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POINTS TO REMEMBER

Rule 11: Pleas

Recently there have been several cases called to the attention of the Criminal Division wherein a sentencing court failed to comply with the requirements of Rule 11 in accepting a guilty plea. In the light of McCarthy v. United States, 394 U.S. 459 (1969), United States Attorneys should exercise particular care that the records made in cases disposed of by pleas reflect full and precise compliance with each requirement of Rule 11, with special emphasis that:

1. The defendant is personally questioned by the presiding judge with respect to the offense charged and the elements and factual basis thereof;

2. The defendant indicates to the judge that he understands the nature and consequences of his plea;

3. The sentencing judge bases his acceptance of the plea solely upon the evidence and responses of the defendant then a part of the record, without regard to collateral information which is not a part of the record.

4. The plea is entered voluntarily and intelligently.*/

Each prosecutor should call the attention of the court to any deficiencies in the latter's questioning of a defendant as mandated in Rule 11 before accepting a quilty plea.

For discussion of rulings of the Supreme Court of the United States that strict compliance with Rule 11, Federal Rules of Criminal Procedure, is mandatory, see Points to Remember, United States Attorney's Bulletin, Vol. 17, No. 18, at p. 475. See also, Vol. 17, No. 16, pp. 395-396.

Johnny Horizon Act Prosecutions

Arrangements have been made with the Federal Bureau of Investigation and the Department of the Interior concerning the handling of matters involving possible violations of the Johnny Horizon Act, 18 U.S.C. 714. Prior to

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*/ See North Carolina v. Henry C. Alford, Law Week, Vol. 39, p. 4001, decided November 24, 1970, ___ U.S. ___, holding that defendant's protestations of innocence did not bar acceptance of second degree guilty plea that was made with advice of counsel, was supported by substantial prosecution evidence of guilt, and was motivated by desire to avoid death penalty.

an investigation or consideration of criminal prosecution, the Department of the Interior will endeavor to obtain compliance with standards administratively established and will thereafter refer to the Criminal Division only those matters which cannot be resolved without consideration of criminal prosecution. Those matters brought to its attention by the Department of the Interior which the Criminal Division agrees cannot be resolved without criminal prosecution will be referred by the Criminal Division, as necessary, to the Federal Bureau of Investigation or to the appropriate United States Attorney.

(Criminal Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

SECY. OF AGRICULTURE'S AUTHORITY TO SUSPEND FUNGICIDE REGISTRATION TO PREVENT IMMINENT HAZARD TO PUBLIC HEALTH, UPHELD.

Nor-Am Agricultural Products, Inc. & Morton International, Inc. v. Clifford M. Hardin, Secretary of Agriculture, G. W. Irving, Jr., Administrator, Agricultural Research Service, & Harry W. Hays, Director, Pesticides Regulation Division (C. A. 7, No. 18,478; November 9, 1970; D. J. 1-23-140)

The Seventh Circuit has upheld the authority of the Secretary of Agriculture to suspend the registrations of certain mercury fungicides marketed by Nor-Am under the trade name "Panogen", pursuant to his finding that such action was necessary to prevent an imminent hazard to the public. The products are used as seed treatment on grain crops to prevent disease. After the Secretary's suspension order, Nor-Am sought and obtained an injunction against the Secretary of Agriculture in the District Court for the Northern District of Illinois. The injunction prevented any action against the products in furtherance of the suspension order; the district court did not preclude the Department of Agriculture from proceeding administratively under a cancellation proceeding, which would have allowed the products to stay on the market pending administrative procedures provided by the statute (7 U.S.C. 135, et seq.). The Government sought and obtained a stay of the injunction pending appeal.

In July 1970, a panel of the Seventh Circuit upheld the district court's injunction and findings that the Secretary's action had been arbitrary and capricious. Judge Cummings dissented, stating that the Secretary's suspension order was not a final decision within the meaning of the Administrative Procedure Act (5 U.S.C. 704) subject to judicial review. The Government filed a petition for rehearing with the suggestion that the matter be reheard en banc and the petition was granted.

In its opinion after the rehearing en banc, the Seventh Circuit (with Judge Cummings writing the majority opinion) held that the statute precludes judicial review of such suspension orders until after completion of the expedited administrative procedures specified in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135b(c), (d)). The opinion relies on Aircraft and Diesel Equipment v. Hirsch, 331 U.S. 752, and Ewing v.

Mytinger & Casselberry, Inc., 339 U.S. 594, to support the unavailability of judicial review of discretionary administrative action in the realm of public health and safety before the completion of administrative procedures. Distinguishing Abbott Laboratories v. Gardner, 387 U.S. 136 (which involved a review of strictly legal issues concerning the validity of a regulation promulgated by the Food and Drug Administration requiring relabeling of drug products to include the generic or "established name" as well as the proprietary name), the opinion states that entirely different considerations are operative in this case where judicial review was sought of the factual basis supporting an emergency order which itself initiated clearly defined adjudicatory proceedings with the agency. In rejecting the view of the district court that Nor-Am's available administrative remedies are inadequate, the Court noted: "Congress balanced the public and private interests when it fashioned not only the Secretary's discretionary power but also the administrative procedures to follow exercise of that power...we should not countenance such an evasion of the review procedure provided by Congress in this statute."

Nor-Am sought a stay of the mandate pending application for a writ of certiorari. On November 24, 1970, the Court denied a stay and ordered the mandate to issue forthwith, and on December 2, Justice Marshall denied an application to recall the mandate.

Staff: United States Attorney William J. Bauer and Assistant United States Attorney John Simon (N. D. Ill.); Raymond W. Fullerton (Department of Agriculture); and Howard S. Epstein (Criminal Division)

IMMIGRATION AND NATURALIZATION

PETITIONS FOR REVIEW OF ORDERS OF IMMIGRATION AND NATURALIZATION SERVICE HELD FRIVOLOUS AND MATTER REFERRED TO ATTORNEY FOR CONSIDERATION OF DISCIPLINARY PROCEEDINGS AGAINST ATTORNEY.

John M. Panagopoulos, et al. v. Immigration & Naturalization Service (C. A. 1, No. 7677; November 12, 1970; D. J. 39-36-355)

This case involved petitions to review orders of deportation of the Immigration and Naturalization Service. The petitions alleged only that petitioners had not received a "fair and impartial" hearing. Significantly, the Court resorted to the prehearing procedure of Rule 33, F. R. A. P., to amplify the basis of the claims. Counsel informed the court in this hearing that, although the administrative relief sought was discretionary and no abuse of discretion had occurred, he was asking the Court to take new evidence, entertain new claims and make its own determination de novo. The

Court held as patently frivolous the claims that it could undertake a de novo consideration, that it could accept new evidence not in the administrative record to support old claims, or that it could consider new defenses not raised in the administrative hearing without some valid reason. On this latter issue, the Court declined to decide whether the judicial review section of the Immigration and Nationality Act (8 U.S.C. 1105a) intended to waive defenses to deportation not raised at the administrative level or allowed the Court to remand to the Service for consideration of new defenses. The Court summarily dismissed the petitions and issued its mandate forthwith.

Significant for U.S. Attorneys in heavy immigration litigation districts, the Court condemned in strong terms the practice of using frivolous litigation solely for the purpose of delaying execution of a valid deportation order, particularly after the Court had warned counsel of the seriousness of such a situation. The Court stated, "in light of this warning, and possibly even without such caution, considering the total clarity of the statute, it may be that counsel deliberately intended to abuse the process of this court in order to obtain an undeserved benefit for one or all of his clients". The Court referred this question to the U.S. Attorney to institute disciplinary proceedings "if he believes it appropriate".

Staff: United States Attorney Herbert F. Travers, Jr. and Assistant U.S. Attorney Willie J. Davis (D. Mass.)

DISTRICT COURT

CONSPIRACY AGAINST RIGHTS OF CITIZENS (18 U.S.C. 241)

EIGHT DEFENDANTS CONVICTED IN STARR COUNTY, TEXAS VOTE FRAUD TRIAL.

United States v. Rene A. Solis, et al. (S.D. Texas, Brownsville Division, No. 70-B-528; September 3, 1970; D.J. 72-017-74)

Confronted with a history of questionable elections in Starr County, Texas, numerous complaints by Starr County citizens, and the repeated failure of local authorities to investigate election irregularities, the U.S. Attorney's Office for the Southern District of Texas conducted an exhaustive probe into voter complaints arising out of the May 2, 1970 Primary elections involving candidates for Federal office.

The indictment of 22 defendants on September 3, 1970, was the culmination of four months of intensive investigation in border towns along the Rio Grande River by a staff of Assistant U.S. Attorneys. Confining the investigation to the area of absentee voting, the Assistant U.S. Attorneys gathered

witnesses that proved to have in common their inability to speak English, lack of education, advanced age or bodily infirmity. In addition, most of the witnesses could neither read nor write and had executed their ballots with a mark.

The trial opened on December 7, 1970, with the severance of one defendant who had been hospitalized. Through the use of documentary evidence and the testimony of 16 witnesses over a 5-day period, the Government presented a picture of the systematic violation of the Texas Election Code by the defendants.

The Government alleged that this systematic violation of State law was accomplished as a part of the defendants' conspiracy to injure and oppress the qualified voters in the free exercise and enjoyment of their right of suffrage.

The Government contended that by the improper delivery and return of the applications for absentee ballots, by the improper delivery and return of the absentee ballots themselves, by the improper marking of the absentee ballots, and the improper assistance of those voting by absentee ballots, the defendants caused or attempted to cause fraudulent ballots to be counted as a part of the total vote cast, thereby diminishing and diluting the value and effect of votes legally, properly and honestly cast.

Although a lengthy trial was anticipated, the prosecution was plagued by "memory lapses" suffered by the Government's witnesses, precipitated either by their ages and infirmities or the apparent pressures exerted upon them by the defendants. As a result of this lack of evidence, on the fourth day of trial, Judge Reynaldo Garza instructed a verdict of not guilty on behalf of nine defendants.

On December 11, 1970, after five hours of deliberation, the jury returned a verdict of guilty against eight defendants, but could not agree as to the fate of the additional four defendants. Those convicted included the Starr County Sheriff, who, in his dual capacity of doctor, certified approximately 346 applications for absentee ballots for sickness or physical disability; the Assistant County Auditor; a school board trustee; a State investigator and various county employees.

Staff: Assistant U.S. Attorneys Jack Shepherd,
Ed McDonough and Raul Gonzalez (S.D. Texas)

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IMMIGRATION AND NATURALIZATION SERVICE
Commissioner Raymond F. Farrell

COURT OF APPEALS

IMMIGRATION - RULE MAKING TO EXCLUDE GROUP FROM DISCRETIONARY BENEFIT

ATTORNEY GENERAL MAY USE RULE MAKING TO DISCRIMINATE AGAINST TRANSITS WITHOUT VISAS IN EXERCISE OF DISCRETIONARY AUTHORITY TO ADJUST STATUS OF ALIENS TO PERMANENT RESIDENCE.

Fook Hong Mak v. INS (C. A. 2, No. 34237; Nov. 24, 1970; D. J. 39-51-3380)

The alien had been admitted for the purpose of transiting through the United States on his way from one foreign country to another. His admission had been under 8 CFR 214. 2(c)(1), which provided that a condition of waiver of presentation of a visa was that while he was in the United States he would not apply for adjustment of status to that of a permanent resident, under section 245 of the Immigration and Nationality Act, 8 U. S. C. 1255. He overstayed the period for which he had been admitted. He admitted deportability in administrative proceedings but insisted on applying for adjustment of status. He sued for review of denial of his application, contending that the regulation was invalid in that he was entitled to an adjudication of his application on its particular merits and that the Attorney General could not lawfully enlarge the classes of aliens statutorily ineligible for adjustment.

The Court of Appeals upheld the regulation and the administrative action. The Court stated:

> We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary power, to determine by appropriate rule-making that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering. The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups. The administrator also exercises the discretion accorded him when, after appropriate deliberation, he determines certain conduct to be so inimical to the statutory scheme that all persons who have

engaged in it shall be ineligible for favorable consideration, regardless of other factors that otherwise might tend in their favor. He has then decided that one element is of such determinative negative force that no possible combination of others could justify an affirmative result.

The Court went on to rule that it was fallacious to contend that because Congress had prevented the Attorney General from exercising discretion in favor of specified classes it meant to require him to exercise it toward everyone else on a case-by-case basis. He could by regulation bar groups such as transits without visas if his experience convinced him that by applying for adjustment they would be abusing the privileges accorded to them.

Staff: United States Attorney Whitney N. Seymour, Jr. and Assistant U. S. Attorney Stanley H. Wallenstein (S. D. N. Y.)

IMMIGRATION

ADVERSARY HEARING NOT REQUIRED FOR WITHDRAWAL OF APPROVAL OF AN INSTITUTION FOR ATTENDANCE OF NONIMMIGRANT ALIEN STUDENTS.

Blackwell College of Business v. Attorney General (D. C. D. C., No. 1987-70; D. J. 39-16-540)

The issue in this case was whether the revocation of plaintiff's status as an institution approved for attendance of nonimmigrant alien students without the type of adversary hearing specified by the Supreme Court in Goldberg v. Kelly, 397 U. S. 254 (1970), was a violation of due process.

Plaintiff Blackwell College of Business had received approval for attendance by nonimmigrant alien students in 1953 and continuation of approval was granted in 1965. Sec. 101(a)(15)(F), I. & N. Act, 8 U. S. C. 1101(a)(15)(F). As a condition of approval Blackwell College agreed to notify the Immigration and Naturalization Service when a nonimmigrant student accepted by the school either failed to register within 60 days of the time he is expected to, or failed to carry a full course of studies, or failed to attend classes to the extent required, or terminated his attendance at the institution. 8 CFR 214. 3(g). Failure to submit the required reports as specified in the regulations is a ground for withdrawal of approval. 8 CFR 214. 3(j). After an investigation by the Service, Blackwell College was notified in December 1969 that the Service intended to take action toward withdrawal of approval. This notice informed the College that it could submit written representations

setting forth reasons why the approval should not be withdrawn. After interviews with officials of Blackwell College, the District Director of the Immigration and Naturalization Service notified the college of his decision to withdraw approval based on Blackwell College's failure to submit required reports. The College was notified of its right to appeal the decision and of its right to submit additional written material for review by the Regional Commissioner.

The President of the College appeared at an interview before the Regional Commissioner where she was represented by counsel. As a result of the review, the case was remanded to the District Director for reconsideration with directions that the records of the Service be made available to the College and that an interview be held where the College could be represented by counsel. Counsel did review the file but no further administrative proceedings took place because the College elected to institute court action.

Counsel contends that the Supreme Court decision in Goldberg v. Kelly, supra, requires an evidentiary hearing where the Government would be required to produce its witnesses for cross-examination and Blackwell College would be allowed to put on witnesses in its behalf.

The court however, held as follows:

> The special circumstances facing the Court in Goldberg are not present in this case. Here we are dealing with administrators of educational institutions, not welfare recipients, and these institutions are represented by counsel during the administrative proceedings. Under these circumstances the procedures of the INS which provide that the school be informed of the grounds upon which withdrawal of approval is founded, be allowed access to the Service's records and be afforded the opportunity to submit written material for consideration satisfy the fundamental requisite of due process.

Staff: Assistant U. S. Attorney Gil Zimmerman (D. C.)
and George Masterton (Criminal Division)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION; ANTI-ASSIGNMENT ACT

FEDERAL ANTI-ASSIGNMENT ACT, 31 U.S.C. 203, DOES NOT INVALIDATE CONDEMNEE'S ASSIGNMENT OF FUTURE CONDEMNATION AWARD WHERE GOVERNMENT DOES NOT OBJECT.

United States v. Certain Space in Property Known as the Chimes Building, 109 West Onondaga Street, Syracuse, Onondaga County, State of New York, et al. (C.A. 2, No. 34674; Dec. 1, 1970; D.J. 33-33-984)

When an office-building lease to the Government expired, the Government, acting through the General Services Administration, occupied space in part of the building for a limited term pursuant to the declaration of taking that commenced this condemnation. One of the condemnees was the Government's former landlord who owned the building at time of taking and whose title was then encumbered by a mortgage in default.

After the date of taking, the mortgagee commenced foreclosure of the condemnee's interest in a New York state court. The foreclosure was dismissed only after the condemnee conveyed its building for $10,000 consideration to the mortgagee by deed in lieu of foreclosure. The condemnee also gave the mortgagee its written assignment of "any sum of money found to be due" from the Government "resulting from" the pending condemnation. The assignment also consented to the mortgagee intervening as a party to the condemnation in place of the former owner who additionally covenanted to do nothing that would prevent the condemnation proceeds from being paid to the mortgagee.

Thereafter the mortgagee and the Government, which by this time had vacated the building, stipulated to a specified sum as just compensation. The mortgagee intervened in the condemnation, which had not yet come on for trial, and petitioned the district court for the stipulated compensation, relying on the deed and the assignment. The Government announced that, if the court should determine the stipulated sum to be just compensation, it would not object to its distribution to the mortgagee.

Treating the mortgagee's petition as a motion for summary judgment, the district court granted it and ordered distribution of compensation to the mortgagee as stipulated, thereby terminating the case.

The former building owner had objected to such distribution, invoking the prohibitions of the Anti-Assignment Act, 31 U.S.C. 203. The district court rejected this contention on the grounds that the "assertion that the assignment is void is without merit. The Anti-Assignment Act is for the Government's protection and only the United States may assert it." The district court also rejected a claim that the former owner had reserved a residual claim. The claim supposedly reserved was styled as one "for loss of equity * * * resulting from any arbitrary or wrongful use of the power of condemnation". The district court said:

> Whether reserved from the assignment or not seems to be of small moment, since by its own terms the "loss of equity" damage is limited to that "resulting from any wrongful or arbitrary use of the power of condemnation", in effect, equivalent to a physical seizure without a condemnation proceeding and a claim over which the Court of Claims and not this court would have exclusive jurisdiction. Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963), see also, United States v. Dow, 357 U.S. 17, 21 (1958). (Emphasis added.)

The Court of Appeals affirmed per curiam "substantially for the reasons set forth" in the district court's opinion

A companion case, Sampson v. U.S., No. 37968, D.J. 90-1-23-2455, is now pending in the Court of Claims. The claim there being prosecuted by the former owner is based on the Government's alleged failure as tenant under the earlier lease to restore the office building to its original condition as required by the lease.

Staff: Dirk D. Snel (Land & Natural Resources Division)

CONDEMNATION

INDIANS; JUST COMPENSATION; TAX BENEFITS.

United States v. 160.40 Acres of Land in Cattaraugus County, State of New York, & the Seneca Nation of Indians, et al. (C.A. 2, No. 35128; November 18, 1970; D.J. 33-33-881-4)

The United States condemned certain lands belonging to Indians living within the Allegany Reservation of the Seneca Nation. These lands were not subject to taxation by the State nor could they be sold to a non-Indian. Due to the lands' unique status, there was no realistic data from which a market value and just compensation could be ascertained. In order to be fair, so we thought, sales outside the reservation of unre-

stricted lands were used by both the Indians and the Government to fix the value of the property taken. This, it was thought, removed from consideration both the disadvantages and advantages of the Indians' property.

The district court found the Indians entitled to additional compensation for the supposed tax benefit, based upon a capitalization in perpetuity of the taxes that would have to be paid by the Indians on replacement lands which had no tax-exempt status. The Government argued that the tax-exempt benefits were completely offset by the restraints on alienation as shown by the actual market within the reservation. It was our contention that there was no reason to resort to sales outside of the reservation if the tax benefits were to be considered.

The Court of Appeals affirmed on the basis of the district court's decision which had found the Government's dilemma to be of its own making. It said the Government could have introduced evidence of the offsetting devaluing factor but had elected to stand on an objection, making no offer of proof. Had the Government done as the court suggested, there would have been no reason to have left the reservation for sales.

Staff: George R. Hyde (Land & Natural Resources Division)

CONDEMNATION

RIGHT TO TAKE; JUDICIAL REVIEW; RECREATIONAL USE; STATUTORY CONSTRUCTION.

United States v. 2,606.84 Acres of Land in Tarrant County, Texas, & Frank Corn, et al. (Richardson) (C.A. 5, No. 28390; October 16, 1970; D.J. 33-45-785-16)

The saga of the Benbrook Dam litigation began in 1944 when the United States sought to acquire certain lands belonging to Mr. Sid Richardson, a wealthy Texas oil man, now deceased, for use in connection with a flood control project.

After a 15-year delay occasioned by the United States refusal to submit the Secretary of the Army to certain discovery procedures which the United States thought were irrelevant and improper but which the Fifth Circuit refused to review--United States v. Richardson, 204 F.2d 552 (1953)--the Secretary of the Army submitted to the taking of his deposition. The trial court, after making copious findings of fact, concluded the taking of the landowner's property to be unauthorized and set aside in part the declaration of taking, despite the fact that the project had been completed. The court held that the land had been taken for recreational purposes which were not authorized by statute and, in addition, that the entire taking was

unauthorized since the dam, as built, was materially changed from that which had been authorized by Congress.

The Court of Appeals reversed, holding that the district court had overstepped the bounds of judicial review. It stated that "/T/he judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project." The change in terminology employed by the district court from one of necessity to one of purpose in an attempt to avoid the rule of non-justiciability, was held to be insufficient to convert a legislative determination into a judicial question. "/O/nce Congress approved the Benbrook Dam, the taking for any purpose associated with that project was an authorized purpose, and the landowner cannot be heard to complain that the condemnation was not necessary to the dam's construction or operation." The Court of Appeals also cautioned against judicial intrusion into areas which Congress has committed to the discretion of experts, in this instance the Corps of Engineers. The taking of the subject land for recreational purposes was held to be authorized under the "allied purposes" language of the statute authorizing the project.

The fact that the dam was built three miles away from the site originally suggested in the original plan, which was approved by the authorizing statute and which was considerably larger and significantly costlier, did not render the project unauthorized. "Mere changes in the plans and specifications of the dam and reservoir did not render arbitrary and capricious the discretion exercised by the Secretary of the Army and the Chief Engineer * * *." A writ of certiorari is being sought by the landowners.

Staff: George R. Hyde (Land & Natural Resources Division)

MINES AND MINERALS

OIL AND GAS ROYALTIES; ESTOPPEL; STATUTORY CONSTRUCTION.

Atlantic Richfield Co. v. Walter J. Hickel, Secretary of the Interior, et al. (C.A. 10, October 12, 1970; 432 F.2d 587; D.J. 90-1-18-829)

The Tenth Circuit, in affirming the interpretation given by the district court to a complex statute concerning royalties to be paid under producing public domain oil and gas leases, affirmed the decision of the Secretary of the Interior which required the payment of over three million dollars in royalties which had been underpaid between 1948 and 1961 and which will require the payment of the higher royalty from 1961 until production ceases.

The Court of Appeals found the Secretary's analysis of the statute to have a reasonable basis in law and affirmed his conclusion.

The fact that the Secretary had accepted the wrong royalty rate for 13 years and a showing by the oil company that it stands to lose over four million dollars by having relied on the acceptance by the Secretary of the lesser royalty was held not to estop the Government. The Court held that the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the United States be waived by unauthorized agents' acts. As harsh as the tenet is under practical application, an administrative determination running contrary to law will not constitute an estoppel against the Federal Government.

The Court concluded that the Secretary is and was without authority to accept less than that royalty provided for in the step-scale provision of the lease.

The Court repeated the strong language of Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), concluding that, although the outcome often causes hardship, it is not a callous doctrine that it upholds.

Staff: George R. Hyde (Land & Natural Resources Division)

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