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Federal Procedure—Substitution of A Public Official under Rule 25 (d) of the Federal Rules of Civil Procedure

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pliance with the *Counselman* decision, and can be used to compel a witness to answer.

It would appear that witnesses will be afforded equally-wide protection from state prosecution, since the new statute retains the phrase "in any court." Whether this further interference with state powers raises a constitutional question not answered by the instant case remains to be seen.

Eileen Tomaka

FEDERAL PROCEDURE — SUBSTITUTION OF A PUBLIC OFFICIAL UNDER RULE 25 (d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioner unsuccessfully sought to compel the return of documents illegally seized and now held by the United States Attorney. The United States Attorney retired, and the court refused to substitute his successor in office on the grounds that this would be an exercise of original jurisdiction over a new party and a new cause. *Danenberg v. Cohen,* 213 F. 2d 944 (7th Cir. 1954).

At common law, an action against a public official abated with his death or retirement from office and could not be revived against his successor without statutory authority. In the very cases in which the Supreme Court recognized this principle, it also recognized the inexpedience of the rule and urged the enactment of remedial statutory authority. *United States* ex rel *Bernardin v. Butterworth,* 169 U. S. 600 (1898); Ex Parte *La Prade,* 289 U. S. 444 (1933).

In response to this judicial prompting, Congress enacted Rule 25 (d) of the Federal Rules of Civil Procedure which provides for substitution against a successor in office when "a substantial need for so continuing is satisfactorily shown." The dearth of cases interpreting "substantial need" necessitates a review of the *Bernardin* and *La Prade* cases, for an indication of judicial interpretation of "substantial need." In the *Bernardin* case the petitioner requested a writ of mandamus to force the successor in office to the head of the Patent Bureau to issue him a patent. The *La Prade* case was a suit against The Attorney General of Arizona to enjoin the enforcement of a statute relating to the size of railroad trains. In both cases the Court was forced to refuse substitution of their successors solely because of the absence, at that time, of statutory authority. A case decided after the enactment of statutory authority allowed substitution of a United States tax collector in a suit to enjoin an unconstitutional collection of an

amusement tax on its football games and held the case to be within the letter of the act. *Allen v. Regents of the University of Georgia*, 304 U. S. 439 (1938).

Rule 41 (e) of the Federal Rules of Criminal Procedure has been interpreted to the effect that an aggrieved party can suppress illegally seized evidence not only in advance of trial but also in advance of indictment. This liberal construction is rationalized by recognizing the harm wrought by a wrongful indictment, even if it does not result in a conviction. In Re *Fried*, 161 F. 2d 453 (2d Cir. 1947). Another theory allows suppression in advance of indictment because the court may reach forward to control the presentation of evidence that may come before it. *Foley v. United States*, 64 F. 2d 1 (5th Cir. 1933).

Although Rule 41 (e) would seem to be the best method available, this rule does not purport or otherwise appear to be an exclusive remedy; for the doctrine rests on and is inseparably tied up with the property right of the person from whom the article is taken. *Foley v. United States, supra.*

It would seem to follow that the present case "falls within the letter and spirit of Rule 25 (d)", and substitution should be allowed as a matter of course. The attitude of the court seems to evince a tacit desire to delimit and narrowly confine the suppression and return of illegally seized property to the exact remedy afforded by Rule 41 (e) of The Federal Rules of Criminal Procedure. If this be the unarticulated ground for the court's dismissal, it is deplorable that a defendant should be deprived of his substantive rights by a mis-application of procedure.

Howard L. Meyer, II

LABOR LAW — RETAIL STORE OWNER MAY DENY UNION OPPORTUNITY TO REPLY TO PRE-ELECTION SPEECH

Employer, variety store, addressed its employees on company time and on company property, exhorting them to vote against the union in the coming election. Requests by the union for an opportunity to address the employees under similar circumstances were refused. The N. L. R. B. found that the employer's refusal constituted discriminatory application of its no-solicitation rule. In a proceeding on petition for enforcement of a cease and desist order, *Held* (2-1): Employer is not required to provide equal opportunity to union representatives to speak to employees on the premises and during working hours. *N. L. R. B. v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954).