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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant U.S. Attorney Barnet D. Skolnik (D. Md.) was commended by Special Agent in Charge, Baltimore, for his preparation and prosecution of a bank robbery case involving over $63,000.

Assistant U.S. Attorney Kendell W. Wherry (M.D. Fla.) was commended by Postal Inspector in Charge, Atlanta, Georgia, "for his expert handling of the prosecution" re Rodriguez & Bullock, each of whom had dangerous criminal tendencies.

Assistant U.S. Attorney James Bruen (N.D. Calif.) was commended by Postal Inspector in Charge, San Francisco, for his "attitude, enthusiasm and professional ability" re the handling and prosecution of Johnny Amos.

Assistant U.S. Attorney Richard J. Mandell (MD. Fla.) was commended by G.T. Register, Jr., Chief, Intelligence Division, IRS, Jacksonville, for his preparation in familiarizing himself in detail with the many varied facets of a tax evasion case.

Assistant U.S. Attorney Arthur Greenwald (C.D. Calif.) was commended by Commissioner Thrower for his assistance in representing IRS employees re State of Calif. v. Miller.

Assistant U.S. Attorney William Schaphorst (D. Neb.) was commended by Chief Counsel, Department of Transportation, Washington, D.C. for his "demeanor before the jury, his competence in presenting the evidence, and above all, his most excellent summation at the conclusion of the trial, obtained for the Government the desired verdict of conviction" re U.S. v. Thompson-Hayward Chemical Co.

Assistant U.S. Attorney David H. Anderson (C.D. Calif.) was commended by Regional Counsel, Federal Aviation Administration for his "zealous and capable handling" re U.S. v. Bezaire. Mr. Bezaire, for the last three years, had been operating balloons in the vicinity of Los Angeles International Airport and interfering with large aircraft making landings.

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POINTS TO REMEMBER

Comprehensive Drug Abuse Prevention and Control Act of 1970

There has recently been distributed to all U.S. Attorneys one copy of a manual relating to the above Act which becomes fully effective on May 1, 1971. It is recognized that most, if not all, offices will require additional copies and they will be furnished upon request as soon as available.

Such requests should be directed to the Chief, Narcotic and Dangerous Drug Section, Criminal Division.

Assaulting and Killing of Federal Officers (Public Law 91-375) - Amendment of 18 U.S.C. 111 and 1114, Extending Statutes to all Postal Service Officers and Employees

On August 12, 1970, H.R. 17070 (P.L. 91-375, 84 Stat. 719) became effective. Section 6(j)(9) of this Act amends 18 U.S.C. 111 and 1114 by striking out the phrase "postal inspectors, any postmaster, officer, or employee in the field service of the Post Office Department" and inserting in lieu thereof "officer or employee of the Postal Service". The effect of this amendment is to bring within these provisions those Postal Service officers and employees assigned to departmental operations and organizations units in the headquarters offices at the seat of the Government. Henceforth all officers and employees of the Postal Service will receive the protection afforded by these statutes regardless of whether they are field service personnel or not.

For policy guidelines regarding prosecutive policy in cases involving Postal Service personnel arising under sections 111 and 1114 of Title 18, consult U.S. Attorneys' Bulletin, Vol. 17, No. 1, January 3, 1969, pages 3-5.

Firearms - Deletion of Term "Willfully" From Model Firearms Indictments

The offenses proscribed by the various Federal firearms statutes (18 U.S.C. 921-928; 18 U.S.C. App. 1201-1203; and 26 U.S.C. 5801-5872) are regulatory offenses requiring proof of only general intent--i.e., knowledge of the facts constituting the offense. United States v. Freed,

No. 345 (U.S. Sup. Ct., April 5, 1971). The model firearms indictments issued by the Criminal Division in 1969 charge violations of the various sections in terms of "willfully and knowingly". It has been brought to our attention that at least serveral district courts regard indictments charging in terms of "willfully" as requiring proof of specific intent to violate the relevant section. To avoid this problem and to avoid any question of the requisite intent under the various firearms statutes, indictments for violation of the Federal firearms statutes should charge only that the defendant "knowingly" committed the alleged offense, not that he "willfully and knowingly" committed it. Where indictments using the term "willfully" have been attacked on the specific intent theory, it should be argued that the statutes require proof of only general intent, and that the term "willfully" only relates to the willingness to engage in the acts constituting the violation and not to the intent to violate the particular statute.

Dual Prosecution Problems in Firearms Prosecutions

In 1959, Attorney General Rogers announced that it was the policy of the Department of Justice that "After a state prosecution, there should be no federal trial for the same act or acts unless the reasons are compelling". Because many acts constituting violations of possessory firearms offenses under Federal firearms statutes also constitute violations of State firearms laws, care should be taken that no Federal firearms prosecution be undertaken subsequent to a State prosecution for the same act or acts. A number of instances have come to our attention in which a Federal prosecution of a firearms offense was undertaken subsequent to a State prosecution because the U.S. Attorney was not aware that the State had previously acted.

To avoid this problem, it is suggested that U.S. Attorneys establish liaison procedures with local prosecutors, local law enforcement officials, and the ATFD to ensure that such dual prosecutions are avoided and that cases meriting the generally more substantial Federal penalties be deferred to Federal prosecution. Where U.S. Attorneys believe that there are compelling reasons to undertake a Federal prosecution subsequent to a State prosecution, a written request setting forth these reasons should be sent to the Weapons and Explosives Control Unit, General Crimes Section, Criminal Division. In accordance with the Department's long-standing policy, prior Departmental approval of all such prosecutions is necessary.

Firearms Developments: Title VII of Omnibus Crime Control and Safe Streets Act of 1968

Two U.S. Courts of Appeals have recently accepted the Criminal Division's interpretation that Title VII makes it a crime for a convicted felon merely to possess a firearm. United States v. Synnes, No. 20438 (8th Cir., February 1, 1971), and United States v. Stevens, No. 20488 (6th Cir., March 22, 1971). The Court of Appeals for the Ninth Circuit had previously adopted our interpretation. United States v. Daniels, 431 F.2d 697 (9th Cir., 1970), and United States v. Liles, 432 F.2d 18 (9th Cir., 1970). This issue has also been argued in the Tenth Circuit in United States v. Boggs, No. 449-70 (10th Cir., argued January 4, 1971); however, no decision has been rendered in that case.

The Court of Appeals for the Second Circuit, however, has disagreed with our interpretation holding that the Government must allege and prove that the firearm was possessed "in commerce or affecting commerce". United States v. Bass, 434 F.2d 1296 (2nd Cir., 1970). On March 29, the Supreme Court granted the Government's petition for certiorari from the decision in Bass. The argument of Bass should take place this Fall.

Because of the pendency of Bass before the Supreme Court and the division among the Courts of Appeals which have faced the question of the proper interpretation of the unartful language of Title VII, the Criminal Division will continue to require prior authorization of all Title VII prosecutions.

(Criminal Division)

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

COURT IMPOSES FINES AND JAIL SENTENCES IN SECTION 1 SHERMAN ACT CASE.

United States v. Metro Denver Concrete Association, et al. (D. Colo., 70 CR 181; March 10, 1971; D. J. 60-10-77)

On March 10, 1971, Chief Judge Alfred A. Arraj announced his acceptance of the pleas of nolo contendere previously tendered on February 12, 1971 by each of the twelve defendants in this case and then proceeded to impose sentence upon each of them.

At the hearing on February 12, 1971, all defendants tendered their pleas to which the Government objected on grounds that the defendants' price fixing, customer allocation, job allocation, and division of the market were per se violations of the Sherman Act indicating the need for the sort of strong deterrent to such unlawful activity that either a verdict of guilt or guilty pleas might more likely produce. Judge Arraj, after stating it to be his policy not to consider any individual defendant's nolo contendere plea without benefit of a pre-sentence investigation report and also obtaining from each a waiver of the provisions of Criminal Rule 32(c), took all twelve pleas under advisement. Each of the five individual defendants was referred to the Probation Department for pre-sentence investigation and report, and the court requested a report on any prior antitrust charges or violations involving the six corporate defendants. During the interim from February 12, 1971 to March 10, 1971, the Probation Department obtained information and received communications from all defendants, and at its request the Government submitted a letter containing a factual analysis of the case and its recommendations for sentencing.

At the hearing on March 10, 1971, Judge Arraj first reminded the defendants of his statement at the prior hearing concerning the penalties that can be imposed pursuant to pleas of nolo contendere. He then advised each of the five individual defendants that a period of confinement would "very likely" be imposed upon them if their pleas were accepted and asked each of them if he still wanted to tender a plea of nolo contendere. Upon receiving an affirmative reply from each individual defendant, Judge Arraj stated that after careful study of the pre-sentence reports and the statements

prepared and submitted to the Probation Department by counsel for all parties he had decided to accept the nolo contendere pleas from each of the twelve defendants. He gave as his reasons the fact that the same penalties can be imposed under a nolo plea as under a verdict of guilty and the fact that a companion civil case is pending.

Thereupon, after soliciting from counsel for each defendant but receiving no request for a delay in sentencing, Judge Arraj stated that on basis of the pre-sentence reports he believed the individual defendants, all of them experienced businessmen, to be equally culpable and therefore deserving of equal punishment. Defendants Arthur J. Clark, President of Pre-Mix Concrete, Inc., Frank P. Spratlen III, President of Ready Mixed Concrete Co., Charles R. Eatchel, Vice President of Jefferson Transit Mix Co., Melvin W. Flanagan, Secretary of Walt Flanagan & Co., and Thomas W. Meade, President of Mobile Concrete, Inc., were each then sentenced to serve seven months in jail, to pay a fine of $2,000 and to be placed on probation for a period of one year. In each instance, six of the seven months jail sentence was suspended, and the court indicated its willingness to authorize a work release program for each individual defendant's one month of actual confinement if the Probation Department gives it prior approval based upon facts to be submitted by those defendants. (A "work release program" is understood to permit a qualified prisoner to be absent from jail under strict regulations during specified working hours of the day to attend to his job. All other times is spent in confinement.)

The court invited but received no mitigating statements from or in behalf of any of the individual defendants either before or after sentence was imposed.

The court then imposed the following fines upon the corporate defendants:

1.	Walt Flanagan and Co.	$10,000
2.	Pre-Mix Concrete, Inc.	8,300
3.	Ready Mixed Concrete Company	7,800
4.	Mobile Concrete, Inc.	6,750
5.	Jefferson Transit Mix Company	5,100
6.	Suburban Reddi-Mix Company	1,850

Judge Arraj explained that the amount of these fines was based upon the 1969 sales of each company in light of its net worth at that time.

In addition to the foregoing sentences, the court imposed a fine of $2,500 upon Metro Denver Concrete Association, an unincorporated trade association, which had been used to implement the conspiracy alleged.

Upon motions for stays of execution on the fines and terms of confinement in order to allow for the arranging of funds and personal affairs, each defendant was granted a stay until noon on March 22, 1971, except Suburban Reddi-Mix Company (the only company from which there was no individual defendant) which requested and received a stay until March 15, 1971.

The indictment in this case, filed on August 6, 1970, charges a conspiracy by six of the seven ready-mix concrete producers in the Denver, Colorado area to raise and stabilize prices and to divide the local market among themselves through the allocation of customers and jobs. The defendant produced and sold concrete locally within a four-county area in the State of Colorado. Interstate commerce could be found only in the cement which they purchased from sources outside Colorado and used in the concrete.

Staff: Assistant U. S. Attorney Carolyn J. McNeill (D. Colo.); Bertram M. Long, Theodore T. Peck, John L. Burley and Elliott B. Woolley (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General L. Patrick Gray, III

COURTS OF APPEALS

SELECTIVE SERVICE ACT

SUIT SEEKING REOPENING OF I-A CLASSIFICATION MAY NOT BE BROUGHT PRIOR TO REGISTRANT'S INDUCTION, HELD.

Lane v. Local Board (C. A. 1, No. 7740; decided February 24, 1971; D. J. 25-36-1699)

Plaintiff, a Selective Service registrant, was classified I-A by his local board and was ordered to report for induction. Following the receipt of the induction notice, he sought reopening of his I-A classification on the ground that he was a conscientious objector whose beliefs crystallized after receipt of the induction notice. The local board refused to change his classification. Prior to the date he was to report for induction, he brought this suit in the district court, alleging that the board had improperly failed to reopen his classification.

The district court, although rejecting most of plaintiff's contentions, enjoined plaintiff's induction until the Selective Service Board clarified whether it had refused to reopen the classification or had reopened and then denied plaintiff's conscientious objector claim. The First Circuit, however, held that any review at all was barred by Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3). The Court ruled that allegations of error in connection with a request to reopen a classification do not bring a registrant within the scope of the narrow exception to Section 10(b)(3) established in Oestereich v. Selective Service Board, 393 U.S. 233. The Court stated that "[i]n our observation procedural errors occur with such frequency as to make § 460(b)(3) meaningless if an allegation of a procedural error is enough to merit pre-induction review".

Staff: Assistant United States Attorney George V. Higgins (D. Mass.)

D. C. CIRCUIT HOLDS THAT IT MAY REVIEW PRIOR TO REGISTRANT'S INDUCTION ALLEGED CLAIMS OF ERRORS OF LAW IN HIS PROCESSING, INCLUDING FAILURE TO REOPEN CLASSIFICATION.

Swift v. Director of Selective Service (C. A. D. C., No. 24,137; decided March 16, 1970; D. J. 25-16-673)

The Selective Service registrant here was classified I-A-O (available for non-combat service) by his appeals board, and in 1969 was ordered to report for induction. Following his receipt of the induction order he sought reopening of his classification, claiming that as a result of his receipt of the induction notice, his beliefs had changed, and that he was now qualified for full conscientious objector status (classification I-O). The local board, however, refused to reopen his I-A-O classification.

The registrant then brought suit in the district court to prevent his induction. The district court denied relief on the ground that it lacked jurisdiction under Section 10(b)(3) of the Military Selective Service Act of 1967. The Court of Appeals, however, reversed (2-1) and, applying United States v. Geary, 368 F. 2d 144 (C. A. 2), certiorari denied, 389 U.S. 939, ruled that the local board had acted improperly in failing to determine on the request for reopening whether the registrant's conscientious objector beliefs were sincere and when they had matured. The Court of Appeals held that this error of law brought the case into the exception to Section 10(b)(3) stated in Oestereich v. Selective Service Board, 393 U.S. 233. According to the Court, the Oestereich exception permitted the courts to review to determine "whether a local board acted in plain controvention of the governing law". (The Court, however, rejected plaintiff's claim that he was subject to the lottery system which became effective January 1, 1970.)

This decision is in conflict with the First Circuit's Lane decision, supra, and at odds with the position of the Department.

Staff: Morton Hollander (Civil Division) and Reed Johnston, Jr. (formerly of the Civil Division)

DISTRICT COURT

GOVERNMENT EMPLOYEES -- INJUNCTIONS

DISTRICT COURT REFUSES TO ENJOIN POSTAL DEPARTMENT FROM ASSIGNING SEVENTH DAY ADVENTIST LETTER CARRIER TO A POSITION REQUIRING REGULAR WORK ON HIS SABBATH.

Richard M. Dawson v. J. G. Mizell (E. D. Va., No. 528-70-R; decided March 24, 1971; D. J. 35-79-17)

Under a nation-wide agreement between the Post Office Department and its employee unions, postal workers are assigned to positions on the

basis of seniority. Plaintiff, who became a Seventh Day Adventist after being employed as a letter carrier, was assigned to a position requiring that he work regularly on Saturday. Whereas before his religious conversion he had worked on Saturdays without complaint, afterwards he refused to do so because Church doctrine precludes labor on Saturday, its Sabbath. The Post Office Department was advised by the local union that it would object to any reassignment of plaintiff. Thereafter, the Department notified plaintiff that he would be discharged.

Plaintiff brought this injunctive action, contending that his discharge would impose an unconstitutional burden on the free exercise of his religion, and relying upon Sherbert v. Verner, 374 U.S. 398. Plaintiff was granted a preliminary injunction pending resolution of the case on the merits.

The district court, concluding that "there is no constitutional prohibition against the defendant insisting that plaintiff either agree to perform the duties assigned to him or suffer the consequences", refused to grant a permanent injunction and dissolved the preliminary injunction. The court pointed out that since Reynolds v. United States, 98 U.S. 145 (1878), "it has been recognized that religious practices are subject to reasonable government interference" and that "[r]eligious discrimination should not be equated with failure to accommodate". The court found that the seniority rights contained in the collective bargaining agreement and under which plaintiff had received his assignment are very important to postal employees and that the reassignment of plaintiff not only would have an adverse effect upon the Post Office Department but also would constitute a violation by the Department of the bargaining agreement. The court thus found justified any incidental burden felt by plaintiff, since "it would be literally impossible to accommodate the religious preference of every employee of the Post Office Department". The court added that "the central purpose of the establishment clause is to insure government neutrality in matters of religion" and observed that the seniority clause in the bargaining agreement was consistent with this purpose. Finally, the court distinguished Sherbert v. Verner, pointing out that it merely forbade the exclusion of any person from eligibility for the benefits of public welfare legislation because of his adherence to or lack of adherence to a certain faith.

Staff: Assistant United States Attorney Rodney Sager (E.D. Va.); David Strauss and Al Gandall (Post Office Department, General Counsel's Office)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

SUPREME COURT

SEARCH AND SEIZURE

CHIMEL v. CALIFORNIA NOT RETROACTIVE.

Williams v. United States; Elkanick v. United States (Sup. Ct., Nos. 81 and 82, respectively; April 5, 1970; ___ U. S. ____; D. J. 12-11-415)

Petitioners Williams and Elkanick were individually convicted of Federal narcotic offenses. In both prosecutions evidence was admitted which was obtained by searches incident to their respective arrests. Both searches were contrary to the guidelines set forth by the Supreme Court in Chimel v. California, 395 U. S. 752 (1969), but both occurred prior to the date of that decision and conformed to the then existing standards set forth in United States v. Rabinowitz, 339 U. S. 56 (1950), and Harris v. United States, 331 U. S. 145 (1947).

The Supreme Court affirmed both judgments, holding that Chimel is not retroactive and is not applicable to searches conducted prior to the decision in that case because the new constitutional interpretation appearing in Chimel was not intended to overcome an aspect of the criminal trial which impairs its truth-finding function. See Arsenault v. Massachusetts, 393 U. S. 5 (1968).

The Supreme Court also held that, as to the applicability of Chimel to searches preceding that decision, there is no constitutional difference between cases on direct appeal and those involving collateral proceedings.

Staff: Solicitor General Erwin N. Griswold; Assistant to Solicitor General Francis X. Beytagh; Assistant Attorney General Will Wilson; Beatrice Rosenberg and Richard Rosenfield (Criminal Division)

SUPREME COURT

FIREARMS

SUPREME COURT UPHOLDS CONSTITUTIONALITY OF NATIONAL FIREARMS ACT.

United States v. Freed et al. (Sup. Ct. No. 345, April 5, 1971; ___ U. S. ___; D. J. 80-017-12C)

The National Firearms Act, as amended by Title II of the Gun Control Act of 1968, creates a taxation-registration system applicable to particularly dangerous weapons, such as sawed-off shotguns and rifles, machine guns, silencers, and destructive devices. The Act, prior to the 1968 amendments, had been held, in part, unconstitutional because compliance with certain provisions of the Act raised substantial risk of self-incrimination. Haynes v. United States, 390 U. S. 85 (1968).

In Freed, the Court unanimously holds that the 1968 amendments cured the constitution defects of the former Act as applied to possessors of National Firearms Act weapons not registered to them. 26 U. S. C. 5861(d). The rationale of the decision would also extend to transfer and making violations under the Act. 26 U. S. C. 5861(e) and (f). The Court also holds that the Government need only allege and prove that the possessor of the weapon was aware of its character and knowingly possessed it. The Government need not allege or prove that the possessor was aware of the registration requirement.

In view of this decision, it is recommended that section 5861(d), rather than sections 5861(b) or (c), be used to charge possessory offenses under the National Firearms Act. See, Gott v. United States, 432 F. 2d 45 (9th Cir., 1970). The Criminal Division will continue to require prior authorization of all cases involving destructive devices. No prior authorization is necessary in cases only involving other National Firearms Act weapons.

Authorization requests and questions concerning the Act should be directed to the Weapons and Explosives Control Unit of the General Crimes Section (ext. 2745, 2675, and 2681).

Staff: Solicitor General Erwin N. Griswold; Assistants to Solicitor General Matthew J. Zinn and Peter L. Strauss; Assistant Attorney General Will Wilson; Beatrice Rosenberg and Mervyn Hamburg (Criminal Division)

COURT OF APPEALS

INFORMERS

EFFECT OF CONTINGENT FEE ARRANGEMENT ON AN INFORMER'S CREDIBILITY IS TO BE LEFT TO JURY.

United States v. Terry Grimes (No. 20369); United States v. Robert Massey (No. 20370) (C. A. 6, Feb. 24, 1971; D. J. 48-017-58; 48-017-58)

The U. S. Court of Appeals for the Sixth Circuit has held that the use of informers paid on a contingent fee basis does not violate due process. Thus, the Sixth Circuit becomes the first Circuit to squarely reject the Fifth Circuit's holding in Williamson v. United States, 311 F. 2d 441 (1962). No other Circuit has expressly followed Williamson. The Second, Ninth and Tenth Circuits have gone to great lengths to distinguish Williamson.

In Williamson, the Fifth Circuit noted that a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed might "tend to be a frameup", or to cause an informer to induce or persuade innocent persons to commit crimes which they had no previous intent to commit. Accordingly, using the supervisory power over the administration of criminal justice in Federal courts (McNabb v. United States, 318 U. S. 332 (1943)), the Fifth Circuit held that in the absence of a justification or an explanation for a contingent fee arrangement, a conviction is invalid if based on evidence of informants hired under such an agreement to produce evidence against a particular defendant as to crimes not yet committed.

The Sixth Circuit Court of Appeals held that there is no overall policy which should bar convictions based on the testimony of informers who are paid on a contingent fee basis for the conviction of specified persons for crimes not yet committed.

The Court went on to state that although it is true that an informer working under this type of arrangement may be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons. For example, a co-defendant who is testifying may feel it imperative to obtain a conviction of his co-defendant in order to improve his own position.

Thus, the Court held that the entire matter should be left for the jury to consider in weighing the credibility of the witness-informant.

Staff: United States Attorney William W. Milligan
(S. D. Ohio)

DISTRICT COURT

CIVIL OBEDIENCE ACT OF 1968

GUILTY VERDICTS RETURNED FOR VIOLATIONS OF 18 U. S. C. 231(a)(3).

United States v. Larry Kogan; United States v. Howard Mechanic (E. D. Missouri, Nos. 70 CR 151(2) and 70 CR 152(2), respectively; Feb. 26, 1971, and October 30, 1970, respectively; D. J. 95-800-42-1)

Two separate district court juries returned guilty verdicts against Larry Kogan and Howard Mechanic for violations of Title 18, Section 231 (a)(3), known as the Civil Obedience Act of 1968.

The indictments alleged that the two defendants threw cherry bombs at firemen and policemen who responded to the scene of a fire at the Air Force R. O. T. C. Building on the Washington University campus on May 5, 1970. It was alleged that the firemen and policemen were there in their official capacity incident to a civil disorder, as defined by the statute, and that Kogan and Mechanic, by throwing the cherry bombs, committed an act to impede the firemen and policemen in the performance of their duties. These are the first prosecutions under this subsection of the statute.

Mechanic was sentenced to five years in the custody of the Attorney General, and Kogan received a five-year sentence and a fine of $10,000 under the sentencing procedure outlined in Title 18, Section 4208(b).

Section 231 of Title 18 is one of several statutes comprising the Federal "Anti-Riot Laws". Departmental authorization is required prior to initiating prosecutions under these statutes (U. S. Atty. Bul., Vol. 16, p. 551). See also DJ Memo 731 relating to cases and matters involving terrorist activities.

Staff: United States Attorney Daniel Bartlett, Jr.
(E. D. Missouri)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

ENVIRONMENT; STANDING; INJUNCTIONS

PRELIMINARY INJUNCTION RESTRAINING TIMBER-CUTTING AND MINING ACTIVITIES IN NATIONAL FOREST; STANDING OF LOCAL CONSERVATION GROUP.

The West Virginia Highlands Conservancy v. Island Creek Coal Co. and Frederick Dorrell (C.A. 4, No. 15028, April 6, 1971; D.J. 90-1-1-2217)

A local conservation group filed a complaint against the forest supervisor of the Monongahela National Forest and the coal company, alleging violations of the National Environmental Policy Act, the Wilderness Act, and the Multiple-Use Sustained-Yield Act. One of the stated objectives of the suit was the protection of the "wilderness qualities" of the Otter Creek area of the forest. The group specifically alleged that an environmental impact statement had not been submitted. A preliminary injunction was issued restraining the forest supervisor from authorizing the cutting of trees or building of mining access roads in the area.

The Court of Appeals, distinguishing Sierra Club v. Hickel, 433 F 2d 24 (C.A. 9, 1970), cert. pending, held that the conservation group--being local and having a special interest in the area--has standing to maintain such an action. In addition, the issuance of the preliminary injunction was held proper. The Court stated that the test for the propriety of a preliminary injunction is not whether the plaintiff established an absolute right to the relief sought but rather "it need establish only a 'probable right'." The Court noted that the effect of the preliminary injunction was negligible as regarded the Government's administration of the area and that the coal company, which appeared to be most affected, had dismissed its appeal. The NEPA issue was not reached. Finally, the issues involved were deemed too important to be decided prior to a full trial on the merits.

Staff: Eva R. Datz (Land and Natural Resources Division)

CONDEMNATION

EVIDENCE; WITNESSES; SALES: DISQUALIFICATION OF EXPERT WITNESS WHO BASED TESTIMONY ON AFTER SALES HELD PREJUDICIAL ABUSE OF DISCRETION.

United States v. 79.39 Acres of Land in Breckinridge and Meade Counties, Ky. (Bosley) (C.A. 6, March 25, 1971; D.J. 33-18-260-125)

The United States condemned lands in Kentucky for the Cannelton Dam on the Ohio River. On appeal, the landowners alleged (1) inadequacy of the verdict and (2) abuse of discretion by the trial judge in striking the entire testimony of one of the landowners' two experts and in refusing to allow him to be recalled for further examination on the ground that his testimony and consideration of sales after the date of taking demonstrated his incompetency.

The Court of Appeals stated, "There is no automatic rule which holds that such testimony serves to disqualify an expert witness. Indeed, there is no absolute rule which forbids taking subsequent sales into account, depending upon the circumstances concerned." In light of the possible prejudice to the result due to the trial judge's abuse of discretion, "on the total record", the case was reversed and remanded for a new trial.

Staff: Thomas L. Adams, Jr. (Land and Natural Resources Division)

CIVIL PROCEDURE; PUBLIC LANDS; APPEALS

HARMLESS ERROR IN DENYING JURY TRIAL IN TRESPASS ACTION INVOLVING LEGAL AND EQUITABLE CLAIMS; APPLICABILITY OF STATE LAW; CONSTRUCTION OF DEEDS; ESTOPPEL BY DEED; REFORMATION.

United States v. Roy W. Williams and Carl V. Ivey (C.A. 5, No. 29674, April 5, 1971; D.J. 90-1-10-748)

This suit was instituted for injunctive relief restraining the defendants' continuing trespasses and requiring them to remove a fence from nine acres of land, purportedly conveyed to the United States by Williams, and for nominal damages. The defendants demanded a jury trial despite the trial court's severance of the damage issue for later determination and claimed title in the disputed land based on a difference with the United

States over a boundary location. The district court, without a jury, found title in the United States and granted the injunctive relief sought as to both defendants.

The Court of Appeals affirmed the judgment in part. It ruled that denial of a jury trial was improper since both the legal and equitable claims turned on the common fact issue of title. However, the Court held the error harmless because the evidence was insufficient for submission of issues to a jury, i. e., the evidence would have warranted a directed verdict for the relief claimed as to both defendants, except for a small sliver of the land in which Ivey obtained a cotenancy due to a minor discrepancy between the Government's deed and the survey line to which it claimed.

The Court applied Georgia law to the substantive claims under the general rule that suits by the United States to protect its proprietary interests are local in nature. But the right to jury trial was determined under Federal law. The opinion discusses general rules of boundaries and surveys and construction of conveyance deeds, and the doctrines of estoppel by deed and reformation.

Staff: Dennis M. O'Donnell (Land and Natural Resources Division)

URBAN RENEWAL; ADMINISTRATIVE LAW

JUDICIAL REVIEW OF URBAN RENEWAL PLAN INTERPRETATION; RIPENESS; MOOTNESS.

L'Enfant Plaza North, Inc., et al. v. D. C. Redevelopment Land Agency, et al. (C. A. D. C., Nos. 23284, 24072, 24313, December 10, 1970; D. J. 90-1-23-1405)

Owners and lessees of land within the Southwest Urban Renewal Area sought injunctive and declarative relief against RLA, the National Capital Planning Commission, and the District Government, regarding the permissibility of the intervening developer's proposed uses of the ground floor of its building on Square 465 for retail uses such as a cafeteria, restaurant with bar facilities, drug store, post office, bank, and a savings and loan institution. The plaintiffs contended the proposed uses violated a provision of the renewal plan, limiting uses "to offices for governmental, professional, institutional or commercial use, and accessory uses such as employee restaurants and off-street parking necessary to serve the primary uses".

After informal conferences, RLA had advised that it believed the uses were permitted, but that its belief was not binding on NCPC or the District Government.

The district court granted the defendants' motion for summary judgment, stating that RLA's "definitive" interpretation was reasonable and therefore conclusive on judicial review.

The Court of Appeals disagreed:

> This was not an agency decision arrived at pursuant to a statutory or otherwise established procedure for hearing and decision. * * * [T]he agency merely expressed its opinion as to the correct reading of language in the Plan, disclaiming in the same breath that its action constituted a binding decision.

It continued:

> This is a lawsuit which turns upon the interpretation of a document. If the parties cannot agree upon the correct reading, as they could not here despite lengthy efforts to do so, the courts exist for just such a situation and will, upon a record made in adversary litigation, resolve the issue.

The Court then specified that RLA's interpretation would of course be "highly relevant" in such litigation and that there were issues of material fact to be decided relative to the meaning of the renewal plan.

Dismissal of a claim that proposed modifications of the plan required the written consent of all developers who would be affected was affirmed for lack of ripeness--no such modifications were pending--as was a challenge to another proposed modification, which had been abandoned, for mootness.

Staff: Assistant U.S. Attorney Michael J. Madigan (District of Columbia)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

COURT OF APPEALS

SUMMONS ENFORCEMENT

TAXPAYER HAS NO RIGHT TO RESTRAIN COMPLIANCE WITH AN INTERNAL REVENUE SERVICE SUMMONS WHERE HE SHOWS NO PROTECTIBLE INTEREST.

Thomas A. Shaheen v. Exchange National Bank of Chicago, et al. (C. A. 7, No. 18692; D. J. 5-23-6440) (71-1 C. C. H., Par. 9293)

The taxpayer, Thomas Shaheen, sought to enjoin the Exchange National Bank of Chicago from complying with a summons issued to the Bank in connection with an investigation of his tax liabilities. The U. S. District Court for the Northern District of Illinois denied the injunction; however, the U. S. Court of Appeals for the Seventh Circuit stayed the action of the district court and granted a restraining order pending appeal.

On February 19, 1961, the Court of Appeals vacated its restraining order and affirmed the district court on the basis of Donaldson v. United States (No. 65 Oct. Term, 1970). The Court of Appeals held that the taxpayer was not entitled to injunctive relief where he admitted having a protectible interest in the subject matter of the summons.

Staff: United States Attorney William J. Bauer; Assistant United States Attorney Richard A. Makarski (N. D. Ill); John Burke and John Mullenholz (Tax Division)

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