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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

Executive Order 11531

The Government Employees Training Act, 5 U.S.C. 4101-4118, excluded from coverage those individuals appointed by the President unless the individual is specifically designated by the President for training. On recommendation of the Department, the President issued Executive Order 11531 to authorize training under the above Act for United States Attorneys and United States Marshals. Any proposals or suggestions regarding training needs are welcome.

(Administrative Division)

Continuation of Title Evidence to Lands Being Acquired by Condemnation Proceedings

Frequently, final assemblies are received in condemnation cases which include title evidence to the lands continued only to a date many months prior to the institution of the case and the filing of lis pendens notice of the proceedings.

Immediately upon the receipt of the request to institute condemnation proceedings, the title evidence should be examined and if not continued to a current date the acquiring agency should be requested to have the evidence continued to the date of the filing of notice of the pendency of the case.

For the protection of the Government's interest and to avoid possible dual payments for lands it is essential that the title evidence be so continued and that all parties shown by the complete title evidence be named and served in the proceedings in order to bar all claims for compensation. Compliance with this request will eliminate considerable correspondence and delays in closing tracts in condemnation cases.

(Land & Natural Resources Division)

Theft of Government Property - 18 U.S.C. 641
Recent Developments

In its first square handling of the issue in United States v. Robt. Mark Howey (No. 25116, June 5, 1970), the Court of Appeals for the Ninth Circuit held that it was not necessary for the Government to prove, in a prosecution under 18 U.S.C. 641, that the defendant knew the property that he had stolen, purloined, or converted to his own use was property belonging to the Federal Government. The District Court for the Middle District of Georgia reached the same conclusion in United States v. Robt. Wyman Boyd (No. 8731, May 1, 1970).

Some confusion has attended the issue by reason of dicta in several cases which were decided on other grounds but which included reference to knowledge in listing the elements of the offense. See e.g.: Kirby v. United States, 174 U.S. 47, 53 (1899); Souza v. United States, 304 F.2d 274, 279-280 (C.A. 9, 1962).

The only reported decision involving Sec. 641 which reversed a conviction because of the court's failure to instruct the jury that specific intent to appropriate Government property was an essential element of a Sec. 641 offense is the holding of the Tenth Circuit in Findley v. United States, 362 F.2d 921, 922-923 (C.A. D.C. 1966). The Court of Appeals in Howey refused to follow Findley stating that Findley is based on an erroneous application of Morissette v. United States, 342 U.S. 246 (1952), and Souza v. United States, supra. The decision in Howey does not, of course, eliminate the requirement for proof of culpable intent, e.g. to steal or to possess stolen property, established in Morissette v. United States, supra, and a defendant's honest belief that he had a right to the property or was lawfully acquiring abandoned property remain available grounds for defense.

Citations to Howey and Boyd should be added to the discussion of this issue and related precedents on pages 24 and 25 of the Department of Justice Handbook on the Protection of Government Property, June 1969.

(Criminal Division)

Costs in Criminal Cases

Recently a question was raised in regard to compromise of cost judgments imposed in conjunction with criminal fines.

Costs usually include the Marshal's fees for serving witnesses, witness fees, witness per diem, and possibly some clerk of court costs. Costs do not include the general expenses of maintaining the system of courts.

A judgment for costs in a criminal case may be enforced in the same manner as a judgment in a civil action, where there is statutory authority therefore, and payment may be enforced by a separate civil suit. (See 20 C.J.S. Costs, Sec. 461 and Sec. 462, page 702.)

Although courts cannot remit costs after imposition (20 C.J.S. Costs, Sec. 460), the position of the Criminal Division is that costs, like any other civil judgment, may be compromised or closed as uncollectible by the United States Attorney

If it is desired to compromise a cost judgment in a criminal case, a request to do so should be submitted to the Criminal Collection Unit of the Criminal Division.

(Criminal Division)

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

SUPREME COURT

CLAYTON ACT

SUPREME CT. REVERSES DISTRICT CT. IN BANK CASE (Section 7 Clayton Act Case).

United States v. Phillipsburg National Bank & Trust Co., et al. (Sup. Ct., No. 1093 O.T. 1969)

Popularly styled the Antitrust Division's first "small bank merger case", the Supreme Court's decision in United States v. Phillipsburg National Bank, announced June 29, 1970, should significantly contribute to the overall antitrust and banking enforcement effort relative to horizontal mergers as well as bank mergers entailing a loss of potential competition and mergers between banks and related financial institutions.

The proposed merger of the third and fifth largest of seven commercial banks located in the twin cities of Phillipsburg, New Jersey - Easton, Pennsylvania, to form the second largest twin-city bank was declared lawful by the District Court for the District of New Jersey in late October, 1969. The merging banks had 13.7 and 9.8 percent of Phillipsburg-Easton total deposits; the four largest banks had 81.5 percent. On direct appeal the Supreme Court reversed the district court on all points.

Mr. Justice Brennan, for the Court, held first that the trial court improperly segmented the product line by considering competition from other non-bank financial institutions. Although acknowledging that the character of business handled by the merging banks differed somewhat from that of large city banks, the Court held that the appropriate line of commerce was "commercial banking". "Sub-markets such as the District Court defined would be clearly relevant, for example, in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution." (E.g. United States v. Wachovia Bank & Trust Co. and American Credit Co., Civ. 2526 (W.D. N.C. 1970).) But submarkets are not a basis for the disregard of a broader line of commerce that has economic significance.

Second, the trial court selected too broad an area as the relevant geographic market. To select "an area approximately four times as large as Phillipsburg-Easton, with a 1960 population of 216,000 and 18

banks" would be improperly to ignore the very localized nature of banking in general and of these small banks in particular. Both merging banks drew over 85 percent of their business from Phillipsburg-Easton. The FRB, the FDIC, and the Attorney General accordingly regarded the twin cities as the most relevant market area. Hence the Court found Phillipsburg-Easton is an appropriate section of the country for section 7 purposes. Moreover, the Court rejected the appellees' contention that such an area was too small to be "an economically significant section of the country" (see e.g. United States v. First National Bank of Sunbury, Civ. 6943 (1969)), noting that in Brown Shoe the Court had found relevant geographic markets in cities with a population exceeding 10,000 and their environs, with a 1960 population of almost 90,000 was "clearly an economically significant section of the country".

Third, the Court found that the market share percentages involved indicated that the proposed merger is "inherently likely to lessen competition substantially". The combined bank would become the second largest in the area with 10.3 percent of area assets, 23.4 percent of total deposits and 27.3 percent of total loans. The assets then held by the two largest banks would increase 6 percent to 55 percent; the deposits 9 percent to 65 percent and loans 14 percent to 63. The merged bank would have five of the seven banking offices in Phillipsburg and be three times larger than the sole remaining bank. It would have 75.8 percent of Phillipsburg's banking assets, 76.1 percent of its deposits and 84.1 percent of its loans.

Fourth, the trial court improperly applied the convenience and needs defense by considering the present availability of banking services only in Phillipsburg. The probable effect of a merger to serve community needs must be appraised in an area no smaller than the area in which probable anticompetitive impact is considered. Indeed, availability of needed services from banks somewhat outside of effective competition of the merging banks should be considered. Furthermore, benefit to "all seekers of banking services in the community, rather than simply those interested in large loan and trust services" must be shown to meet the convenience and needs defense.

Dissenting in part and concurring in part, Mr. Justice Harlan in an opinion in which the Chief Justice joined, objected "to the 'numbers game' test for determining Clayton Act violations". Too, he urged that in view of recent changes in New Jersey banking law the appellee banks on remand should be permitted to demonstrate whether

the possibility of new entry might diminish the market powers of the merged banks. In banking, he stated, "the possibility of entry can act as a substantial check on the market power of existing competitors".

Staff: Howard E. Shapiro, Donald I. Baker, Gregory B. Hovendon and Kenneth G. Robinson, Jr. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

GOVERNMENT NOT LIABLE FOR ALLEGEDLY NEGLIGENT APPROVAL OF STATE PLANS FOR INTERSTATE HIGHWAY.

Daniel v. United States (C.A. 5, No. 28462; May 19, 1970; D.J. 157-17M-185)

The Fifth Circuit has affirmed a decision of the District Court for the Middle District of Florida, holding that an action brought under the Federal Tort Claims Act based on the allegedly negligent design of a traffic separator on an interstate highway, was properly dismissed. The Court held that the approval of a State's project plans for Federal-Aid Highways by the Secretary of Transportation (formerly by the Secretary of Commerce) is a "discretionary function" excepted from the coverage of the Federal Tort Claims Act. The Fifth Circuit thus followed the only prior appellate decision on the subject (Mahler v. United States, 306 F.2d 713 (C.A. 3), certiorari denied 371 U.S. 923).

Staff: Walter H. Fleischer (Civil Division)

NATIONAL GUARD

LONG-HAIRED GUARDSMAN CALLED TO ACTIVE DUTY FOR "UNSATISFACTORY PARTICIPATION" IN DRILLS.

Frank Gianatasio, Jr. v. First Lieutenant Eamonn M. Whyte, etc. et al. (C.A. 2, No. 34585; June 2, 1970; D.J. 25-14-1649)

Appellant, after three and one-half years of uneventful service in the Connecticut Army National Guard, appeared at 13 drills with hair sufficiently long to deprive him of a "neat appearance" in the view of his commanding officer. As a result of his "unsatisfactory participation" in these meetings, he was called for active duty for two years less active duty time already served. After exhausting his administrative remedies, he brought this action. The district court granted the Government's motion for summary judgment and the Second Circuit affirmed.

First, the Court rejected appellant's argument that his constitutional rights were violated by the National Guard's action in calling him to active duty itself pursuant to 10 U.S.C. 673a (enacted after his enlistment) rather than reporting him to Selective Service as his enlistment contract had required. In the Court's view, appellant was not harmed by this shift in procedures inasmuch as the function of Selective Service was purely ministerial. In this connection the Court relied on United States v. Lonstein, 370 F.2d 318, 320 (C.A. 2), and stated that the holding in that case had not been affected by Gutknecht v. United States, 396 U.S. 295 or Breen v. Selective Service Local Board No. 16, 396 U.S. 460.

Second, in response to appellant's argument that the army regulation implementing 10 U.S.C. 673a contradicts regulations of the Secretary of Defense (specifically 32 C.F.R. 101.3-101.5), the Second Circuit noted that the Secretary's regulations did not purport to specify exclusive call-up procedures and that, in any event, "these regulations were supplanted on January 9, 1969 by a new Department of Justice /sic/ Directive 1215.13, 34 F.R. 130, which specifically authorizes resort to 10 U.S.C. Sec. 673a".

Third, the Court rejected appellant's contention that he was being punished without the protection of constitutionally required procedural safeguards inasmuch as appellant had agreed in his enlistment contract to immediate induction if he failed to participate satisfactorily in the National Guard. Further, the Court stated that there was no evidence of injury resulting from summary procedures inasmuch as plaintiff did not contest that his hair length violated Guard rules.

Fourth, the Second Circuit declined to overrule Raderman v. Kaine, 411 F.2d 1102, where it had previously dealt with an induction based on hair length. Specifically, the Court refused to find that appellant, a salesman of fashionable shoes and clothing who claimed he needed long hair for his job, was being "unjustly deprive/d/ *** of his right to a livelihood in civilian life" since, as the district court had noted, he could have worn a wig at work.

Staff: United States Attorney Stewart H. Jones and
Assistant U.S. Attorney Richard P. Crane, Jr. (D. Conn.)

SELECTIVE SERVICE

PRE-INDUCTION REVIEW TO DRAFTEE WHO CLAIMS THAT HIS INDUCTION, WHICH HAD BEEN POSTPONED FROM OCTOBER 1969 AT HIS REQUEST, SHOULD BE GOVERNED BY LOTTERY SYSTEM, DENIED.

Kenneth R. Stella v. Selective Service System of the U.S.A., Local Board No. 66 (C.A. 2, No. 34825; June 8, 1970; D.J. 25-52-2157)

Appellant, who was first called for induction into the armed services in October 1969 and whose induction was postponed several times at his request, brought this action challenging an order to report on April 21, 1970, on the ground that his induction should be governed by the new lottery system which became effective on January 1, 1970. Appellant's lottery number would have been a comparatively safe one--212. The district court dismissed the action without prejudice to bringing a post-induction habeas corpus action. The Second Circuit affirmed, also holding that pre-induction review of the order was barred by Section 10(b)(3) of the Military Selective Service Act. Noting that "/t/he Supreme Court *** has recently cautioned against an overly literal application of this statute" (see Breen v. Selective Service Board, 396 U.S. 460, 462; Oestereich v. Selective Service Board, 393 U.S. 233, 238), the Court explained:

> it is necessary for us to pierce the pleadings and probe the merits of the claim in order to determine whether the board's action appears to have been "blatantly lawless" or a "clear departure from its statutory mandate".

Relying on 32 C.F.R. 1632.2(d), which states that an Order to Report for Induction survives any postponement of induction and remains valid for the new induction date, and on Gutknecht v. United States, 396 U.S. 295, 306, where the Supreme Court said that the lottery system "applies of course only prospectively", the Second Circuit concluded that plaintiff had failed to bring himself within the exceptions to the jurisdictional barrier to pre-induction review enunciated by the Supreme Court in Breen and Oestereich.

Staff: United States Attorney Edward R. Neaher and Assistant U.S. Attorney Lloyd H. Baker (E.D. N.Y.)

SOCIAL SECURITY DISABILITY BENEFITS

DISABILITY STANDARD UNDER 1967 AMENDMENTS TO SOCIAL SECURITY ACT IS INABILITY TO WORK, NOT INABILITY TO BE HIRED; APPLICATION TO CASE PENDING ON APPEAL WHEN AMENDMENTS BECAME EFFECTIVE DOES NOT VIOLATE DUE PROCESS.

Hermione King v. Finch (C.A. 5, No. 28247; June 16, 1970; D.J. 137-75-150)

Claimant's 1963 application for disability benefits was denied by the Secretary, and that decision was affirmed by the district court. The Court of Appeals (Wisdom, J., dissenting) reversed and remanded to the Secretary for further findings as to whether any employer would hire claimant, even assuming she could work. On rehearing en banc, the Court vacated the opinion, noting that the 1967 Amendments were applicable to pending cases, and remanded for consideration in light of the statutory changes. Thereafter the Secretary again denied benefits, the district court affirmed, and the claimant appealed, arguing that (1) the decision was not supported by substantial evidence, and (2) application of the Amendments to a case already decided by the Court of Appeals violated both the "separation of powers" doctrine (Const., Act III) and substantive due process. The Fifth Circuit affirmed.

On the merits, the Court held that the standard for disability is a stringent one and that the statute, as amended, "makes it absolutely clear that the consideration whether an applicant would be hired is irrelevant" (Slip Op., p. 2). The Court explained that "the standard is not inability to be hired, but complete inability to work, to perform any substantial gainful activity" (Slip. Op., p. 4), and it concluded that the claimant had not met her burden under this test.

With regard to the Constitutional challenges to applying the amended disability standard to a pending case, the Court held first that the power of the courts to adjudicate claimant's rights had not been infringed, nor had its jurisdiction or procedures been changed. Absent this, the Court concluded that there was no violation of separation of powers. Finally, the Court held that, absent payment or at least award of benefits, claimant had no property right of which she could have been deprived by the application of the 1967 Amendments to her case.

Staff: William D. Appler (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

FIREARMS - RECENT DEVELOPMENTS

CONSTITUTIONALITY OF CLASSIFICATIONS OF CONVICTED FELONS AND PERSONS UNDER INDICTMENT (18 U.S.C. 922(d), (g), and (h), and 18 U.S.C. App. 1202).

United States v. Thoresen (C.A. 9, Nos. 24,432-3; June 8, 1970; D.J. 80-11-30)

In its decision remanding this case for further hearings, the Ninth Circuit upheld the constitutionality of the classifications of convicted felons and persons under indictment with respect to the restrictions placed on persons falling within these classifications against shipping, transporting or receiving firearms in interstate commerce.

Although this prosecution was brought under section 902(e) of the former Federal Firearms Act (15 U.S.C. 902(e)), the provisions of that Act have been carried forward into sections 922(g) and (h) (18 U.S.C. 922(g)(h)), of the Gun Control Act of 1968. This decision should be valuable in defending against expected future constitutional attacks on the classifications under both the Gun Control Act of 1968 and Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.

Staff: United States Attorney James L. Browning, Jr. and Assistant U.S. Attorney Jerrold M. Ladar (N.D. Calif.)

NARCOTICS

MENTAL COMPETENCY TO STAND TRIAL. TIMELY ASSERTION OF FIFTH AMENDMENT PRIVILEGE.

Joe Aragon Martinez v. United States (C.A. 10, No. 243-69; March 30, 1970; D.J. 12-49-75)

In 1966, appellant was convicted under a two-count indictment charging violations of 26 U.S.C. 4742(a) and 4744(a). The conviction was affirmed in Martinez v. United States, 373 F.2d 810 (10th Cir., 1967). Appellant then sought relief under 28 U.S.C. 2255, alleging in his motion that he was mentally incompetent.

The evidentiary hearing revealed that appellant received three psychiatric examinations, including a 90-day commitment at the Medical Center for Federal Prisoners in Springfield, Missouri. Following each examination, the district court found appellant competent to stand trial.

The psychiatric reports asserted that appellant was a mentally disturbed individual, and allowed that "if subject to sufficient stress and frustration, he (Martinez) is likely to fly apart, and disintegrate . . . ." Appellant offered psychiatric opinion that "the stress of a trial could possibly cause psychotic disorganization" which would not be apparent to lay observers. This was the crux of appellant's claim.

The Court of Appeals found the possibility of such a breakdown very unlikely. The psychiatric examination shortly before his trial revealed no evidence of thought disturbance, and appellant's trial attorney testified that Martinez understood his advice and assisted him in the defense.

The Court held that findings of fact rendered by a district court after an evidentiary hearing, including those respecting mental competency, are to be sustained unless clearly erroneous. Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir., 1968). The Court found the findings of competence were supported by the evidence.

Appellant also argued that his conviction under 26 U.S.C. 4744(a) was unconstitutional on the basis of Leary v. United States, 395 U.S. 6 (1969). The Court found, however, that at no time during the trial did appellant claim the Fifth Amendment privilege against self-incrimination, and his belated assertion on this appeal was untimely. Sepulveda v. United States, 415 F.2d 321 (10th Cir., 1969). The Court of Appeals also upheld the conviction under 26 U.S.C. 4742(a) as not being vulnerable to the Fifth Amendment contention. Buie v. United States, 396 U.S. 87 (1969).

Staff: United States Attorney Victor R. Ortega and Assistant U.S. Attorney John A. Babington (D. N.M.)

THEFT OF POST OFFICE PROPERTY - 18 U.S.C. 641 - RECENT DEVELOPMENTS

STAMPS ARE PROPERTY BELONGING TO, NOT MERELY USED BY, POST OFFICE DEPARTMENT.

United States v. Bobby H. Pursley (C.A. 5, No. 28981; June 19, 1970; D.J. 90-1-7-6383)

The defendant was charged with theft of postage stamps and cash from a post office substantion in a department store, in violation of 18 U.S.C. 641, and received the maximum sentence of ten years' imprisonment.

On appeal the defendant contended that he was chargeable only under 18 U.S.C. 1707, which permits a maximum penalty of only three years' imprisonment. In upholding the conviction and sentence, the Court held that the stolen items belonged to the Post Office Department and were thus property of the United States, as that term is used in 18 U.S.C. 641. The Court relied on the Reviser's Notes, pertaining to 18 U.S.C. 1707, which indicate an express intent to limit that section to property merely used by the Post Office Department, as opposed to property belonging to governmental departments which is covered by 18 U.S.C. 641.

Staff: United States Attorney Robert K. Fukuda; Assistant U.S. Attorney Michael R. Sherwood (D. Hawaii); and James L. Whitten (Criminal Division)

DISTRICT COURTS

FIREARMS - RECENT DEVELOPMENTS

RESTRICTIVE USE PROVISION OF NATIONAL FIREARMS ACT HELD EFFECTIVE BAR TO BOTH FEDERAL AND STATE PROSECUTIONS BASED ON INFORMATION REQUIRED TO BE FURNISHED BY ACT.

United States v. Herbert L. Carlie (N.D. Cal., No. Cr-70-101; May 21, 1970; D.J. 80-017-11)

In the first decision in which a court has focused on the restrictive use provision of the National Firearms Act, 26 U.S.C. 5848, as the basis for a decision upholding the constitutionality of the new Act against an attack based on the Supreme Court's decision in Haynes v. United States, 390 U.S. 85 (1968), Judge William T. Sweigert stated:

> We find that the provisions of Title 26, U.S.C. Sec. 5848 do provide immunity to registrants insofar as prosecutions under Federal law are concerned; and that the constitutional rule of Murphy v. Waterfront Commission forbids the use of such information or the fruits thereof by state law enforcement agencies.

Other decisions upholding the constitutionality of the new National Firearms Act placed little or no emphasis on the efficacy of the restrictive use provision. United States v. Valentine, No. 19,787 (8th Cir., June 25, 1970); United States v. Cobb (W.D. Tenn., October 1, 1969), and United States v. Schutzler (S.D. Ohio, October 9, 1969).

The position stated in Judge Sweigert's opinion, as well as those relied on in Valentine, Cobb and Schutzler, should be argued whenever the constitutionality of the National Firearms Act is drawn in question. Copies of these opinions may be obtained from the Weapons Control Unit of the General Crimes Section (ext. 2745).

Staff: United States Attorney James L. Browning, Jr. and Assistant U.S. Attorney James L. Hazard (N.D. Calif.)

FIREARMS - RECENT DEVELOPMENTS

FORFEITURE - IMPORTATION OF FIREARMS WITHOUT FEDERAL LICENSE.

United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns (E.D. N.Y., Nos. 70 C 562, 70 C 475; June 16, 1970; D.J. 80-52-30)

The Government recently brought a successful forfeiture action for the forfeiture of 38,400 imported starter pistols which were readily convertible to fire a projectile. The basis of the forfeiture action was that the importer was not licensed to import firearms, and by importing the convertible starter pistols, he violated 18 U.S.C. 922(a)(1). Consequently, the pistols became forfeitable pursuant to 18 U.S.C. 924(d).

In reaching its decision the court held that the Government need only prove three points to sustain its case. First, it must prove that the guns were imported into the country. Second, it must prove that the importer does not have the requisite Federal firearms license. And third, it must prove that the guns are readily convertible. The court further stated:

> The gun control statute is violated if an unlicensed individual imports or deals in firearms, whether or not he does so wilfully and/or intentionally.

Staff: United States Attorney Edward R. Neaher and Assistant U.S. Attorney Michael F. Crawford (E.D. N.Y.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

SUPREME COURT

INDIANS

TITLE TO BED OF NAVIGABLE ARKANSAS RIVER WAS GRANTED TO INDIAN NATIONS BY TREATY AND WAS NOT RESERVED FOR FUTURE STATE OF OKLAHOMA.

Choctaw Nation v. Oklahoma, and Cherokee Nation v. Oklahoma (Sup. Ct., Nos. 41 and 59; April 27, 1970; D.J. 90-2-11-6900)

In 1966 the Cherokee Nation brought suit in the U.S. District Court for the Eastern District of Oklahoma against the State of Oklahoma, seeking to recover the royalties derived from oil and gas leases made by the State on the riverbed of the Arkansas River. The Nation claimed that it had been since 1835 the absolute fee owner of part of the riverbed. Subsequently, petitioners Choctaw and Chickasaw Nations sought and were granted leave to intervene in order to present their claims that part of the riverbed belongs to them. The State urged ownership on the grounds that the United States retains title to navigable riverbeds in trust for a future state. It pointed to other States and urged "equal footing". A judgment on the pleadings was entered in favor of the State in the district court. The court held that title to the riverbed remained in the United States until 1907, when it passed to the State upon Oklahoma's admission to the Union. On appeal, the Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed. (The Chief Justice and Justices White and Black dissented.) The United States participated as amicus curiae in both appellate phases, urging the position of the Indians.

Part of the Arkansas River in question is surrounded on both sides by land granted to the Cherokees in the 1835 Treaty of New Echota. No reference was made in the treaty to this part of the river. The Cherokee Nation was merely granted one undivided tract of land described only by exterior metes and bounds. The Court had no doubt that all the rivers and riverbeds within those boundaries were granted in fee simple as part of the general grant.

The main question involved an interpretation of phrases used in several treaties as boundary descriptions such as: "Beginning on the Arkansas River", "up the Arkansas to the Canadian Fork" (1820 Treaty of Doak's Stand, 7 Stat. 211); "beginning near Fort

Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork" (1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333); "down the Arkansas" (1835 Treaty of New Echota, 7 Stat. 480); and "down the main channel of Arkansas River" (patent issued by President Van Buren in 1838).

The Court rejected out of hand the State's argument that general conveyancing law required the exclusion of the riverbeds from the grants by noting that "these treaties are not to be considered as exercises in ordinary conveyancing". Citing the fact that the treaties were not arm's length transactions, the Court stated that they would therefore have to be interpreted as the Indians would have understood them, and that any doubts would have to be resolved in the Indians' favor.

The Court concluded that the descriptions granted title to the riverbed to the Indians. The Court rejected the argument that the descriptions should be read to refer to the river banks, by stating that the United States could have said "river banks" if it had wanted to--as it had actually done in an 1817 treaty with the Cherokees. See 7 Stat. 158. The Court's interpretation is bolstered by the President's use of the term "down the main channel" in the patent of 1838.

The Court cited Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922), to support its decision. In that case a similar phrase ("the main channel") in an Indian Treaty was interpreted to include the riverbed.

The Court also cited several acts of Congress which set boundaries between states, noting that the terms "up" or "down" a river set the boundary at the middle of the riverbed. Since the grants to the Indians were to sovereign "political societies", the same interpretation was used as to the treaty terms.

The Court notes that the Congressional intent was clearly evidenced to grant complete sovereignty to the Indians over their new lands, and that this sovereignty included control of the riverbeds.

Staff: Louis F. Claiborne and Philip A. Lacovara (Assistants to the Solicitor General); Roger P. Marquis and Frank B. Friedman (Land and Natural Resources Division)

DENIAL OF SECY. OF INTERIOR'S POWER TO CHANGE AN INDIAN WILL UNDER 25 U.S.C. 373; JUDICIAL REVIEW OF SECY.'S ACTION APPROVED.

Julia Tooahnippah (Goombi) v. Hickel (Sup. Ct., No. 300; April 27, 1970; D.J. 90-2-4-125)

George Chahsenah, a Comanche Indian, died in 1963 and bequeathed his entire estate to a niece and her three children. The beneficiaries under the will sought to have it approved by the Secretary of the Interior, as required by 25 U.S.C. 373. Other relatives of the testator alleged that the testator was incompetent to make a will, and contended that the estate should pass under the intestacy laws.

The Examiner approved the will, but the Regional Solicitor of the Department of the Interior, concluding that the testator had not fulfilled his obligation to his illegitimate daughter, disapproved the will, and ordered that the entire estate be distributed by intestate succession.

The beneficiaries under the will brought an action against the Secretary of the Interior in the district court, contending that the action of the Regional Solicitor was arbitrary, capricious, and an abuse of discretion, and that it exceeded the authority conferred upon the Secretary by 25 U.S.C. 373. The plaintiffs sought to have the district court review the Regional Solicitor's action in accord with the standards of the Administrative Procedure Act, 5 U.S.C. 701 (1964 ed., Supp. IV), arguing that the court had jurisdiction by virtue of either that Act or the 1962 Mandamus Act, 28 U.S.C. 1361. The intestate beneficiary was allowed to intervene as a party defendant. The defendants contended that the action of the Regional Solicitor was within the authority conferred upon the Secretary, and, as such, is made final and unreviewable by 25 U.S.C. 373. They also contended that the Regional Solicitor's decision was in accordance with the evidence, was not arbitrary or capricious, and did not involve an abuse of discretion.

The district court held that 28 U.S.C. 1361 did provide a basis for jurisdiction. The court held that the review powers of the Secretary are not so broad as to defeat a plainly expressed and rationally based distribution by one who possessed testamentary capacity. On appeal the Court of Appeals for the Tenth Circuit reversed the district court, holding that the Secretary's action under 25 U.S.C. 373 was unreviewable.

The Supreme Court noted that the district court had jurisdiction under 28 U.S.C. 1331, since the complaint alleged that the amount in dispute was in excess of $10,000 and that the dispute arose under the laws of the United States. The Court also noted that there is no statute which precludes judicial review of such a matter, and that therefore the Administrative Procedure Act allowed review.

After thus quickly deciding the jurisdiction and reviewability problems, the Court just as quickly disposed of the issue of the Secretary's power: "To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian testator. * * * we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition."

The Court did not specifically set out the scope of the Secretary's power in such a situation. It merely concluded that "Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. sec. 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable'."

Staff: Richard B. Stone (Assistant to the Solicitor General) and Robert S. Lynch (Land & Natural Resources Div.)

COURTS OF APPEALS

RIVERS AND HARBORS ACT

STANDING TO SUE; JUDICIAL REVIEW UNDER ADMINISTRATIVE PROCEDURE ACT; CORPS OF ENGINEERS ENJOINED FROM ISSUING PERMIT TO PLACE FILL FOR HIGHWAY IN HUDSON RIVER BECAUSE CORPS REFERRED TO RETAINING WALL AS A "DIKE" AND DIKES REQUIRE CONSENT OF CONGRESS.

Citizens Committee for the Hudson Valley, the Sierra Club & Village of Tarrytown, New York v. Volpe, et al. (C.A. 2, No. 34010; April 16, 1970; D.J. 90-1-4-185, 90-10-4-186)

The New York State Department of Transportation proposed to construct a six-lane highway along the ten-mile stretch of the Hudson River. The plan included dredging and filling in a portion of the river along the shoreline. This involved placing some 9,500,000 cubic yards of fill, bound by a rock wall, along a portion of the river's bank, extending at one point 1,300 feet into the river. Upon application of the State of New York, the Corps of Engineers issued a permit authorizing the dredge and fill operation pursuant to its authority under the River and Harbors Act of 1899, 33 U.S.C. 401 et seq. Plaintiffs sought a declaration that it was beyond the authority of the Army to issue the permit, and an injunction prohibiting the issuance of a permit or the commencement of any construction without congressional consent and the approval of the Secretary of Transportation.

The district court held that the Corps had breached a non-discretionary duty to secure the consent of Congress and the approval of the Secretary of Transportation before issuing the permit. The permit was declared void and the injunctive relief was granted. The Court of Appeals affirmed.

The Court first treated the issue of jurisdiction. Since the statute pursuant to which the Army Chief of Engineers issued the disputed permit contained neither any provision for judicial review, nor any specific procedures for appeal of the Army's decision, review of the action is determined by the provisions of the Administrative Procedure Act, applicable to all administrative actions or proceedings "except to the extent that: (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. 701 (Supp. IV). As there was no evidence of a congressional intent to prohibit review in the Rivers and Harbors Act, the presumption of reviewability embodied in the Administrative Procedure Act gave the Court jurisdiction.

Standing to sue requires that a person suffer legal wrong or be aggrieved by agency action, under the Administrative Procedure Act. 5 U.S.C. 702. The Court noted that allowance of standing to "private attorneys general" in "public actions" challenging administrative activity is by no means a new or unusual concept. The Court went on to hold that the public interest in environmental resources is a legally protected interest which affords the plaintiffs, "as responsible representatives of the public", standing to obtain judicial review of the agency action alleged to be in contravention of that public interest. The Court compared this case to its previous decision in Scenic Hudson Preservation Conf., 354 F.2d 608 (C.A. 2, 1965). In that case, the Court interpreted the Federal

Power Act, Sec. 10(a), 16 U.S.C. 803(a), requiring the consideration of "recreational purposes" of waterway development when granting licenses under that Act, as creating express statutory protection for the public's interest in conservation of environmental resources, and held that organizations with a demonstrated concern for those resources could claim that statutory protection for the public.

Although the Rivers and Harbors Act has no provisions like those in the Federal Power Act, the Court felt that the same principles applied. The case of Road Review League v. Boyd, 270 F. Supp. 650 (S.D. N.Y. 1967), first applied this reasoning in a very similar situation, and the Court felt that this case was controlling in the present action.

The Court cited several other statutes which evidence a concern for recreational, natural, scenic, and historic resources and which are relevant to the issue of standing in this case. These statutes include The Department of Transportation Act of 1966, as amended by Sec. 18(b) of the Act of August 23, 1968, 82 Stat. 824, 49 U.S.C. 1653(f) (Supp. IV); the Hudson River Basin Compact Act, P.L. 89-605, 80 Stat. 847 (1966); the Fish and Wildlife Coordination Act of 1934, as amended, 16 U.S.C. 662(a); and the Fish and Wildlife Act of 1956, as amended, 16 U.S.C. 742(a) et seq.

It also held that the village of Tarrytown had standing to contest the issuance of the fill permit, even though it would not directly affect the town. If the fill were allowed to be constructed and the town were relegated to contesting the construction of the highway, then, as the Court says, the village would be "hard put at some later date to overbalance the equities in favor of the State that such a large commitment of public funds would engender and its legitimate concern could be irretrievably subverted even though the permit was issued unlawfully. Although the fill itself will not have a significant direct effect on the special interests demonstrated by Tarrytown, the effect of the permit will have a substantial impact."

The substantive issue was treated "briefly" by the Court, which merely stated that, after reviewing the evidence, "we adopt the conclusion of the district court that the word 'dike' used by the defendants in their permit has the same meaning there as in Sec. 401 of the Act, and that construction of a dike is forbidden by that Section without the consent of Congress". It was our position that the so-called "dike" here was merely a retaining wall for the fill and, as such, could be approved by the Corps of Engineers. It was not the typical dike to contain water as, we maintained, was intended by Congress where it reserved approval to itself. The

Court also rebuked the Army for failing to realize that a "causeway" would be built, and that that would require the consent of Congress and the Secretary of Transportation.

The plaintiff's attack upon the constitutionality of the delegation of power to the Commissioner of the Department of Transportation of the State of New York was dismissed, because the Court could find no authority for judicial intervention. In addition, the Court seemed to feel that there was no violation of due process in the delegation of the large amount of power to the Commissioner.

Staff: Robert S. Lynch (Land & Natural Resources Div.)

PUBLIC LANDS

AUTHORITY OF SECY. OF INTERIOR UNDER TAYLOR GRAZING ACT TO REJECT APPLICATIONS TO EXCHANGE PRIVATELY OWNED LANDS IS DISCRETIONARY AND UNREVIEWABLE UNDER ADMINISTRATIVE PROCEDURE ACT; CHANGE OF POLICY PENDING APPLICATION; ADMINISTRATIVE "LAW OF THE CASE".

Perley M. Lewis v. Hickel (C.A. 9, No. 23086; June 1, 1970; D.J. 90-1-18-638)

This suit sought to overrule the Secretary of the Interior's rejection of appellants' application to exchange privately owned lands under the Taylor Grazing Act. Regulations provided that applications could be rejected any time prior to the issuance of a patent and that applications created no contractual rights or conveyed any title. Appellants completed all requirements. The local Land Office found that the proposed exchange was in the "public interest", pursuant to both the Act and the regulations, but on application for the same public lands by another applicant, the Director, Bureau of Land Management, remanded the case. The other applicant took no appeal to the Secretary. The Land Office again ruled for appellants. While the other applicant's administrative appeal to the Director was pending, a more stringent "public interest" test was announced. On remand to the Land Office, appellants' exchange was rejected under the new test. The Director and the Secretary affirmed rejection. On cross-motions for summary judgment, the district court held the Secretary's action to be within his authority and discretion.

In affirming, the Ninth Circuit ruled that the other applicant's failure to prosecute an administrative appeal to the Secretary did not make the earlier "public interest" finding final or the law of the case, so as to preclude the Secretary from reviewing all findings when the

case was presented to him. The Court declared that the relevant statutes did not specify terms and conditions of exchanges which were therefore within the Secretary's general rule-making power. Consequently, no interests were conveyed even though the applicants had complied with the conditions. The Court then concluded that "the determination of 'public interest' is one 'by law committed to agency discretion' and therefore unreviewable" under the Administrative Procedure Act.

Staff: Raymond N. Zagone and Robert S. Lynch (Land and Natural Resources Division)

TUCKER ACT; FEDERAL TORT CLAIMS ACT

MONEY CLAIM FOR LAND PERMANENTLY TAKEN TO BE DETERMINED UNDER TUCKER ACT, NOT FTCA; TRANSFER OF ACTION TO CT. OF CLAIMS; JURISDICTION; TRESPASS; GOVT. TITLE.

Roman v. Velarde, U.S. and Hill (C.A. 1, No. 7148; May 26, 1970; D.J. 90-1-5-1063)

Plaintiffs sought $400,000 from the United States under the FTCA for alleged wrongful deprivation of property in a national forest in Puerto Rico. It was alleged that the United States, with knowledge, had been in possession since 1948 under title its grantor illegally obtained from plaintiffs. The action was dismissed for lack of jurisdiction because no specific negligent or wrongful act or omission of a Federal employee was alleged; the suit would, of necessity, try the United States' title without its consent; and, if viewed as a taking, the action exceeded the district court's $10,000 Tucker Act jurisdiction.

While conceding that the district court had no Tucker Act jurisdiction, the Court of Appeals reversed and remanded for transfer to the Court of Claims under 28 U.S.C. 1406(c). Although it stated that the FTCA may be a consent to a trespass action even where the Government's title would be a threshold issue, the Court nevertheless agreed that a claim for compensation for land permanently taken would be more appropriately determined in an inverse condemnation action under the Tucker Act, rather than under the FTCA on a "continuing trespass" theory. It explained that, under the Tucker Act, complete and final compensation could be awarded and that the decree would describe with precision the estate found to have been taken or require an actual conveyance. The Court's construction of the two statutes

thus recognized and preserved the statutory system of remedies against the United States: "Congress may have intended that the FTCA embrace only claims not previously consented to under the Tucker Act. /Citations omitted./ Without deciding the validity of this general proposition, we hold that the FTCA does not provide a supplementary forum for plaintiffs demanding compensation for land permanently taken. At the time of the FTCA's passage such compensation could be sought under the Tucker Act. * * *"

Staff: Raymond N. Zagone and Gerald D. Secundy
(Land and Natural Resources Division)

MARINE RESOURCES

PUBLIC HEARINGS BY CORPS OF ENGINEERS NOT REQUIRED BEFORE ISSUING OIL DRILLING PERMIT ON OUTER CONTINENTAL SHELF.

County of Santa Barbara, et al. v. Robert J. Malley, et al. (C.A. 9, No. 25,049; April 21, 1970; D.J. 90-1-18-866)

County of Santa Barbara and The City of Santa Barbara v. Hickel, et al. (C.A. 9, No. 25,413; April 21, 1970; D.J. 90-1-18-851)

Weingand, et al. v. Hickel, et al. (C.A. 9, No. 25,414; April 21, 1970; D.J. 90-1-18-859)

These three cases arose as an aftermath of the well-publicized oil well blow-out of January 1969, in the Santa Barbara Channel. In Malley, plaintiffs sought injunctive relief to prevent any further development of oil producing facilities in the Channel until they were granted a public hearing; in Santa Barbara, they sought a mandatory injunction to stop all drilling; and in Weingand, plaintiffs attempted to enjoin the Secretary of the Interior from effectuating the DuBridge Report and implementing the operative Act. Both Santa Barbara and Weingand challenged the constitutionality of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq. In all three cases, the Court sustained the lower court's decisions against the plaintiffs. */

The Court of Appeals in Malley declared that since the granting of a preliminary injunction rests in the sound discretion of the district court, and is reviewable only for abuse of discretion, plaintiffs were

*/ Although the Ninth Circuit consolidated the three cases for briefing and argument, two decisions were handed down--one in Malley and the other in Santa Barbara and Weingand.

properly denied relief because they "did not show a strong likelihood that they would ultimately prevail on the merits of their right-to-a-hearing claim". Such hearings will be held "only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security".

In its decision in Santa Barbara and Weingand, the Court moved beyond the abuse of discretion test to determine the merits of the asserted right to a hearing. In August of 1969, the regulations pertaining to hearings were altered, and the new regulations were found to be controlling. Therefore, because there is no mandatory requirement for hearings in the new regulations, the Court found that the failure to grant such hearings does not amount to irreparable injury, thereby justifying an injunction.

All aspects of the constitutional question had previously been considered by a three-judge court in the Santa Barbara case, and therefore the Court was without jurisdiction to review that issue.

Staff: Walter Kiechel, Jr. (Deputy Assistant Attorney General); Edmund B. Clark and Thomas L. McKevitt (Land and and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

EVIDENCE

PARTIES TO WRITTEN AGREEMENT MUST INTRODUCE STRONG PROOF THAT WRITTEN AGREEMENT WAS SHAM IN ORDER TO AVOID TAX CONSEQUENCES FLOWING FROM WRITTEN AGREEMENT.

John Paul Jones, et ux. v. United States (D. Kan., June 15, 1970; D.J. 5-29-1704)

Taxpayer sold 100% of the stock which she held in her insurance agency. The contract of sale recited that the stock was transferred for the sum of $50,000. Contemporaneously, the insurance company, through which all agency business was written entered into a contract with the seller whereby the company would pay to the seller an amount equal to five per cent of the gross premiums of the agency corporation for a period of 10 years in return for the seller's promise to act as a consultant to the insurance company, if and when called upon. In yet another written agreement between the agency corporation and the insurance company, it was agreed that the commissions allowed to the agency corporation would be reduced by five per cent.

Taxpayer sued for a refund of taxes claiming she was entitled to capital gains treatment on the percentage payments received under her agreement with the insurance company. Taxpayer contended that the agreements were a sham and that the percentage payments were in fact installment payments from the buyer of her stock which were merely being routed through the insurance company.

At trial, the Government sought to invoke the parol evidence rule by objecting to the taxpayer attempting to vary the written agreements by oral testimony in absence of any showing of fraud, undue influence or duress. The Government relied upon the cases of Commissioner v. Danielson, 378 F.2d 771 (3rd Cir. 1967), and Clark v. United States, 341 F.2d 671 (9th Cir. 1965). The Court overruled the Government's objection.

Oral testimony was received on behalf of the taxpayer as to the alleged true nature of the agreements. The Government introduced testimony to the effect that the particular agency was unique in that

all of its business was centered in eight separate group accounts. Further testimony showed that the seller had an unusually high commission agreement with the underwriting insurance company, that the seller was a pioneer in the group insurance business, had a close relationship with the groups insured through the agency and that the underwriting insurance company was concerned about the probabilities of retaining the eight groups should the seller become associated with another underwriter. It was also shown that the seller remained with the agency and assisted in its operation for a number of years after the sale of her stock.

An instruction was requested and given that the taxpayer must establish by strong proof that the written agreements had no economic reality in order for the taxpayer to avoid the tax consequences of the written agreement. Balthorpe v. Commissioner, 356 F.2d 28 (5th Cir. 1966). See also, Hamlins Trust v. United States, 209 F.2d 761 (10th Cir. 1954).

The jury returned a verdict for the United States.

Staff: Thomas H. Boerschinger and R. Blake Hoenig (Tax Division)

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