an output of 58,232,480 tons, and that Illinois is the leading state in bituminous coal reserves with estimated recoverable reserves of 67,800,000,000 tons.

The complaint charges that the effect of the acquisition by Material Service and its successor, General Dynamics, of the stock of United Electric "has been and will be substantially to lessen competition or tend to create a monopoly in the production and sale of bituminous coal in the State of Illinois and in the Eastern Interior Coal Province sales area, and in various other sections of the country, in violation of Section 7 of the Clayton Act."

The Government's suit asks that General Dynamics be required to divest itself of all of the stock and assets of United Electric and that General Dynamics be enjoined from acquiring stock or assets of any other firm engaged in the production or sale of bituminous coal in Illinois and in the Eastern Interior Coal Province.

Staff: John T. Cusack, Paul D. Carrier and Bertram M. Long (Antitrust Division)

COMPLAINT CHARGING VIOLATION OF SECTION 7 OF CLAYTON ACT; PROPOSED FINAL JUDGMENT.

United States v. Eversharp, Inc. et al. (E.D. Pa., Civ. 43623; September 20, 1967; D.J. 60-0-37-965)

A complaint and simultaneous proposed consent judgment was filed in this case on September 20, 1967. The complaint alleged violations of Section 7 of the Clayton Act by Eversharp, Inc., a producer of wet shaving instruments, namely, safety razors and blades, Schick Electric Inc., a producer of dry shaving instruments, namely, electric razors, and Technicolor, Inc. Judge Ralph Body signed a stipulation which provides that the final judgment may be entered at any time after 30 days unless the Government withdraws its consent.

Eversharp is the second largest manufacturer of safety razors and blades in the nation, accounting for 27 percent of all sales, and Schick is the third largest in the production of electric razors, accounting for 16 percent of all sales.

The complaint's first alleged violation was the Eversharp and Technicolor stock acquisitions of Schick stock in May 1965 which gave them 27.5 percent ownership and 10 of 12 designated directors on Schick's board of directors. The second alleged violation of Section 7 was the imminent merger of Schick into Eversharp. The effect of the alleged violations was that competition would be reduced in the shaving instrument industry by eliminating one of only nine competitors, since the electric shaving industry consists of only five significant domestic competitors, and the safety razor and blade industry consists of only four. The combination of two of these firms would have the effect of totally eliminating one as an independent entity; would leave the surviving corporation with less incentive to compete against itself in the sale of electric shavers versus safety razors and blades; and would result in increasing concentration generally in the shaving instrument industry.

The final judgment provides that if Eversharp and Schick merge they must form two subsidiary companies, one of which will possess the present assets of Schick and the other will possess the present wet shaving assets of Eversharp. One of these two companies would have to be sold within a two year period to a purchaser approved by the Government.

The companies intend to consummate this merger. However, provision is made in the final judgment that if the merger should not be consummated, Eversharp and Technicolor would be required to sell their Schick stock within a six month period.

Staff: John F. Hughes, Kenneth R. Lindsay, John L. Wilson, Lewis E. Rubin and Roy C. Cook (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SPECIAL NOTICE

FORECLOSURE ACTIONS

Reference is made to SPECIAL NOTICE appearing in UNITED STATES ATTORNEYS' BULLETIN, VOL. 15, NO. 13, June 23, 1967 at page 342, relative to the Department's position that there is no right of redemption in foreclosure suits instituted by the Federal Government. You are now advised that the United States District Court for the District of Oregon filed an Opinion on October 2, 1967 in United States v. Forest Glen Senior Residence, an Oregon Corporation, et al., squarely upholding our position. Until such time as the Opinion is published copies thereof will be furnished to you upon request.

COURTS OF APPEALS

FEDERAL HOUSING ADMINISTRATION

UNSUCCESSFUL BIDDER HAS NO STANDING TO CHALLENGE LEGALITY OF FHA BIDDING PROCEDURE; 28 U.S.C. 2680(h) BARS ACTION UNDER FEDERAL TORT CLAIMS ACT FOR MISREPRESENTATION IN CONNECTION WITH AUCTION.

Irwin A. Edelman v. Federal Housing Administration (C.A. 2, No. 30,646; September 7, 1967; D.J. 130-52-5794)

In this case, the appellant instituted suit to enjoin a conveyance of property by the F.H.A. to a successful bidder on the ground that the F.H.A. had conspired with that bidder to defraud appellant and other bidders. Appellant sought to be declared the successful bidder. The district court dismissed the complaint, and the Second Circuit affirmed. The Court of Appeals held that insofar as appellant's claim was based on the Federal Tort Claims Act, 28 U.S.C. 1346(b), the suit was barred by 28 U.S.C. 2680(h) which excludes from coverage of the Tort Claims Act actions for "misrepresentation, deceit, or interference with contract rights". Moreover, insofar as appellant's action was for declaratory or injunctive relief, the Court of Appeals held that he had no standing to challenge the legality of the F.H.A. bidding procedure. In addition, the Court ruled that there was no contract between the F.H.A. and appellant that the agency would conduct the auction fairly.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Jerome C. Ditore (E.D. N.Y.)

FEDERAL TORT CLAIMS ACT

GOVERNMENT HELD NOT LIABLE FOR PERSONAL INJURIES SUSTAINED BY EMPLOYEES OF ITS INDEPENDENT CONTRACTORS WHERE IT DOES NOT ASSUME DUTY OF PROTECTING THEM.

Roberson v. United States (C. A. 9, No. 20,832; September 15, 1967; D.J. 157-8-168)

Plaintiffs Roberson and Rodgers were employed by Merritt-Chapman & Scott, an independent contractor hired to construct the Glen Canyon Dam in Page, Arizona. The contract between the Government and Merritt-Chapman & Scott required the contractor to "exercise reasonable precautions for the safety of employees in the performance of this contract". Plaintiffs sustained personal injuries when they fell from a scaffold while working at the dam site and they commenced this action against the United States under the Federal Tort Claims Act to recover for such injuries. In the district court, plaintiffs contended that "the Government voluntarily assumed the duty of protecting [them] from the hazards which they encountered in working on the [scaffold]. After trial, the district court granted the Government's motion for judgment in its favor. The court found that the failure of certain equipment and the lack of adequate safety appliances on the scaffold resulted in the injuries sustained by the plaintiffs. It concluded that the fact that the Government voluntarily maintained its own safety program during construction did not abrogate the contractor's undertaking to maintain its own safety program for the protection of its own employees.

The Court of Appeals affirmed. The appellate court expressly refused to consider as a ground for reversal three additional theories which plaintiffs failed to present when the case was before the trial court. The Court then concluded that the Government did not undertake, directly or indirectly, to render safety services to plaintiffs. See Restatement of Torts (2d) §§323 and 324(A). The Ninth Circuit states:

> In conducting its safety inspection program, the Government was not undertaking to render services to the contractor. It sought only to protect its own interest, namely to assure itself that the contractor was performing in the manner required of it under the contract. The safety inspection activities of the Government did not relieve the contractor of any of its contractual duties; quite to the contrary, it was designed only to make sure that the contractor performed those duties. See United States v. Page, 10 Cir., 350 F. 2d 28, 31.

Staff: Howard J. Kashner (Civil Division)

GOVERNMENT HELD LIABLE FOR FAILURE OF FAA PERSONNEL TO ISSUE ADDITIONAL WARNING WITH RESPECT TO AIR TURBULENCE.

United States of America and Baker Aircraft Sales v. Betty K. Furumizo, et al. (C. A. 9, No. 20,641; August 9, 1967; D. J. 157-21-134)

Plaintiff Betty Furumizo commenced this tort suit against the United States and Baker Aircraft Sales to recover damages for the death of her husband in an airplane accident at Honolulu International Airport. The accident occurred when the Piper Cub in which Furumizo was riding as a student pilot encountered air turbulence upon take-off from a preceding DC-8. The Piper was operated by a Baker employee, and was cleared for take-off by a Federal Aviation Agency control tower operator, who issued it a cautionary warning with respect to turbulence. After trial, the district court found the United States and Baker equally liable. See 245 F. Supp. 981 (D. Hawaii). The liability of the United States was found on the alleged failure of the tower personnel "to hold up the clearance a sufficient time to minimize the acute danger" to the Piper from the DC-8's wake turbulence.

The United States and Baker appealed, and the Court of Appeals affirmed. As to the United States, the Court of Appeals sustained the district court's finding of Governmental negligence on the ground that the applicable regulations required the controllers to give the Piper a second warning on turbulence, which they failed to do.

The Ninth Circuit also rejected Mrs. Furumizo's claim that the damages awarded were inadequate.

Staff: David L. Rose and Harvey L. Zuckman (formerly of the Civil Division)

LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT

INJURIES ON DECK OF PIERS OR WHARVES NOT COVERED UNDER ACT.

Houser v. O'Leary, Deputy Commissioner, et al (C. A. 9, No. 21,289; September 27, 1967; D. J. 83-61-28)

The Department of Labor reports that 25 percent of all injuries in maritime employment occur on the pier or the wharf alongside the vessel being loaded, unloaded or repaired. This is one of the cases brought at the instigation of the International Longshoremen's Association to contest the validity of the Labor Department's rejection of Longshoremen's Act claims for injuries in the course of employment under maritime contracts occurring on piers or wharves. In this case the evidence showed that the injury

occurred alongside a vessel loading in the Willamette River at Portland, Oregon, at a point on the deck of a wharf situated over and in navigable waters under which the river flowed and small craft were regularly navigated. The Deputy Commissioner rejected the claim and the district court affirmed, 253 F. Supp. 417 (D. Oreg. 1966), holding that as a matter of law a wharf is an "extension of the land" and the injuries in question which occurred on the wharf were excluded from coverage under Section 903(a) of the Longshoremen's Act, since they did not occur "upon" navigable waters.

The Court of Appeals affirmed. It rejected appellant's contentions (1) that coverage of the Longshoremen's Act extended to the limits of admiralty contract and/or tort jurisdiction in respect to locus of injury, and (2) that since an injury on a wharf occurs literally over navigable waters, it is therefore "upon navigable waters" for purposes of the Act.

The Court of Appeals emphasized that it had already rejected federal coverage of such injuries. Johnston v. Marshall, 128 F. 2d 13, certiorari denied, 317 U.S. 649 (1942). The Court refused to read the Supreme Court's decision in Calbeck v. Travelers Insurance Co., 370 U.S. 114, as holding that the Act's coverage was coextensive with admiralty jurisdiction in respect to the place of injury. The Court observed that under appellant's view, "the Act's coverage flows and ebbs with the scope of admiralty tort jurisdiction" (sic), which would make every question of coverage involve "a decision of constitutional dimension".

Staff: Leavenworth Colby (Civil Division)

WHERE EMPLOYER OF INJURED LONGSHOREMEN FILED REPORT INTENTIONALLY MISSTATING EMPLOYEE'S AVERAGE WEEKLY WAGE, ONE YEAR PERIOD FOR FILING CLAIM FOR ADDITIONAL COMPENSATION UNDER ACT DOES NOT COMMENCE TO RUN UNTIL EMPLOYER FILES CORRECT WAGE REPORT.

Belton v. Traynor (C.A. 4, No. 11,094; June 22, 1967; D.J. 83-79-44)

By agreement between a longshoremen's union and certain employers, a longshoremen's "average weekly wage" for workmen's compensation purposes under the Longshoremen's Act was to be treated as $54.00 per week. In the instant case an injured longshoreman, assisted by a union representative, filed for and was voluntarily paid benefits by the employer's insurer based on the $54.00 figure, which had been reported by the employer to the Deputy Commissioner as the man's average wage. In fact, the longshoreman's average wage exceeded one hundred dollars per week. The longshoreman filed a claim for additional benefits based on his actual earnings, but his claim was filed after the one year limitation period provided in the Act (33 U.S.C. 913(a)) had expired. The Deputy

Commissioner ruled that the claim was out of time, and the district court affirmed this determination. The Court of Appeals, however, reversed, holding that under the Longshoremen's Act, actual wages were required to be used as the basis for computing compensation due an injured employee (33 U.S.C. 910). The Fourth Circuit went on to hold that, where the employer has not provided a statement of the employee's true wages as required under 33 U.S.C. 930(a), the limitations period specified in 33 U.S.C. 913(a) for filing claims for additional compensation is tolled by 33 U.S.C. 930(f) "until such [correct] report shall have been furnished ***".

Staff: United States Attorney Claude V. Spratley, Jr.; Assistant United States Attorney James A. Oast, Jr. (E.D. Va.); Alfred H. Myers (Department of Labor)

SHIPPING ACT -- "COMMON CARRIERS"; FEDERAL RULES OF CIVIL PROCEDURE

NO REQUIREMENT UNDER ACT THAT "COMMON CARRIER" MAINTAIN PRE-DETERMINED AND REGULAR SCHEDULE OF SAILINGS; DISTRICT COURT ERRED IN DISMISSING COMPLAINT BECAUSE OF VARIANCE BETWEEN PROOF AND PLEADINGS.

United States v. Stephen Brothers Line (C.A. 5, No. 23,746; September 27, 1967; D.J. 61-18838)

In this case, the United States sought the imposition of statutory penalties on a carrier for its failure to file with the Federal Maritime Commission, or to keep open to public inspection, a tariff, in violation of Section 18(b)(1) of the Shipping Act of 1916. The Government's complaint alleged that the carrier had been in common carriage between Miami and "Central and South American Ports", but its proofs showed that its trade had been to the Dominican Republic which is not, strictly speaking, in Central or South America. The district court dismissed the Government's complaint without leave to amend, on the grounds that the proof did not conform to the pleading, and that the carrier was not a "common carrier" under the Act because there was no pre-arranged definite schedule to make the trips in issue and because no definite and regular schedule was maintained.

On appeal, the Fifth Circuit reversed. It held that the issue as to trade with the Dominican Republic was tried "by express or implied consent" of the parties within the meaning of Rule 15(b), F.R. Civ. P., and that, in the circumstances, that Rule required the district court to permit amendment of the pleadings to conform to the proof. On the merits, the Court held that there was no requirement under the Shipping Act that a "common carrier"

maintain a pre-determined and regulated schedule of sailings. The Court of Appeals, quoting from Washington ex rel. Stimson Lumber Co. v. Kykendall, 275 U.S. 207, stated that a common carrier was simply "one who undertakes for hire to transport from place to place the property of others who may choose to employ him . . . ."

Staff: Alan S. Rosenthal and Florence Wagman Roisman
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

APPELLATE BRIEFS

In order to insure that the Department is aware of current problems in Criminal Division cases and in order for the Department to render possible aid, you are reminded that two copies of all briefs and printed records in these cases should be forwarded to the Department as soon as available. See Title 6 of the United States Attorneys Manual at page 8.2. It is not necessary to send more than two copies of a brief, nor is it necessary to write a letter with the routine briefs; in fact, some offices use a form to transmit briefs, records or opinions. However, it is important that the Department receive two copies of the brief for appellant and two copies of the Government's response as soon as possible.

DECISIONS ADVERSE TO THE GOVERNMENT

In order to enable the Department to obtain the advice of the Solicitor General in seeking review of decisions adverse to the Government, you are reminded that you should promptly (within one or two days if possible) notify the Appellate Section of all final decisions by district judges dismissing indictments and of all decisions by appellate courts reversing convictions as well as of any other decision adverse to the Government where we can seek review, e.g. forfeitures, immigration matters, suppression of evidence in narcotic cases under 18 U.S.C. 1404, etc. You should send a full copy of the opinion and your specific recommendations together with any pertinent papers. See Title 6 of the United States Attorneys Manual, pages 1-4, 6, 8.2, 8.6-9, and 11-16. Since a notice of appeal is jurisdictional, the failure promptly to notify the Department or file a protective notice of appeal means that the Government loses by default. Early notification is necessary to enable the Department to suggest either a rehearing or to enable the Criminal Division to write a memorandum to the Solicitor General outlining the pertinent facts and law.

SUPERVISION BY CRIMINAL AND TAX DIVISIONS OF VIOLATIONS BY EMPLOYEES OF THE INTERNAL REVENUE SERVICE

The Criminal Division has supervisory jurisdiction over criminal violations involving malfeasance or misfeasance of office by employees of the Internal Revenue Service which may also give rise to tax violations. Supervisory jurisdiction over the tax violations is exercised by the Tax Division. In order that the responsibility of both Divisions may be fulfilled

expeditiously, each Division has agreed to the following procedures:

1. If there are only employee violations contained in the IRS Intelligence reports, the Criminal Division will handle the case to the exclusion of the Tax Division.

2. If there are tax liability as well as employee violations contained in the IRS Intelligence reports, the employee violations will be reviewed by the Criminal Division prior to the tax liability review by the Tax Division.

3. Whenever practicable the employee violations will be the subject of an early indictment separate and apart from any indictment charging tax liabilities.

4. If proof of the employee violations needs to be and would be bolstered by their incorporation into a single indictment with the tax violations, the employee violations will be delayed while the Tax Division seeks an opinion of the General Counsel of the Internal Revenue Service and makes other preparations desired by the Tax Division.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

UNITED STATES ATTORNEYS MANUAL

In Title 2, page 23, last paragraph, the three references to "180" days should be changed to read "120" days.

APPOINTMENTS

Department

The nomination of Erwin N. Griswold as Solicitor General has been confirmed by the Senate.

Solicitor General Erwin N. Griswold

Mr. Griswold was born July 14, 1904 at East Cleveland, Ohio, is married and has two children. He holds the degrees of A.B. and A.M. from Oberlin College, LL.B. and S.J.B. from Harvard Law School, L.H.D. from Tufts College, and LL.D. from the University of British Columbia. He was admitted to the Bar of the State of Ohio and the State of Massachusetts in 1929 and 1935, respectively. Mr. Griswold was in private practice in 1929, and from 1929 to 1935 was with the Office of the Solicitor General, and also served as Special Assistant to the Attorney General. From 1934 to 1936 he was Assistant Professor of Law at Harvard. Mr. Griswold was a member of the Alien Enemy Hearing Board for the State of Massachusetts from 1941 to 1945. He was a consulting expert with the Treasury Department in 1942. He was Charles Stebbins Fairchild Professor of Law and Langdell Professor of Law at Harvard Law School, and from 1950 until his appointment as Solicitor General, served as Dean of the Law School.

United States Attorneys

The nominations of the following new appointees as United States Attorneys have been confirmed by the Senate:

Hawaii - Yoshimi Hayashi

Mr. Hayashi was born in Honolulu, Hawaii on November 2, 1922. He received his B.A. degree from the University of Hawaii in 1950, and his LL.B. degree from George Washington University Law School in 1958. Mr. Hayashi was admitted to the State Bar of Hawaii in 1958. From 1951 to

1955 he was counselor with the Council on Veterans Affairs, and in 1958 he was law clerk to the Chief Justice of the Hawaii Supreme Court. From 1961 until his appointment as United States Attorney, he was an Assistant United States Attorney for the District of Hawaii.

Missouri, Western - Calvin K. Hamilton

Mr. Hamilton was born September 28, 1924 at Caplinger Mills, Missouri, is married and has two children. He received his A.B. degree (1949) from Drury College, Springfield, Missouri, and his LL.B. degree (1956) from the University of Kansas City. Mr. Hamilton was admitted to the Bar of the State of Kansas and the State of Missouri in 1956, and was with the Department of Justice, Criminal Division, from 1956 to 1957. From 1957 to 1959 he was in private practice in Springfield, Missouri, and from 1959 to 1961 was an Assistant Attorney General for the State of Missouri. From 1961 until his appointment as United States Attorney, he was Assistant United States Attorney for the Western District of Missouri.

The nomination of Asher E. Schroeder as United States Attorney for the Northern District of Iowa has been submitted to the Senate for confirmation.

The nomination of William A. Meadows to a new four-year term as United States Attorney for the Southern District of Florida has been confirmed by the Senate.

Assistant United States Attorneys

Michigan, Eastern - JEROME B. GREENBAUM, JR., ESQ.; University of Michigan, LL.B., and formerly in private practice.

New York, Southern - LEE A. ALBERT, ESQ.; Yale University, LL.B., and formerly law clerk, Supreme Court.

New York, Western - EDGAR C. NE MOYER, ESQ.; Buffalo Law School, LL.B., and formerly in private practice and an attorney with FHA.

Maryland - STEPHEN D. SHAWE, ESQ.; Harvard Law School, LL.B., law clerk, Court of Appeals, and formerly in private practice.

New York, Southern - ABRAHAM D. SOFAER, ESQ.; New York University, LL.B., law clerk, Supreme Court and Court of Appeals, and formerly in private practice.

Maryland - NEVETT STEELE, JR., ESQ.; Maryland University, LL.B., law clerk, Court of Special Appeals of Maryland, and formerly in private practice.

Texas, Southern - HUGH MASSEY RAY, JR., ESQ.; Vanderbilt Law School, LL.B., and formerly in private practice.

Texas, Southern - MALCOLM R. DIMMITT, ESQ.; Southern Texas College, LL.B., and prosecuting attorney, Harris County.

Texas, Southern - CHARLES L. HAMEL, ESQ.; Texas University, LL.B.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

COURT OF APPEALS

ATTORNEY GENERAL'S LIST OF DESIGNATED ORGANIZATIONS

FEDERAL EMPLOYMENT LOYALTY PROGRAM - EXECUTIVE ORDER 9835 AND EXECUTIVE ORDER 10450; ATTORNEY GENERAL'S LIST OF ORGANIZATIONS DESIGNATED AS FASCIST, COMMUNIST, TOTALITARIAN OR SUBVERSIVE.

Industrial Workers of the World v. Ramsey Clark (C. A. D. C. No. 20,586, September 26, 1967; D. J. 146-28-84)

The IWW was first designated in 1949 under Executive Order 9835 as an organization seeking to alter the form of government of the United States by unconstitutional means. Executive Order 10450 replaced Executive Order 9835 on April 27, 1953. The designation of IWW was continued under E. O. 10450, and the organization filed no notice of contest of this designation within the 10 day period prescribed in the regulations implementing the Executive Order and did not avail itself of the process afforded thereunder. However, the IWW did begin a course of correspondence with the Attorney General from at least January 1954, objecting to the designation and seeking its removal from the list. The Attorney General took the position that relief could not be given because of the IWW's default in failing to protest within 10 days of the listing in 1953. The Attorney General on January 6, 1965 wrote IWW that a petition for delisting would be given careful study and consideration if the organization submitted information providing a reasonable basis therefor. IWW submitted a "Petition" in February 1965 citing as "new material evidence" the decision of the Seventh Circuit Court of Appeals in Thompson v. Immigration & Naturalization Service, 332 F. 2d 167. Thereafter the Attorney General denied all relief, deeming the Thompson decision immaterial and not constituting evidence. It was in 1965 that this suit was filed, alleging, among other things, that IWW had exhausted its administrative remedies and that the Attorney General's rejection of the February 1965 petition was arbitrary and capricious.

IWW sued in the District Court of the United States for the District of Columbia (1) to enjoin the Attorney General from designating and listing IWW under E. O. 10450; and (2) for a declaratory judgment that the executive order unconstitutionally delegated authority to the Attorney General, and violated Fifth Amendment procedural due process; and (3) requesting that the Court order a hearing on notice and charges to determine whether

IWW should be removed from the list of designated organizations in view of the decision in Thompson v. Immigration & Naturalization Service (C. A. 7, 1964), 332 F. 2d 167, "the only proper relevant determination ever made of the character of the I. W. W." and which held that Thompson's application for naturalization could not be denied solely because of his membership in IWW, an "organization that seeks to change the form of government of the United States by unconstitutional means"; (4) in the alternative, IWW requested a hearing on the merits of the original listing claiming the January 6, 1965 letter of the Attorney General inviting submission of new evidence constituted a waiver of the 10 day limitation period.

The District Court granted the Attorney General's Motion to Dismiss or for Summary Judgment. The District Court saw no need to reach the broad constitutional issues involved; but ruled that, by failing to exhaust its administrative remedy (of contesting the listing within 10 days), IWW had precluded itself from pursuing a judicial remedy.

The Court of Appeals held that the District Court erred in part. According to the Court of Appeals, the requirement of the Attorney General that the listed organization demonstrate to the Attorney General's satisfaction that there is a material "change in the character" of the IWW is "less than a wholly satisfactory administrative remedy". First Amendment guarantees of freedom of speech, press and political association are involved; the IWW has timely raised a justiciable objection that the Attorney General's denial of relief was arbitrary; and IWW was entitled to judicial consideration of that issue, which entails a careful analysis of the Thompson litigation, "a new judicial determination of the ultimate legal significance of relevant evidence, a determination that may embody both factual inferences and changing legal concepts". Although the issues in none of the cases are the same, their approach is relevant in determining whether the Attorney General's conduct was arbitrary and capricious and the District Court should consider this question. It was on this reasoning that the Court of Appeals affirmed the lower court's denial of a review of the 1953 listing; but remanded for further proceedings with respect to the claim that the Attorney General acted arbitrarily on the 1965 petition for delisting.

Staff: Appeal argued in the Court of Appeals by Kevin T. Maroney, Chief, Appeals and Research Section. With him on the brief were George B. Searls and Lee B. Anderson (Internal Security Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURTS OF APPEALS--CRIMINAL CASES

EVIDENCE

REVENUE AGENT NEED NOT ADVISE OF RIGHT TO COUNSEL BEFORE OBTAINING EVIDENCE FROM TAXPAYER.

Whitfield v. United States (C. A. 9, No. 21, 465; September 11, 1967; D. J. 5-12-4478)

The agent advised the taxpayer that she could refuse to answer any questions and that anything she said could be used against her in court. He did not, however, advise her of her right to counsel. The district court admitted her statements to the agent in evidence at the trial, and the Court of Appeals found no error.

The Ninth Circuit took note of the fact that its earlier opinion in Kohatsu v. United States, 351 F. 2d 898, certiorari denied, 384 U.S. 1011, had been criticized by Judge Will in United States v. Turzynski, 268 F. Supp. 847 (N. D. Ill.). It pointed out, however, that it had adhered to the rule of Kohatsu in Selinger v. Bigler, 377 F. 2d 542, and stated that it did not find it necessary to reexamine that holding. The Court also stated that, in any event, the trial had been completed before the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436, and that the Supreme Court's subsequent decision in Johnson v. New Jersey, 384 U.S. 719, made it clear that the rule of Miranda was to have no retroactive effect.

Staff: United States Attorney William Matthew Byrne, Jr., and Assistant United States Attorneys Robert L. Brosio and Ronald S. Morrow (C. D. Cal.)

COURT OF APPEALS--CIVIL CASES

SET-OFF

GOVERNMENT HAS NO RIGHT TO SET OFF AMOUNT OF CONTRACTOR'S UNPAID TAXES AGAINST FUNDS RETAINED PENDING COMPLETION OF CONTRACT WHEN FUNDS CLAIMED BY COMPLETING SURETY.

Trinity Universal Insurance Co., et al. v. United States (C. A. 5, No. 24, 246; September 12, 1967, D. J. 5-73-2091)

This recent case involved the rights of a surety on a performance bond, required by the Miller Act (49 U.S.C. 270a), to funds withheld by the Government to insure completion of a contract. The contractor completed 90 percent of a Government contract before its default. Of the amount the contractor earned up to the time of default, the Government withheld $39,906.96. The contractor owed $6,495.07 in unpaid Federal employment, withholding and F.I.C.A. taxes, although the record does not indicate whether those taxes arose from the contract in question. After the contractor's default, the surety agreed with the Government to complete the job. Upon completion, the surety sought the balance of the contract price as well as the $39,906.96 retained by the Government. The Government paid the balance of the contract price but set off the amount of the taxes owed by the contractor against the amount retained to ensure completion of the contract. The surety then began this action to recover the amount of the set-off, claiming the right to the retained amount free of set-off.

The district court rejected the surety's claim, basing its decision on United States v. Munsey Trust Co., 332 U.S. 234. The Court of Appeals reversed. It held Munsey Trust distinguishable since in that case the surety's claim arose from payment of laborers and materialmen and was therefore obtained by subrogation to the rights of the contractor, against whom the Government had a valid right of set-off; in the instant case, the surety's claim arose from completion of the contract and was therefore, in the view of the Court, obtained by subrogation to the rights of the Government itself, as well as to the rights of the contractor. Thus the Court reasoned that the surety had the same right to the retained funds as the Government and that right could not be diminished by set-off. The Court also based its decision on the alternative theory that the Government, by agreeing to allow the surety to complete the job, also implicitly agreed that the full amount of the retained funds would be available to the surety on completion. This decision is, as noted by the Court of Appeals, in conflict with the Court of Claims decision in Standard Accident Insurance Co. v. United States, 97 F. Supp. 829, which reached an opposite conclusion on similar facts.

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SUMMONS ENFORCEMENT

EXAMINATION OF CORPORATE BOOKS FOR "CLOSED" YEARS; NO ALLEGATION BY GOVERNMENT OF SUSPECTED FRAUD; BURDEN ON TAXPAYER TO SHOW IT HAD NOT BEEN NOTIFIED THAT SECOND EXAMINATION OF BOOKS WAS NECESSARY; EFFECT OF DESTRUCTION OF SOME CORPORATE BOOKS.

United States and Rowles, Special Agent v. Wozniak (C.A. 6, No. 17,142; August 3, 1967; D.J. 5-37-2310)

The corporation refused to comply with an Internal Revenue Service summons on the grounds that there was no necessity for a further examination of its books for "closed" years; that the Service already had the information sought as the result of a prior audit; and that it had destroyed some of its records after the prior audit. The district court directed compliance, and the Sixth Circuit affirmed.

The Court of Appeals held, in reliance on United States v. Powell, 379 U.S. 48, that the Government's petition for enforcement of the summons need not allege a suspicion that the returns for the "closed" years were fraudulent, and need make no showing of fraud in the absence of a substantial question whether enforcement of the summons would be an abuse of the court's process. The Court also held that the additional examination of the corporation's books was not "unnecessary" under 26 U.S.C. 7605(b), since the taxpayer failed to sustain its burden of showing that the Commissioner had not sent it to the "reopening letter" required by Section 7605(b). Finally, the Court held that the taxpayer had failed to show that it had been prejudiced by the destruction of some of its records.

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STATE COURT OF APPEALS

JURISDICTION

SITUS OF TAXPAYER'S INTEREST IN CASH SURRENDER VALUE OF LIFE INSURANCE POLICIES HELD TO BE COUNTY OF HIS RESIDENCE.

Bankers Trust Co., Respondent v. The Equitable Life Assurance Society, Defendant; United States, Plaintiff-in-Intervention, Appellant v. Bankers Trust Co., Defendant-in-Intervention, Respondent, et al. (New York Court of Appeals, No. 450-66; May 23, 1967; D. J. 5-51-8802)

Plaintiff Bankers Trust brought suit to recover the cash surrender value of life insurance policies assigned to it by the taxpayer to secure various loans. The defendant insurance company was dismissed upon payment of such cash into court. The Government intervened to assert its tax lien, notice of which was filed prior to several of the loans made by the plaintiff.

On the question of priority between the federal tax lien and the plaintiff's lien, plaintiff argued that the Government had failed to meet the requirements of the New York law (which has since been repealed) that notice of lien be filed in the county where the property is located, if it is located within New York City, as well as in the county of the taxpayer's residence. Since a number of the policies were physically located in New York City, and since

no notice of federal tax lien was filed in New York City, the Appellate Division held that the Government had failed to file the notice of lien where the property was located and that the bank's lien was therefore superior to that of the United States. The Court of Appeals reversed, holding that for the purposes of the New York statutory requirement regarding filing of liens, the situs of insurance policies is that of the insured's residence.

In reaching its decision, the Court noted that the situs of intangible property is in truth a legal fiction and that, accordingly, the selection of a situs should be based upon "a common sense appraisal of the requirements of justice and convenience in particular conditions", which may lead to different conclusions in each case. The Court stated that "the lender's interest can be fully served by requiring only that the lien notice be filed in the taxpayer's county of residence and that there is no need for inconveniencing the Government by requiring it to track down whatever of the taxpayer's intangible assets might have found their way back into New York City".

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Laurence Vogel and Grant B. Hering (S.D. N.Y.); Joseph Kovner (Tax Division)

THREE-JUDGE DISTRICT COURT

EVIDENCE

CONSTITUTIONALITY OF SECTION 7604, INTERNAL REVENUE CODE OF 1954.

United States and Glen B. Johnson, Special Agent, Internal Revenue Service, Petitioners v. First National Bank of Pikeville, Citizens Bank of Pikeville, and Pikeville National Bank and Trust Co., Respondents, Taylor Justice and Stella Justice, Intervening Petitioners (E.D. Ky., Pikeville Div., No. 1061; June 27, 1967; D.J. 5-30-527)

This action was commenced by the United States seeking enforcement of Internal Revenue summonses issued under the provisions of Section 7602 of the Internal Revenue Code of 1954 upon three banks, directing production of records relative to the taxpayers, Taylor and Stella Justice. In an unreported decision of the District Court for the Eastern District of Kentucky, compliance with the summonses was ordered and a petition to intervene by the taxpayers, Taylor and Stella Justice, was denied on the basis of their inability to raise constitutional defenses regarding bank records in which they had no property interest, relying on United States v. Peoples Deposit Bank & Trust Co., 112 F. Supp. 720 (E.D. Ky. 1953), aff'd 212 F. 2d 86, certiorari denied 348 U.S. 838. On appeal to the Sixth Circuit, reported at 365 F. 2d 312, the Order of the District Court was reversed and the matter

remanded with direction that the taxpayers' motion to intervene be granted. The Court's ruling was on the basis of the Supreme Court decision of Reisman v. Caplin, 375 U.S. 440, granting the right of the taxpayer to intervene in this type of proceeding and finding that the taxpayers' constitutional rights regarding the bank's records could not be determined until they were allowed to intervene.

On remand the taxpayers petitioned for a three-judge court challenging the constitutionality of Section 7604(a) and (b) of the Internal Revenue Code of 1954 and seeking an order enjoining enforcement of the summonses issued to the banks. The argument of the intervening petitioners was that the United States in this statute attempts to secure evidence to be used in a criminal proceeding, and the statute is therefore violative of constitutional safeguards provided by the Fourth and Fifth Amendments. In oral argument and in a brief filed with the three-judge court the United States asserted that Sections 7602, 7603 and 7604 of the Internal Revenue Code are a constitutional delegation of power by the Congress to the Secretary of the Treasury so long as the investigation is authorized by Congress for a purpose which Congress might order and so long as the documents sought are relative to the inquiry. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

In upholding the constitutionality of Section 7604, the three-judge Court found that the purpose of the investigation was "to determine the accuracy of the income tax returns of the taxpayers" and further stated that even though the summonses might be used to obtain information for subsequent use in a criminal proceeding the statute was not thereby rendered unconstitutional, recognizing the right guaranteed in Reisman of the taxpayer to intervene in a summons enforcement action to assert constitutional defenses in the application of the statute.

The intervening petitioners, Taylor and Stella Justice, have filed an appeal with the Supreme Court of the United States pursuant to 28 U.S.C. 1253.

Staff: United States Attorney George I. Cline (E.D.Ky.); David H. Hopkins, Jr. and James H. Jeffries, III (Tax Division)

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