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THE RECORDS HELD BY CLERKS OF COURT DEALING WITH NATURALIZATION PROCEEDINGS PRIOR TO JUNE 29, 1906 ARE NOT FEDERAL RECORDS AND ARE SUBJECT TO DESTRUCTION—§366, TITLE 44, U.S.C., OPINION 2129 OAG 1961.

## SYLLABUS:

The records held by clerks of courts dealing with naturalization proceedings had prior to the Federal Naturalization Act of June 29, 1906, are not federal records. Such records are subject to destruction pursuant to the provisions of Section 149.38, Revised Code and related sections. (Opinion No. 2129, Opinions of the Attorney General for 1961, issued on April 14, 1961, approved and followed.)

Columbus, Ohio, May 11, 1962

Hon. Edward J. Schaefer, Archivist

The Ohio Archives, 1234 East Broad Street, Columbus 5, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“A number of our County Clerks of Court are concerned with the deterioration of old naturalization record books prior to the Federal naturalization statutes of June 29, 1906.

“I have communicated with the United States Department of Justice, Immigration and Naturalization Service, Washington 25, D. C. Their reply of February 16, 1962 is quoted as follows:

“This Service has no knowledge of a Federal Retention Schedule which could be applied to the naturalization records in the county courts which were made before the effective date of the basic naturalization statute of June 29, 1906. Naturalization records created in State courts prior to that time were established and controlled by the laws of the various States and were not made in pursuance of Federal Statutes. Consequently, questions concerning the micro-filing and destruction or disposition of such naturalization records in Ohio is a matter to be decided upon the basis of the statutes of Ohio or the rules or orders of the courts in which such records exist.

“In connection with inquiries you may receive concerning the making of copies of naturalization records and the

use of such copies, we must bring to your attention those provisions of Section 1426, Title 18 of the United States Code, which make it a criminal offense under certain circumstances to make copies of certain naturalization documents.' "Therefore, my request for your opinion is as follows:

"Can the Courts charged with the responsibility of the Naturalization records prior to the Federal Naturalization Statutes of June 29, 1906, cause such records to be microfilmed and the originals disposed of in accordance with the provisions of Section 149.31, 149.36, 149.38 and 149.40, Revised Code?"

Since the Department of Justice is the legal arm of the Federal Government, I have no hesitation in relying upon its letter quoted in your request. It naturally follows from said question that naturalization records, made prior to 1906 by clerks of courts in Ohio, are not records of the United States and, therefore, are not governed by federal statutes dealing with the disposition of United States public records.

The term "records," as used in the Federal Disposition of Records Act, is defined in Section 366, Title 44, United States Code, which reads, in part, as follows:

"When used in sections 366-376 and 378-380 of this title, the words 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government in pursuance of Federal Law or in connection with the transaction of public business \* \* \*."

In accordance with the above, it should be noted that the disposition of records made by a clerk of court in a naturalization proceeding had in a state court after 1906, jurisdiction for which proceeding is presently found in Section 1421, Title 8, United States Code, is governed by the Federal Disposition of Records Act.

Section 1426, Title 18, United States Code, referred to in the letter of the Department of Justice, is a criminal provision which, briefly stated, prohibits the falsification or counterfeiting of any naturalization or immigration record. Clearly, such unlawful activity would not be accomplished by the microfilming of public records pursuant to the pertinent provisions of Chapter 149., Revised Code.

In addition to naturalization records kept by clerks of courts, under the naturalization laws in force from 1887 to 1906, Ohio Probate Courts

had jurisdiction to hear naturalization proceedings, 1 Ohio Jurisprudence, 912, Alienage and Citizenship, Section 24, and records of such proceedings are undoubtedly still maintained by said courts. I see no reason to treat said records differently than the records of the clerks of courts in question herein. (The Probate records aforementioned are not the same as those which are presently required to be kept by the Probate Court under division (M) of Section 2101.12, Revised Code, nor is the record made under such section kept pursuant to federal law.)

Coming now to your specific question of whether the records referred to in your request can be microfilmed and the originals thereof subsequently disposed of, pursuant to the provisions of Sections 149.31, 149.36, 149.38, and 149.40, Revised Code, I have pointed out earlier herein that said records are legal records kept by the clerk of courts pursuant to their responsibilities under Ohio law. Such records obviously have some legal value, and as such, they may be disposed of in accordance with the pertinent provisions of the Revised Code. It will be noted that the clerk of courts of the county is a member of the county records commission (Section 149.38, Revised Code), and clearly such commission would have primary jurisdiction to consider the disposal of records held by him.

I considered a question dealing with the disposal of similar records in Opinion No. 2129, Opinions of the Attorney General for 1961, rendered April 14, 1961, the syllabus of which reads as follows :

“Pursuant to the provisions of Section 9.01, Revised Code, the public officials therein enumerated, are authorized to use the microfilm process of reproduction for the recording, filing, maintaining and preserving of records they are required to record, file, maintain and preserve, and to dispose of the original records or copies of such records in accordance with the provisions of Sections 149.31, 149.32, 149.37, 149.38, 149.41 and 149.42, Revised Code.”

Your attention is also called to Opinion No. 5667, Opinions of the Attorney General for 1955, page 371, and Opinion No. 1348, Opinions of the Attorney General for 1960, page 335.

In accordance with the foregoing, I am of the opinion and you are advised that the records held by clerks of courts dealing with naturalization proceedings had prior to the Federal Naturalization Act of June 29, 1906, are not federal records. Such records are subject to destruction pursuant

to the provisions of Section 149.38, Revised Code and related sections. (Opinion No. 2129, Opinions of the Attorney General for 1961, issued on April 14, 1961, approved and followed.)

Respectfully,

MARK McELROY

Attorney General