United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 16 DECEMBER 13, 1968 NO. 36

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 16 December 13, 1968 No. 36

TABLE OF CONTENTS

		Page
NEWS NOTES		
Dept. Files First Suit Challenging Merger of TV and Newspaper Interests		1091
Magaddino, Head of Cosa Nostra in Buffalo, Indicted		1091
Guilty Verdicts Returned in L. A. Friars Club Case		1092
POINTS TO REMEMBER		
Counsel for Indigents		1093
DEPARTMENT OF JUSTICE PROFILES		1094
EXECUTIVE OFFICE FOR U.S. ATTORNEYS	Appointments	1095
ANTITRUST DIVISION		
SHERMAN ACT		
Sup. Ct. Rules That Export Shipments Paid for With U.S. Funds are Not Exempt from Antitrust Laws Under Webb-Pomerene Export Act	U.S. v. Concentrated Phosphate Export Assn., Inc., et al. (Sup. Ct.)	1096
CIVIL DIVISION		
INTERLOCUTORY APPEALS		
Order Denying Motion to Vacate Receivership Is Unappealable Under 28 U.S.C. 1292(a)(2); Order Denying Stay and/or Consolidation Unappealable Under 28 U.S.C. 1292(a)(1) and 1291	U.S. v. Chelsea Towers, Inc. (C.A. 3)	1099
SBA - INJUNCTIONS		
15 U.S.C. 634(b)(1) Bars Issuance of Injunction Against SBA, and Where Such Injunction is Imposed by State Ct., U.S. Dist. Ct.,	Vincent, et al. v. SBA, et al. (C.A. 4)	1100

		Page
CIVIL DIVISION (CONTD.)		
SBA - INJUNCTIONS (CONTD)		
Upon Removal of Action, May Properly Dissolve Injunction		
CRIMINAL DIVISION		
MILITARY SELECTIVE SERVICE ACT - CONSCIENTIOUS OBJECTION		
Board Not Required to Consider Conscientious Objection Claim Submitted After Refusal to Submit to Induction	Palmer v. U.S. (C.A. 9)	1101
INTERNAL SECURITY DIVISION		
SUBVERSIVE ACTIVITIES CONTROL BOARD		
Determinations of Communist Party Membership	A.G. v. Boorda; A.G. v. Archuleta; A.G. v. Holley	1102
LEGISLATIVE INVESTIGATIONS		
Ct. Lacks Jurisdiction to Enjoin Holding of Congressional Hearings - Single Dist. Judge Can Dismiss Action for Injunctive Relief Brought by Subpoenaed Witnesses	Davis, et al. v. Willis, et al; Young v. Willis, et al. (D. D.C.)	1103
TAX DIVISION		
INJUNCTION		
Motion to Dismiss Denied Where Taxpayer's Affidavit Raised Factual Issue of Whether Waivers of Statutory Collection Period Were Executed Under Duress	Monsky v. Fitzgerald, Jr., D.D. of IRS (E.D. N.Y.)	1104
FEDERAL RULES OF CRIMINAL PROCEDURE		
RULE 6: THE GRAND JURY	U.S. v. Zirpolo, et al (D. N.J.)	1105
(e) Secrecy of Proceedings and Disclosure		1107

		Page
RULE 7: THE INDICTMENT AND THE INFORMATION	U.S. v. Zirpolo, et al. (D. N.J.)	1109
(c) Nature and Contents		1111
(f) Bill of Particulars		1113
RULE 16: DISCOVERY AND INSPECTION		
(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony	U.S. v. Zirpolo, et al. (D. N.J.)	1115
(b) Other Books, Papers, Documents, Tangible Objects or Places		1117
RULE 32: SENTENCE AND JUDGMENT		
(d) Withdrawl of Plea of Guilty	U.S. v. Fina, et al. (E.D. Pa.)	1119
RULE 41: SEARCH AND SEIZURE		
(a) Authority to Issue Warrant	Navarro v. U.S. (C.A. 5)	1121
(e) Motion for Return of Property and to Suppress Evidence	U.S. v. Zirpolo, et al. (D. N.J.)	1123

NEWS NOTES

DEPARTMENT FILES FIRST SUIT CHALLENGING MERGER OF TV AND NEWSPAPER INTERESTS

December 5, 1968: The Department of Justice has filed its first suit challenging the merger of television and newspaper interests. The civil antitrust suit, brought in U.S. District Court in Chicago, opposed the acquisition of the major newspapers in Rockford, Illinois by the Gannett Company, owner of the dominant television station in Rockford. Gannett, which is headquartered in Rochester, New York and operates newspapers and broadcasting stations in five states, assumed control of WREX-TV in Rockford in 1963. In April 1967, the company acquired full stock control of Rockford Newspapers, which publishes the city's only morning paper and the larger of the two afternoon dailies. The latter acquisition, according to the complaint, violated the Celler-Kefauver section of the Clayton Act by eliminating competition between Rockford Newspapers and WREX-TV, and by substantially lessening competition while increasing concentration in the sale of advertising and the dissemination of news and advertising by local mass media in metropolitan Rockford. In a proposed consent decree, which is to become final in 30 days, Gannett agreed to sell either Rockford Newspapers or WREX-TV within 18 months to a qualified purchaser.

STEFANO MAGADDINO, HEAD OF COSA NOSTRA IN BUFFALO, INDICTED

December 5, 1968: A federal grand jury in Buffalo returned an indictment charging Stefano Magaddino, leader of the Cosa Nostra organization in Western New York, and nine other persons, including his son, Peter, with violations of the Travel Act, 18 U.S.C. 1952, and conspiracy to violate that statute. In addition to the Magaddinos the following were indicted: Benjamin Nicoletti, Sr., Benjamin Nicoletti, Jr., Gino Monaco, Sam Puglese, Michael Farells, Augustine Rizzo, Patsy Passero and Louis Tavano. The indictment charges that the defendants between September and November of this year operated a large-scale bookmaking business between the Niagara frontier on the American side and Ontario in Canada. The combine accepted both sports and race bets with a number of bookmakers operating under the control of Benjamin Nicoletti, Jr., with some of the proceeds going to Stefano Magaddino. The defendants were picked up previously on Commissioner warrants and at that time $478,000 in cash was seized at Peter Magaddino's home. In addition $38,000 in cash was seized at the Magaddino funeral home. In the latter instance the money was identified as the proceeds of the wagering operation by analysis of Peter Magaddino's records.

GUILTY VERDICTS RETURNED IN LOS ANGELES FRIARS CLUB CASE

December 2, 1968: The trial of five defendants in the Central District of California charged with conspiracy to violate the federal statute which prohibits the use of interstate facilities to promote an illegal gambling enterprise has been concluded with jury verdicts of guilty against John Rosselli, representative of the Chicago criminal organization in Las Vegas and on the West Coast; Maurice Friedman, former owner of several Las Vegas casinos; T. Warner Richardson, also a former Las Vegas casino operator; Manuel Rickey Jacobs, a professional gambler tied to various interstate gambling operations; and Benjamin Teitelbaum, a co-owner of a Hollywood film firm. The defendants, all of whom except Richardson were members of the Friars Club in Beverly Hills, together with other unindicted co-conspirators, devised a scheme for the purpose of cheating at gin rummy games played at the Club. Peep holes were drilled in the ceiling of the card room and persons sitting in the attic transmitted radio signals to their accomplices playing below which guided their play in accordance with the contents of their opponents' hands. Over $500,000 was illegally obtained in this fashion. The trial of these defendants, which lasted more than six months, was handled by Assistant U.S. Attorney David Nissen, Chief of the Special Prosecutions Division of the U.S. Attorney's office in Los Angeles.

* * *

POINTS TO REMEMBER

COUNSEL FOR INDIGENTS

In Tobin v. United States (C.A. 2, decided October 29, 1968), an indigent charged with a White Slave Traffic Act violation waived appointment of counsel at arraignment, indicated he would employ his own counsel, but appeared at trial seven months later, saying he had been unable to hire an attorney. In view of the defendant's dalliance and the Government's readiness for trial, the court would have required defendant to proceed without counsel; however, the defendant pleaded guilty. The Second Circuit set aside the conviction, one reason being that the trial judge had not clearly informed defendant he could have counsel appointed if financially unable to retain counsel.

Trouble is to be anticipated any time a defendant who is not an attorney is permitted to defend himself. You are urged to do whatever you can to see that courts take great pains clearly to apprise indigents of their right and to encourage them to accept appointed counsel. See United States v. Curtiss, 330 F.2 d 278 (C.A. 2, 1964), Knight v. Balkcom, 363 F. 2d 221 (C.A. 5, 1966). Despite the inconvenience that would have been involved in postponing the trial in Tobin, the Court of Appeals showed no inclination to charge the indigent with a burden of signalling that he had been unable to retain counsel. There must be some convenient way, after a defendant has waived appointment of counsel at arraignment, to insure that he has counsel (his own or court-appointed) in time to allow the case to proceed when called for trial. Please be alert to potential problems whenever a person who could be indigent waives counsel at arraignment, saying either that he will employ counsel or will defend himself, especially if that person might seem motivated toward confounding the proceedings. Some measures need to be taken between the time of that waiver and trial to obviate postponement of trial. We solicit suggestions that can be passed along for dealing with this general problem.

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DEPARTMENT OF JUSTICE PROFILES

Erwin N. Griswold
Solicitor General

Erwin Griswold was born at East Cleveland, Ohio, July 14, 1904. He received an A.B. and A.M. from Oberlin College, an LL.B. from Harvard Law School in 1928, and an S.J.D. in 1929 from Harvard. He was an attorney in the Office of the Solicitor General and Special Assistant to the Attorney General from 1929-1934. From 1934-1946 he was a Professor of Law at Harvard Law School, and was the Dean of Harvard from 1946 until his appointment as Solicitor General in 1967. He was President of the Association of American Law Schools from 1957-1958, and has been a member of the U.S. Civil Rights Commission since 1961. Dean Griswold has been a contributor to numerous legal publications. He is the General Editor of the American Case Book Series and the author of "Cases on Federal Taxation" (1940), "Cases on Conflict of Laws" (1941), "The Fifth Amendment Today" (1955), and "Law and Lawyers in the United States" (1964). He has received honorary doctorate degrees from more than twenty universities in five countries.

* * *

Gustave Diamond
United States Attorney
Western District of Pennsylvania

Gus Diamond was born January 29, 1928 at Burgettstown, Pennsylvania. He received his A.B. degree from Duke University in 1951 and his LL.B. degree from Duquesne University in 1956. From 1951 to 1956 he was in private industry in Pennsylvania, and from 1956 to 1961 he was law clerk to Judge Marsh, Western District of Pennsylvania. He was an Assistant United States Attorney (1961-63) prior to his court-appointment as United States Attorney in 1963. Since becoming U.S. Attorney Mr. Diamond has successfully prosecuted a number of organized crime and racketeering cases in the Pittsburgh area. His office prosecuted Tony Grosso for wagering tax violations, which case was eventually overturned by the Supreme Court on the basis of the unconstitutionality of the registration requirements of the wagering tax statute.

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Director John K. Van de Kamp

APPOINTMENTS

ASSISTANT UNITED STATES ATTORNEYS

California, Central - ALAN HARVEY FRIEDMAN; University of California, A.B.; Boalt Hall School of Law, Berkeley, J.D. Former law clerk to judge of Los Angeles Superior Court.

California, Central - JOHN S. LANE; Emory University, A.B.; Washington & Lee University Law School, LL.B.

California, Central - DARRELL WM. MacINTYRE; University of Wisconsin, B.S.; University of Georgia Law School, LL.B. Formerly in private practice; also, Assistant Solicitor General, State of Georgia.

Minnesota - RALPH E. KOENIG; University of North Dakota, Ph.B.; University of North Dakota Law School, LL.B. Formerly in private practice; also, Insurance Claim Adjustor, State Farm.

New York, Southern - THOMAS J. FITZPATRICK; Fordham University, B.S.; Fordham Law School, LL.B. Formerly in private practice.

Ohio, Southern - PAUL BRICKNER; University of Richmond, A.B.; Western Reserve University Law School, J.D. Former attorney-advisor, National Aeronautics & Space Administration.

* * *

ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

SUPREME COURT

SHERMAN ACT

EXPORT SHIPMENTS PAID FOR WITH U.S. FUNDS ARE NOT EXEMPT FROM ANTITRUST LAWS UNDER WEBB-POMERENE EXPORT ACT

United States v. Concentrated Phosphate Export Assn., Inc., et al. (Sup. Ct. 29; November 25, 1968, D.J. 60-44-28)

On November 25, 1968, the Supreme Court held that a group of phosphate fertilizer companies which had organized themselves into an export trade association under the Webb-Pomerene Export Act of 1916 (15 U.S.C. 61-65) are not exempt from the antitrust laws with respect to commodities offered for purchase under the United States foreign aid program. The Court's opinion, written by Justice Thurgood Marshall, noted that Congress had created the Webb-Pomerene exemption to the antitrust laws so that American enterprises could act jointly through export associations in order to compete more effectively against foreign cartels. But the exemption was carefully designed to avoid substantial injury to domestic interests. A survey of the legislative history made plain that Congress sought to aid American business solely at the expense of foreign, not domestic consumers. The exemption from the antitrust laws was thus confined to transactions in the course of "export trade". This case presented the question whether shipments paid for with U.S. tax dollars came within the scope of that phrase as used in the Webb-Pomerene Act.

Judge Sylvester Ryan of the Southern District of New York found that foreign aid transactions were "initiated, directed, controlled and financed" by the Agency for International Development and that this agency was at the center of the transactions. But he concluded, nonetheless, that the form of the transactions--in this case, shipments to the Republic of Korea of concentrated phosphates financed by AID--were in fact direct sales, and thus constituted American exports to Korea within the meaning of the Webb-Pomerene Act.

The Supreme Court held that the formal contractual features are not the critical elements of an antitrust analysis. American participation was the dominant feature of the transactions and the burden of non-competitive prices fell not on foreign purchasers but on the American taxpayer. Moreover, the Court observed that the United States Government retained effective

control over every stage of the shipments, starting from the selection of goods to be purchased all the way through procurement and final payment. A vast array of statutes, international treaties and agreements, and administrative regulations furnished the policies by which AID was charged with managing this program. Indeed, AID's authority went so far as to permit it to reacquire title to AID financed goods prior to their arrival at the destination port, even though formal title and risk of loss might already have passed to the recipient nation's government. In such circumstances, the Court concluded, the "economic reality" of the transactions compelled the determination that "/t/he United States was, in essence, furnishing fertilizer to Korea", and that such transactions cannot be held to constitute "export trade" within the meaning of the Webb-Pomerene Act.

The defendants asserted that the case had become moot by reason of the dissolution of their Webb association since entry of the district court's judgment and the promulgation by AID of a new regulation precluding Webb associations from bidding on foreign aid procurements where the procurement is limited to United States suppliers. The Court rejected this argument. First, the purpose of the Government's injunction suit was to prevent the individual defendant companies from forming any new export associations without court approval and from continuing any joint pricing, as well as obtaining the dissolution of the former association. Only the latter objective had thus far been achieved. Second, the new AID regulation applied only to procurements in which eligibility for bidding was restricted to American firms, and was therefore inapplicable to this case. Foreign companies from certain designated under-developed countries were eligible to bid on each of the eleven procurements, and in some cases, were successful in doing so.

Nevertheless, the Court declined to foreclose the possibility that the district court, on remand, might conclude that an injunction is still not warranted. The defendants had claimed that it was no longer economical for them to engage in further joint operations because AID has, under its new regulation, increasingly rendered Webb associations ineligible to bid by restricting bidding to U.S. suppliers. This statement alone, the Court declared, was insufficient to satisfy the "heavy burden of persuasion" which a defendant must bear in showing that the likelihood of further violations is sufficiently remote to make an injunction unnecessary. Accordingly, the defendants, on remand, will have the opportunity to persuade the district judge that "subsequent events /have/ made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur".

Justice White, joined by Justice Stewart, dissented. In their view, the plain meaning of the phrase "export trade" embraced the foreign aid transactions in which the defendants had engaged because AID merely supplied the

funds which Korea used to pay for the purchases. Moreover, the purpose of the statute was to enable American companies to meet foreign competition; in each of these transactions, American firms had encountered the competition of foreign bidders. It is this fact, not that payment was made with U.S. tax dollars, which the dissenters considered to be the critical element.

The case was argued by Deputy Attorney General Warren Christopher.

Staff: Howard E. Shapiro and William R. Weissman (Appellate); Burton R. Thorman (Sp. Lit.) (Antitrust Division); and Lawrence G. Wallace (Solicitor General)

* * *

CIVIL DIVISION

Assistant Attorney General Edwin Weisl, Jr.

COURTS OF APPEALS

INTERLOCUTORY APPEALS

ORDER DENYING MOTION TO VACATE RECEIVERSHIP IS UNAPPEALABLE UNDER 28 U.S.C. 1292(a)(2); ORDER DENYING STAY AND/OR CONSOLIDATION UNAPPEALABLE UNDER 28 U.S.C. 1292 (a)(1), AND 1291.

United States v. Chelsea Towers, Inc. (C.A. 3, No. 17,187; November 21, 1968; D.J. 130-48-5904)

In this case, the United States brought an action to foreclose a mortgage held by FHA, and ex parte obtained the appointment of a receiver over the property. Six days after the appointment of the receiver Chelsea Towers, Inc., owner of the property, moved to vacate or modify the receivership, to stay the foreclosure, or to consolidate it with another action it then had pending in the same court. Ultimately, the district court denied that motion (as well as a later motion which asked for the return to Chelsea Towers, Inc. of certain property given to the receiver as trustee). Chelsea Towers sought to appeal this interlocutory order of the district court under 28 U.S.C. 1292 (a)(1) and (2). Its notice of appeal was filed within 60 days of the entry of the order denying its motion, but more than 60 days from the date of the appointment of the receiver.

The Third Circuit dismissed the appeal in its entirety. With respect to the receivership matter the Court affirmed the settled principle that an order denying a motion to vacate a receivership where the motion is addressed to the propriety of the original appointment is not appealable under 28 U.S.C. 1292(a)(2). Thus, since the notice of appeal was addressed to the order denying the motion to vacate, the appeal would not lie. It should be noted that the motion to vacate was filed less than 10 days after judgment so that, theoretically at least, under Rule 59, F.R.Civ. P., the time for filing a notice of appeal from the original order would not have begun to run until the denial of the motion to vacate. The Court, however, evidently held that if a party is going to invoke Rule 59 in this type of case, it must do so explicitly in its motion.

With respect to the stay and consolidation matters, the Court accepted our position that the denial of a stay pending disposition of another action is not a denial of an injunction under 28 U.S.C. 1292(a)(1), and that the denial of a consolidation of two actions is not a "final order" under 28 U.S.C. 1291 and the case of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541.

Staff: John C. Eldridge and William Kanter (Civil Division)

SMALL BUSINESS ADMINISTRATION - INJUNCTIONS

15 U.S.C. 634(b)(1) BARS ISSUANCE OF INJUNCTION AGAINST SMALL BUSINESS ADMINISTRATOR, AND WHERE SUCH INJUNCTION IS IMPOSED BY STATE COURT, U.S. DISTRICT COURT, UPON REMOVAL OF ACTION, MAY PROPERLY DISSOLVE THE INJUNCTION.

M. R. Vincent, et al. v. Small Business Administration, et al. (C.A. 4, No. 12,410; October 31, 1968, D.J. 105-83-7)

After a general creditor's suit to establish lien priorities on certain property was filed in a West Virginia State Court, the Small Business Administration filed in that court a "Proof of Secured and Priority Claim" for $61,812.50. The original complaint was then amended to include the Small Business Administration and the United States as party defendants. On the same day, at the request of the plaintiffs, the state court enjoined the SBA from holding a foreclosure sale on property involved in the suit upon which it had a lien. The SBA thereafter filed a petition for removal on behalf of the Small Business Administration and the United States. Pursuant to the motion of the United States, the district court issued an order dissolving the injunction. On appeal, the Court of Appeals for the Fourth Circuit accepted our argument and held that the injunction was properly dissolved since it was clearly barred by 15 U.S.C. 634(b)(1). The Court also rejected the appellant's claim that the SBA's immunity from injunctive process is unconstitutional.

Staff: John C. Eldridge and Patricia Baptiste
(Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

MILITARY SELECTIVE SERVICE ACT - CONSCIENTIOUS OBJECTION

BOARD NOT REQUIRED TO CONSIDER CONSCIENTIOUS OBJECTION CLAIM SUBMITTED AFTER REFUSAL TO SUBMIT TO INDUCTION.

Palmer v. United States (C.A. 9, No. 22,736, September 25, 1968)

Appellant, after refusing to submit to induction, submitted a claim of conscientious objection to his local board. The board took no action. Appellant contended that he was entitled to have the local board act upon his claim. The Ninth Circuit rejected the argument, and stated:

> Classification functions of the local board cease with induction, and a registrant cannot, by refusing to submit to induction, impose upon the board any new duties respecting reclassification or reopening . . . . To permit such imposition would be highly disruptive of the Selective Service process.

Staff: United States Attorney Eugene G. Cushing (W.D. Washington)

* * *

INTERNAL SECURITY DIVISION
Assistant Attorney General J. Walter Yeagley

SUBVERSIVE ACTIVITIES CONTROL BOARD

DETERMINATIONS OF COMMUNIST PARTY MEMBERSHIP.

Attorney General v. Simon Boorda; Attorney General v. Robert Archuleta; Attorney General v. Wayne Dallas Holley (SACB Docket Nos. I-50-69, I-45-69, and I-46-69; D.J. 146-1-26S-210, 146-1-77-145, and 146-1-77-50, respectively)

On July 1, 1968 the Attorney General filed three separate petitions before the Subversive Activities Control Board for orders determining Simon Boorda, alleged Chariman of the Communist Party of Indiana, Robert Archuleta, alleged Secretary-Treasurer of the Communist Party of Utah, and Wayne Dallas Holley, alleged Chairman of the Communist Party of Utah, to be members of the Communist Party of the United States of America.

Evidentiary hearings were held before the full Board in Washington, D.C., on September 11 and 12, 1968, in the Boorda case, and on October 1 and 2, 1968, in a consolidated proceeding against Archuleta and Holley.

On November 15, 1968 the Board issued a report and order in the Boorda case, and on November 21, 1968 issued its report and order in the Archuleta and Holley cases. In each case the Board granted the Attorney General's petition and found and declared the respondents to be members of the Communist Party of the United States of America. The orders are now on appeal to the U.S. Court of Appeals for the District of Columbia Circuit and will not become final until all appellate review has been exhausted.

Hearings are pending before the Board in four similar membership cases also filed on July 1, 1968 against Scarlett Ann Patrick, Anna Pastor Laconich, and Ruth Beer, all alleged members of the New Jersey Communist Party State Board, and against Sargeant Caulfield, alleged Acting Chairman of the Communist Party of Louisiana.

Staff: Oran H. Waterman, Robert A. Crandall, and
Garvin L. Oliver (Internal Security Division)

DISTRICT COURT

LEGISLATIVE INVESTIGATIONS

FEDERAL DISTRICT COURT LACKS JURISDICTION TO ENJOIN HOLDING OF CONGRESSIONAL HEARINGS - SINGLE DISTRICT JUDGE CAN DISMISS ACTION FOR INJUNCTIVE RELIEF BROUGHT BY SUBPOENAED WITNESSES.

Davis, et al. v. Willis, et al.; Young v. Willis, et al. (D. D.C., Civil 2441-68 and 2455-68; D.J. 145-11-71 and 146-200-9603, respectively)

On October 1, 1968, Renard Davis and five others filed suit to enjoin the House Committee on Un-American Activities from holding hearings with respect to the possible Communist involvement in the demonstration which took place in Chicago in August 1968 near the National Democratic Convention, and to enjoin the Attorney General and the United States Attorney for the District of Columbia from enforcing any subpoenas issued by the Committee. Plaintiffs allege they are variously associated with Students for a Democratic Society, the National Moblization Committee to End the War in Vietnam, and the Youth International Party. Dr. Quentin Young filed a similar action on October 2, 1968.

Judge Hart on October 9, 1968, on the basis of the ruling in Krebs v. Ashbrook, 275 F. Supp. 111 (D.D.C., September 11, 1967), affirmed (D.C. Cir., No. 21382, May 14, 1968), rehearing en banc denied (July 12, 1968), petition for certiorari filed October 5, 1968 and served October 10, 1968, that Rule XI of the Rules of the United States House of Representatives under which the Committee operates is not an "Act of Congress" within the meaning of 28 U.S.C. 2282 and 2284, and that a suit attacking the constitutionality of Rule XI should not be heard by a three-judge district court, denied plaintiffs' motion for a three-judge court, and on October 17, 1968, on the Government's motion, dismissed the consolidated actions on the grounds that under the separation of power doctrine there is no justiciable issue presented and the court has no jurisdiction over the subject matter, that there is an adequate remedy at law open to the plaintiffs to protect their rights in the event they should be indicted or any criminal action brought against them, and that the actions against the Attorney General and the United States Attorney are premature, there being no action pending in any way, no action having been taken by the Committee or the Congress to cite any person for contempt in connection with the challenged Committee hearings which began on October 1, 1968.

Staff: Keven T. Maroney, Lee B. Anderson and Benjamin C. Flannagan (Internal Security Division)

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT

SUIT TO ENJOIN COLLECTION OF TAXES

MOTION TO DISMISS INJUNCTION ACTION DENIED WHERE TAXPAYER'S AFFIDAVIT RAISED FACTUAL ISSUE OF WHETHER WAIVERS OF STATUTORY COLLECTION PERIOD WERE EXECUTED UNDER DURESS.

Irving Monsky v. Edward J. Fitzgerald, Jr., Dist. Dir. of Internal Revenue (E. D. N. Y., Civil 68-C-213; October 17, 1968, D. J. 5-52-11821)

This case seeks to enjoin the collection of federal tax liabilities for the years 1944 through 1947 of the taxpayer-plaintiff. The complaint alleged that the assessments were arbitrary, illegal and unenforceable by reason of the expiration of the statute of limitations.

A motion to dismiss the complaint was filed by the defendant on the basis of the prohibitions of Section 7421 of the Code and the plaintiff's failure to state a claim for relief under the doctrine of Enochs v. Williams Packing & Navigation Co., 370 U.S. 1.

The court disregarded contrary authority and determined that allegations of potential loss of business and life insurance policies together with an inability to pay the tax and sue for a refund were sufficient to demonstrate irreparable injury under Enochs. Despite the defendant's documented chronology of the timeliness of current collection activity, the court held that "plaintiff's allegations of delays in government processing of this case do state a valid claim for relief justiciable in this Court".

The plaintiff submitted an affidavit after the argument of the motion which alleged that waivers extending the statutory period for collection were executed by the taxpayer under duress. The memorandum decision deemed the complaint amended to include the statements in the affidavit.

Construing the allegations of delay and duress in the manner most favorable to the plaintiff, the court denied the motion to dismiss the action.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Howard L. Stevens (E. D. N. Y.); and John S. Kingdon (Tax Division)

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