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COMMENDATIONS

Assistant United States Attorney Patrick Boyle, Southern District of California, has been commended by John H. Dunnigan, Southern Regional Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, for his success in surmounting considerable difficulty in the removal of a criminal defendant to the Southern District of Florida for trial.

Assistant United States Attorney Benjamin L. Burgess, Jr., District of Kansas, has been commended by A. N. Hunter, Chief, Intelligence Division, Internal Revenue Service for the highly professional assistance he rendered Interal Revenue Service agents who were subpoenaed to appear as State witnesses in a local criminal matter.

Assistant United States Attorney Stephen A. Shefler, Northern District of California, has been commended by N. M. McFadyen, M.D., Director, Palo Alto Veterans Administration Hospital, for his thorough preparation and outstanding trial presentation in defense of a federal employee racial discrimination case in what may have been the nation's first Title VII trial de novo.

Assistant United States Attorney Craig R. McKay, Western District of Pennsylvania, has been commended by G. H. Patrick Bursley, Rear Admiral, U.S. Coast Guard, Commander, Second Coast Guard District, for his successful prosecution of U.S. Steel Corporation for violations of the Federal Water Pollution Control Act.

Assistant United States Attorney Kenneth E. Vines, Middle District of Alabama, has been commended by Charles E. Pool, Regional Counsel, United States Postal Service, for his work in the case of City of Montgomery v. Benjamin F. Bailer, which resulted in the dissolution of an injunction and dismissal of the complaint against the Postmaster General.

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POINTS TO REMEMBER

TRAVEL

The Executive Office of the President issued a Bulletin, No. 76-9 on December 4, 1975 advising that stringent controls must be placed on travel. The following provides guidance on the control and management of official travel.

Guidelines:

Do not permit travel when the matter in question can be handled by mail or telephone.

Minimize the number of people who must travel for a single purpose; for example, never allow two or more persons to travel when one will suffice.

Examine travel assignments at official stations to assure that travel is performed by employees at stations which are in closest proximity to travel destination.

Review and reauthorize all continuous or indefinite travel authorizations and issue appropriate guidelines to restrict travel to the minimum necessary for accomplishment of agency missions.

Screen all specific travel authorizations to limit trips, numbers of individuals traveling, points to be visited, itineraries, and durations to those that are essential to the performance of agency missions.

Establish procedures that will eliminate attendance and minimize participation by employees at conferences, meetings, and seminars when attendance is contingent upon travel at Government expense and not directly related to the accomplishment of the agency missions.

The guidance set forth must be strictly adhered to. We are required to prepare a report on FY 1976 accomplishments and savings resulting from the implementation of this policy. Your cooperation is requested.

(Executive Office)

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DELAYED POST OFFICE RETURN RECEIPTS (P.S. FORM 3811)

The United States Postal Service (USPS) has advised the Department of complaints from their customers on the failure of government agencies to acknowledge receipt of registered, certified and insured mail, and to send back the return receipt after delivery is made to the addressee. The USPS has asked our assistance in resolving this problem.

Please insure that appropriate personnel are aware of the importance of the return receipt. When completed, the return receipt should include the following:

1. The name of the agency (may be rubber stamped).

2. The legible signature of the person who signed for the material.

3. The date mail is received.

4. A stamped number that corresponds with the registered, certified or insured number on the envelope.

(Executive Office)

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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

NICKEL COMPANY CHARGED WITH VIOLATION OF SECTION 7 OF THE CLAYTON ACT.

United States v. The International Nickel Company of Canada, Limited, et al., (Civ. 76-152; January 19, 1976, DJ 60-9-037-16)

On January 19, 1976, the Government filed a civil complaint charging violation of §7 of the Clayton Act and seeking equitable relief to order International Nickel Company of Canada, Limited, (Inco) and its subsidiary The International Nickel Company, Inc. (Inco, Inc.) to divest themselves of all ownership and control of ESB, Incorporated.

Inco is the world's largest producer of nickel and the largest supplier of nickel is the United States with over 60 percent of the United States market. It is the principal supplier of nickel to the battery industry. ESB, acquired by Inco, Inc. in September, 1974, is the world's largest manufacturer of batteries and the largest battery manufacturer in the United States.

Batteries may be separated in two basic types -- primary or dry cell batteries and secondary or rechargeable or storage batteries. Secondary batteries include industrial batteries which are custom made heavy duty batteries designed primarily for traction such as fork lift trucks and mine locomotives and for standby power such as used in electric utility equipment, telephone equipment and emergency lighting. Electric road vehicle batteries are secondary batteries used to power electric trucks, vans, and automobiles. In the United States battery-driven road vehicles are in the experimental stage of development.

The manufacture and sale of both secondary batteries and industrial batteries in the United States is highly concentrated. In 1973 the total sale of industrial batteries amounted to $147,594,000. ESB had sales of industrial batteries in 1973 of $39,544,000 or about 27 percent of all such sales ranking it second in the industry.

For many years both Inco and ESB have engaged in research and development programs for all types of batteries including industrial and electric road vehicle batteries. Inco's English subsidiary, International Nickel Limited, discovered and patented a new battery plate made of nickel called the Controlled Micro-Geometry Electrode for use in secondary batteries. Since this discovery Inco expended substantial sums for research, development and commercialization of this invention -- in order to become a major force in the industrial battery market.

The complaint charges that the effect of the acquisition may be (1) the elimination of potential competition between ESB and Inco in the manufacture and sale of industrial batteries and various submarkets thereof; (2) the elimination of actual competition between ESB and Inco in the research and development of industrial batteries and electric road vehicle batteries; (3) concentration in the manufacture and sale of industrial batteries and various submarkets thereof may be preserved and increased; and (4) competition generally in the development, manufacture and sale of industrial batteries and electric road vehicle batteries may be substantially lessened.

Staff: Morton M. Fine and Walter L. Devany
(Antitrust Division)

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

COURTS OF APPEALS

MEDICAID

FIFTH CIRCUIT AFFIRMS VALIDITY OF REGULATION GOVERNING STATE BOARDS WHICH LICENSE NURSING HOME ADMINISTRATORS.

State of Florida v. Mathews (C.A. 5, No. 75-1905, decided January 23, 1976; D.J. 137-17-69).

A provision in the Medicaid Act, 42 U.S.C. 1396, et seq., requires a State which participates in the nursing home care component of the program to license nursing home administrators by means of a board "representative" of the professions and institutions concerned with the care of chronically ill and infirm aged patients. 42 U.S.C. 1396g(b). The Secretary promulgated a regulation implementing this provision which specified that a State board would not be considered to be in compliance with the statute if it was composed in major part of representatives of a single profession. The State of Florida, which possessed a licensure board composed in major part of nursing home administrators, instituted suit contending, inter alia, that the Secretary's regulation was contrary to the statute, discriminated against nursing home administrators, and violated the Tenth Amendment.

The Court of Appeals affirmed the decision of the district court rejecting the State's contentions. According to the court, the regulation should be sustained unless the State discharged the "difficult burden" of demonstrating that the regulation was inconsistent with the statutory purpose. After examining the statutory language, the legislative history, and subsequent Congressional action, the court of appeals held that the Secretary had, in fact, promulgated an acceptable standard, rationally related to the purpose of the statute, as a means of clarifying the statutory intent. The court also held that the statute and the regulation were rationally related to a valid Congressional purpose and thus did not unconstitutionally discriminate against nursing home administrators. Finally, the court held that since the only effect of the statute and regulation was to induce, but not require, a State to license its nursing home administrators in a particular manner, there was no infringement upon any power reserved to the States by the Tenth Amendment.

Staff: David M. Cohen (Civil Division)

MEDICAL CARE RECOVERY ACT

EIGHTH CIRCUIT HOLDS THAT MEDICAL CARE RECOVERY ACT DOES NOT PERMIT A DIRECT ACTION AGAINST INSURANCE COMPANY.

United States v. Farm Bureau Insurance Co. (C.A. 8, No. 75-1303, decided January 7, 1976; D.J. 77-0-1-1).

The government brought suit under the Medical Care Recovery Act (MCRA) to recover from a Missouri insurance company the value of medical care provided to a serviceman injured by the insured driver. The government did not sue the insured-tortfeasor, but brought suit directly against the insurance company, contending that the MCRA created an independent federal right to recover the costs of medical care from any party liable to pay damages for the tort. Accordingly, the government maintained, no direct action statute was necessary to permit the government directly to sue an insurance company liable under its policy for the medical expenses.

The district court dismissed the government's complaint, and the court of appeals affirmed, holding that the federal right created by the MCRA permits direct suits only against tortfeasors, and not, as here, when the defendant's liability is not in tort but arises only under an insurance contract.

Staff: Robert S. Greenspan (Civil Division)

STATUTE OF LIMITATIONS

THIRD CIRCUIT HOLDS FRAUDULENT ENDORSER NOT AN ENDORSER WITHIN THE MEANING OF 31 U.S.C. 129.

United States v. Duncan (C.A. 3, No. 75-1526, decided December 23, 1975; D.J. 77-48-1780).

From 1939 to 1968 the Veterans Administration (VA) caused benefit checks to be issued to the deceased widow of a Civil War veteran. During the 29 year period, the deceased widow's daughter cashed the checks and appropriated the funds to her own use. In 1968, the VA learned that the widow was deceased and issued no further checks. Following the daughter's death in 1973, the government, in 1974, instituted this action against the daughter's estate to recover the funds she had wrongfully appropriated from 1939 to 1962. (The United States had recovered the funds wrongfully appropriated from 1962 to 1968.) The district court, without opinion granted the estate's motion for summary judgment, apparently adopting the estate's sole defense that the action was barred by 31 U.S.C. 129, which provides that no action shall be brought against any "endorser transferor, depositary or financial agent" by reason of a forged or fraudulent endorsement on a government check until the action is commenced within six years of the date the check is presented to the Treasury for payment.

On the government's appeal, the Third Circuit reversed, holding that the daughter was not an "endorser" as the term is used in 31 U.S.C. 129. Ruling that it is proper to refer to the legislative history to determine the meaning of the statutory term regardless of how clear the statute appears on its face, the court of appeals determined that the legislative history of 31 U.S.C. 129 shows that the statute was enacted to protect third parties who take a check without notice of defect, and not parties who, as here, intentionally sign the name of another to benefit persons not entitled to the proceeds. Accordingly, the court remanded the case to the district court to determine whether the action had been timely instituted under 28 U.S.C. 2415 and 2416, which set forth the usual time limitations on government suits.

Staff: Allen H. Sachsel (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

COURT OF APPEALS

WIRETAPS - FOREIGN

EVIDENCE FROM CANADIAN WIRETAPS, ALTHOUGH OBTAINED IN A MANNER NOT COMPORTING WITH THIS COUNTRY'S CONSTITUTIONAL OR STATUTORY REQUIREMENTS, IS NEVERTHELESS ADMISSIBLE IN FEDERAL CRIMINAL PROSECUTIONS.

United States of America v. Frank Cotroni and Frank Dasti, (2d Cir., December 22, 1975).

Appellants--both Canadian citizens--were convicted after a jury trial of conspiracy to import cocaine into the United States for the purpose of sale, and also for receiving, concealing, and facilitating the transportation and concealment of nine kilograms of cocaine. The cocaine originated in Mexico and had an ultimate destination of New York City.

Part of the evidence introduced against Dasti and Cotroni took the form of summaries and transcripts of 32 wiretaps furnished by the Canadian investigation into gambling operations and were only a small portion of thousands of conversations intercepted during the three-year investigation. Since no judicial authorization had been obtained prior to the implementation of these intercepts, it was clear that the Canadian procedure fell short of standards contained in Title III of the Omnibus Crime Control Act of 1968. However, it was equally clear that the United States government did not initiate, supervise, control, or otherwise participate in the operation.

Appellants moved to suppress the evidence on the grounds that the intercepts were carried out in violation of both United States and Canadian law. The trial court determined (1) that there was no violation of Canadian law in existence at the time of the taps and (2) that the standards and requirements of Title III do not affect intercepts carried out beyond the territorial jurisdiction of the United States. The motion to suppress was accordingly denied, and Dasti and Cotroni were convicted.

On appeal, admissibility of the wiretap evidence was the major issue. The Second Circuit Court of Appeals, in affirming the lower court judgment, referred for support to its previous decision in United States v. Toscanino, 500 F.2d 267 (2d. Cir. 1974), which held that "the federal statute governing wiretapping and eavesdropping, 18 U.S.C. 2510 et seq., has no application outside of the United States." Toscanino at 279. The

Court found no significance in the fact that the intercepted conversations had travelled in part over this country's communication system, reasoning that "it is not the route followed by foreign communications which determines the application of Title III, [but rather] where the interception took place."

An alternative ground for exclusion--that the intercepts violated appellants' constitutional rights--was no more successful. "Appellants' rights vis-a-vis their own government are not defined by the provisions of the United States Constitution and are therefore no legal concern of an American court." The Second Circuit did add, however, that where the conduct of foreign police was so reprehensible as to shock the conscience, "a different result might obtain." (n. 10)

Staff: David G. Trager
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FIREARMS - PROSECUTION

AIDING AND ABETTING STATUTE APPLICABLE TO ONE FURNISHING FIREARM TO PERSON PROHIBITED FROM RECEIVING.

United States v. Falletta, 523 F.2d 1198. (C.A. 5, 1975. D.J. 80-017-1).

The Court of Appeals for the Fifth Circuit affirmed the conviction of defendant prosecuted under 18 U.S.C. §2(a) for aiding and abetting a violation of 18 U.S.C. App. §1202(a) on government's theory that in furnishing firearm to a convicted felon he aided and abetted "receipt". The Court rejected defendant's construction of 1202(a), based on Gerbardi v. United States, 287 U.S. 112 (1932), that in failing to impose liability on the transferor of the firearm Congress intended that such person go unpunished. The Court concluded that because 1202(a) was enacted primarily to restrict possession of firearms by certain persons and Congress had not focused on the 'receiving' offense which largely duplicated existing law, there was no affirmative legislative policy, as in Gerbardi, to create an exception to ordinary rules of accessorial liability for those cooperating in receipt.

The Court also rejected defendant's contention that in enacting 18 U.S.C. §922(d) which prohibits persons licensed to deal in guns from selling or otherwise disposing of firearms to convicted felons, Congress intended it as an exhaustive list of those who could be prosecuted for furnishing a firearm to such persons. The Court noted that ordinary accessorial liability had been imposed by the courts under the predecessor of 922(d) in connection with firearms receipts and that even if the court accepted this reasoning to apply to Title IV of the Omnibus Crime Control and Safe Streets Act which contained 922(d), it could not extend the reasoning to Title VII which contained 1202(a).

Staff: United States Attorney Wayman G. Sherrer
Assistant United States Attorney J. Stephen Salter (N. D. Ala.)

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DISTRICT COURT

FEDERAL WAGERING TAX STATUTES

COURT DISMISSES CLASS ACTION FOR REPAYMENT OF FINES AND FOR CORAM NOBIS RELIEF.

United States of America v. Virginia Dare Neely, Executrix, et al., (W.D. Pa., Civil No. 73-1067, decided December 17, 1975).

Petitioner filed a class action seeking coram nobis relief and repayment of fines for convictions under the Federal Wagering Tax Statutes [26 U.S.C. §§4401 et seq., 7201 et seq.]. In Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States 390 U.S. 62 (1968), the Supreme Court had ruled that assertion of the Fifth Amendment privilege constituted complete defense to prosecution under the statutes and that rule has since been applied retroactively.

The issues raised by the government's motion to dismiss were (1) whether coram nobis and Tucker Act remedies applied in this situation, (2) whether the Tucker Act's six year limitations period barred the suit because Neely had no rights at stake before the Court when the action was filed [Neely had also filed a petition on his own behalf], and (3) whether class relief was otherwise appropriate.

On December 17, 1975, the district court, the Honorable Barron P. McCune, dismissed the action. Judge McCune ruled that civil procedure class remedies are not available for criminal coram nobis relief, and that the running of limitations period barred the suit because Neely had never been a proper representative of the class he asserted. See e.g., Washington v. Wyman, 54 F.R.D. 266 (S.D.N.Y. 1971). As to the latter, the Court rejected Neely's argument that the filing of the class action complaint tolled the limitations period as to the class until the petitions to intervene were filed by class members in June 1974. Cf., American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974); Haas v. Pittsburgh National Bank, No. 74-2190 (3d Cir., decided Sept. 25, 1975). Those petitions had been filed after the running of the limitations period for such claims. See United States v. Sams, 521 F.2d 421 (3d Cir. 1975).

The Court also ruled that the class asserted would be unmanageable (1) because the government would be entitled to assert set-offs and counterclaims as to each class member before effecting repayment [31 U.S.C. §227], (2) because proceedings would be delayed until each member of the class had made a

request for refund to the Comptroller-General pursuant to 28 U.S.C. 7422(a), and (3) because the individual members' interests in determining whether to file a claim and risk an audit in view of the Set-Off Statute, would make class treatment of the claims undesirable.

Staff: Edward S. Christenbury
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(Special Litigation Section
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(W.D. Pa.)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Peter R. Taft

COURTS OF APPEALS

MINES AND MINERALS:ENVIRONMENT

REJECTION OF PERMIT APPLICATIONS; EXCEPTION TO ADMINISTRATIVE PROCEDURE ACT; NEPA STATEMENT NOT NECESSARY.

Hunter, et al. v. Morton (C.A. 10, No. 75-1145, Jan. 26, 1976; D.J. 90-1-18-1050).

The appellant filed applications for coal prospecting permits in Utah in which the manager of the local land office rejected certain portions of the acreage specified therein and, as to the remaining acreage, ruled that the applications "may be allowed" upon applicant's compliance with certain specified conditions which were never met. The applicant appealed the manager's decision as to the rejected portions, and the Director of BLM affirmed the decision. The applicant then appealed to the Secretary of the Interior and, while this appeal was pending, the Secretary issued an order rejecting all permit applications. Subsequently, the Secretary rejected the applicant's appeal and petition for reconsideration.

The applicant filed this suit seeking a decree that he owned the permits and for mandamus directing their issuance. In affirming the judgment of the district court, the court of appeals held that since the applicant-appellant did not comply with the conditions to that portion of the manager's order which provided the applications "may be allowed" nor did he appeal therefrom, he was not entitled to the permits, that at no time did the applications reach the stage so as to grant applicant a property interest or right, that the granting of permits here was within the discretion of the Secretary, that post-appeal affidavits cannot be considered a part of the appellate record, that in this case the conduct of subordinate BLM officials would not work as an estoppel against the Secretary, that the Secretary's order rejecting all coal prospecting permit applications was within the exceptions of the Administrative

Procedure Act, and that such order did not require an impact statement pursuant to the National Environmental Policy Act of 1969.

Staff: Glen R. Goodsell (Land and Natural Resources Division).

CONDEMNATION

CONDEMNATION OF LEASEHOLD INTEREST; PRE-TRIAL STIPULATIONS; FIFTH AMENDMENT PRINCIPLES OF JUST COMPENSATION ARE PARAMOUNT TO LEASE CLAUSE INTERPRETATIONS.

United States v. 0.23 of an acre of land, City of Norfolk, Virginia, CMM Corporation, et al. (C.A. 4, No. 75-1652, Jan. 19, 1976; D.J. 33-48-839).

In 1966 the CMM Corporation, condemnee herein, leased the land in issue from a railroad company for 30 years and subsequently constructed a building thereon and subleased portions of that building. In 1974 the United States acquired the fee simple interest in the subject premises by deed from the railroad company, and subsequently condemned the leasehold interest of the condemnee. During the course of the proceedings, the United States Attorney and the condemnee executed a pre-trial stipulation which was to bind the parties to the condemnation clause of the lease in determining the amount of just compensation the condemnee was to receive. The condemnee interpreted the clause to mean that it was entitled to both the depreciated cost of the building and the undiscounted value of the subleases over their remaining life. The Government contended that the clause determined only distribution of the condemnation award between the lessor and lessee, and did not change the measure of damages. The district court agreed with the Government.

In affirming the district court, the court of appeals held that by a stipulation the Government does not bind itself to make an award of double compensation, that stipulations are not sacrosanct, that leases must be construed in their entitety, and that just compensation

is not, under any theory, consistent with the double counting argument advanced by the condemnee.

Staff: Glen R. Goodsell and Thomas P. Carolan (Land and Natural Resources Division).

DISTRICT COURTS

PUBLIC LANDS

REJECTION OF APPLICATIONS FOR PIPELINE RIGHT-OF-WAY HELD ARBITRARY AND CAPRICIOUS.

John V. Hyrup v. Kleppe (Civil Action No. 74-M-689, D. Colo.; D.J. 90-1-2-1028).

Plaintiff herein sought judicial review of a Department of the Interior Board of Land Appeals decision rejecting his application for a right-of-way over public lands for the purpose of constructing a pipeline needed to appropriate waters of a spring located upon the public domain. Plaintiff's application for a right-of-way was made under the Act of July 26, 1866, 43 U.S.C. sec. 661.

Before the IBLA it was argued that (1) the waters of the spring in question had been withdrawn by the Executive Order of April 17, 1926, designated as Order of Withdrawal - Public Water Reserve No. 107 and were therefore not subject to appropriation, and (2) that plaintiff had filed for a permit under a statute that had been superseded by the Act of March 3, 1891, 43 U.S.C. sec. 946, and the Act of February 15, 1901, 43 U.S.C. sec. 959, and his application was therefore defective per se. The IBLA decided against the applicant on the second question holding it unnecessary to determine whether the spring in question was actually withdrawn by the Executive Order of April 17, 1926. The district court reversed the IBLA decision, declaring the decision to have been "an arbitrary one and an abuse of discretion."

The court in so stating held that there was sufficient evidence in the administrative record to be able to conclude that the spring in question was tributary to a river and therefore not of the type withdrawn by Public Water Reserve No. 107. This spring was therefore available for appropriation under the water laws of the State of Colorado.

As to the second question, the court held that 43 U.S.C. sec. 661 was not inconsistent with the latter acts and therefore plaintiff's application should not have been rejected "upon so tenuous a rationale as the reference to the wrong statute." The court held:

> That Section 661 gives Mr. Hyrup recognition of the right to appropriate water under the law of the State of Colorado and a right to the use of public land for a pipeline. Section 959 authorizes the Secretary of the Interior to condition the use of such a right of way by regulations to protect the public interest. The public interest includes such reasonable conditions and limitations as may be necessary for the protection of the environment.

The court thereupon remanded the case for further administrative proceedings.

Staff: Gary J. Fisher and J. Hank Meshorer (Land and Natural Resources Division).

MINES AND MINERALS

JURISDICTION TO CONSIDER COMPLAINT FOR DECLARATORY JUDGMENT, ETC., TO NULLIFY INTERIOR APPROVAL OF PROSPECTING PERMITS AND COAL MINING LEASES IN ABSENCE OF PERMITTEES AND LESSEES.

Crow Tribe of Indians v. Dale K. Frizzell, et al. (Civil No. 75-1531, D.C.; D.J. 90-2-18-141).

This action was brought to obtain declaratory judgment and mandamus requiring Interior officials to nullify prospecting permits and coal mining leases which had been issued by the Crow Tribe and approved by Interior. Plaintiff alleged the permits and leases were invalid for failure to comply with NEPA and for violation of BIA regulations.

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