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United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

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NOTICE

FORMAT OF U.S. ATTORNEYS' BULLETIN

A memorandum of 12 May 1976 from Mr. William B. Gray, Director, Executive Office for United States Attorneys, to all Assistant Attorneys General read as follows:

> As part of our efforts to improve communications between the Department here in Washington and the United States Attorneys' Offices, and among the United States Attorneys' offices themselves, this office plans to make specific changes in the format of its United States Attorneys' Bulletin. I ask for your cooperation in insuring that all copy submitted to us for publication after April 30, 1976, be drafted along the lines described below. We will continue to edit all copy submitted to us for publication to insure standard format is observed.
>
> Casenotes: When preparing, please include only case name, court and date, Department of Justice Number, citation to Law Week or other commercial service, if available, a brief description of the holding, the importance of the case to the work of the United States Attorneys, and the name and phone number of the attorneys who handled the case. We wish to limit the length of casenotes to one half of a page each, to eliminate duplication with the commercial services and to expand the number of cases reported in the United States Attorneys' Bulletin.
>
> Appendix on Federal Rules of Criminal Procedure: The Criminal Division has agreed that these appendices will, in the future, be prepared from slip opinions, if possible, rather than advance sheets so as to reduce the time between the date of decision and its publication in the Bulletin from as much as three months to four weeks. Citations for these decisions will then be available by way of telephonic request to the office of Ms. Patricia Gormley, Legislation and Special Projects Section, Criminal Division.
>
> Points to Remember: In the future, we request that the Points to Remember Section should not be used to enunciate new or freshly revised policy or prescribed procedure. The revised United States Attorneys' Manual will be the more appropriate

vehicle for such communication, and the Bulletin's Points to Remember Section should be used only to reiterate and highlight policies or procedures enunciated elsewhere.

This section's most important function should be to note the innovative handling of current litigation problems by the United States Attorneys and Legal Divisions, and to suggest, where appropriate, a particular approach to such problems. Another use for this section would be to inform United States Attorneys about, and solicit their views on, anticipated developments in the law and their implications for the work of the Department of Justice.

Lastly, this section might be used to publish miscellaneous items. In recent issues these included items on Accurate Reporting, Recommended Privacy Act Forms, and the Use of the Appendix on the Federal Rules of Criminal Procedure.

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United States Attorneys and their Assistants are encouraged to submit items. Items for casenotes should ordinarily be routed to the appropriate Divisions (names of contacts in the Divisions are provided below). Items for Points to Remember may be routed to the appropriate Division or the Executive Office.

Any inquiries should be addressed to Mr. James Thunder, U.S. Attorneys' Bulletin Staff, Executive Office for United States Attorneys. FTS 739-4104 (Executive Office)

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POINTS TO REMEMBER

THE INTERSTATE AGREEMENT ON DETAINERS ACT

A teletype of 14 May 1976 sent to all United States attorneys read as follows:

> It has come to the attention of this office that the Government's failure to comply with the provisions of the Interstate Agreement On Detainers Act, Pub. L. 91-538, 18 U.S.C. App. P. 167 (1975 Supp.) (hereinafter the agreement) has in recent weeks been the grounds for at least two district courts' dismissals of indictments with prejudice. The agreement is designed to facilitate securing defendants incarcerated in other jurisdictions for purposes of prosecution, but places strict requirements on the jurisdiction requesting the prisoner. The requesting jurisdiction must, inter alia, not return the prisoner to the original place of imprisonment prior to trial or suffer dismissal of the indictment with prejudice (Art. IV(E)). The requirements of the agreement have been held by U.S. District Courts for the E.D. Pa. and E.D.N.Y. to apply to any transfer of convicted prisoners from state custody to federal custody for purposes of federal prosecution, even if procedurally accomplished by the writ of habeas corpus and prosequendum (28 U.S.C. 2241(c)(5)). Since the Solicitor General's views on appealing these cases and the likely outcome of such appeals is not yet known, we urge you to acquaint yourselves with the agreement and make the necessary efforts to comply with its requirements whenever possible. Such compliance should minimize disruption of your trial calendars by avoiding further adverse rulings.
>
> (Executive Office)

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ACT FOR THE PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS OF THE UNITED STATES

The policy requiring departmental authorization for prosecutions under the Act for the Protection of Foreign Officials and Official Guests of the United States (18 U.S.C. §§ 112, 970, 1116, 1117, 1201) is rescinded. Pending revision of the United States Attorneys Manual, you should note this change at page 301 of the analysis of the Act, published as Appendix II to the United States Attorneys Bulletin, Volume 21, Issue No. 7, March 30, 1973.

Decisions to initiate prosecution under the Act should continue to take into account the clear intent of Congress that the Act supplement, not supplant, applicable state and local laws. Thus, availability of effective non-Federal disposition for a violation of the Act remains an appropriate basis for declination in the absence of other overriding Federal concerns.

If there are any questions concerning the Act for the Protection of Foreign Officials and Official Guests please contact the General Crimes Section 202-739-4512.

(Criminal Division)

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CONTROLLED SUBSTANCES ACT - SIMPLE POSSESSION

A first time offender convicted under 21 U.S.C. 844(a) of simple possession of a controlled substance is eligible only once for conditional discharge and (if not over 21 years of age) expungement of his records (see 21 U.S.C. 844(b)). To ensure that simple possession offenders are not given the benefit of §844's discharge and expungement provisions more than once, a nonpublic record of every offender's §844 discharge or expungement is maintained by the Department of Justice. The Department custodian of these records is the Directives and Records Management Unit, Administrative Services Section, Operations Support Staff, Office of Management and Finance. When a United States Attorney has reason to believe that a §844 offender does not qualify for discharge or expungement because of previous discharge or expungement under 21 U.S.C. 844(b), he should communicate with and forward pertinent information about the offender, including his fingerprints, to the Directives and Records Management Unit. That Unit will check the information and the fingerprints with the material contained in its nonpublic record files. The Unit will then advise the United States Attorney as to what the check reveals. Regarding §844 discharge and expungement generally, please see DOJ Order 2710.

(Criminal Division)

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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

COURT HOLDS CORPORATE DEFENDANTS HAVE RIGHT TO REQUEST DISCOVERY.

United States v. Allied Maintenance Corporation, et al., (76 CR 48; April 20, 1976; DJ 60-337-20)

On April 20, 1976, District Judge Inzer B. Wyatt ruled on discovery motions by defendants. The most significant part of his ruling was that corporate defendants have standing under Rule 16(a)(1)(A) to request to discover "statements" made by its officers or employees which are in the possession of the Government. The corporate defendants had moved for discovery of any statements of their employees which were in the possession of the Government. We argued that the corporate defendants were not entitled to discovery of such statements under Rule 16(a)(1)(A). It is our position that the very language of the newly amended rule allows discovery of statements only to individual defendants who made such statements. We further argued that discovery by a corporate defendant under Rule 16(a)(1)(A) was limited to the grand jury transcripts specified in the Rule. The Court found this position logical but granted the discovery anyway. The Court states:

> . . . The government argues that since there is such a provision for grand jury testimony, it must have been intended that the earlier section of the Rule apply only to individual defendants. The position is entirely logical, based on the wording of the Rule.
>
> I am not inclined to adopt this position, however, because it does not seem fair or reasonable.

* * *

> Liberality of disclosure is now preferred. There seems to be no good reason why a corporate defendant should not have discovery of 'statements'. Such is my ruling.

This ruling by Judge Wyatt dealt with three disputed issues of discovery raised by a motion for broad discovery by the defendants. The second disputed issue concerned the defendants' request that the government disclose whether or not electronic surveillance had been conducted during the investigation of this case. We declined to disclose whether or not electronic surveillance had been conducted. The Court sustained our position noting that under Rule 12(d)(2) the Government would be required to give notice if it intended to use such evidence at trial. We had stated that we did not intend to use such evidence at trial. The Court noted further that under Rule 16(a)(1)(A) the Government would have to turn over statements of defendants whether obtained by electronic surveillance or not.

The third disputed issue was raised by the defendants' request for the statements and grand jury testimony of an attorney who was counsel to a trade association to which all the corporate defendants belonged. The association itself has not been indicted. Defendants claimed that an attorney-client privilege was in issue because counsel for an association was counsel for each of the association's members. To support this claim they filed an affidavit stating that the deponent had heard this attorney say that he considered himself an attorney for each of the association's members. Defendants claimed that they should be allowed discovery of this attorney's statements and grand jury testimony in order to determine whether they had grounds for a motion to suppress. We argued that no defendant was actually claiming that this attorney represented that particular defendant; and therefore no defendant could claim an attorney-client privilege. Further, we argued that the attorney-client privilege was a rule of evidence and is properly raised at trial when the evidence and the privilege can be examined with particularity. The Court ruled that the moving affidavit was insufficient to warrant the relief sought, and the Court

would not accept the proposition that an attorney for an association was thereby an attorney for each member of that association.

Defendants moved for reargument on this last issue citing Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31 (S.D. N.Y. 1954) and United States v. American Radiator & Standard Sanitary Corp., 278 F. Supp. 608 (W.D. Pa. 1967) for the proposition that an attorney for an association is an attorney of its members. On May 3, 1976 Judge Wyatt denied the motion for reargument ruling that the cases cited were not authority for the discovery motion of the defendants.

Staff: Augustus A. Marchetti, Bruce Repetto, Edward Friedman and Mark A. Summers

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

SUPREME COURT

FREEDOM OF INFORMATION ACT

SUPREME COURT HOLDS THAT PERSONNEL FILES ARE NOT EXEMPT UNLESS THEIR DISCLOSURE WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY.

Department of the Air Force v. Rose (Sup. Ct. No. 74-489, decided April 21, 1976; D.J. 145-14-787).

In this Freedom of Information Act suit seeking disclosure of the Air Force Academy's case summaries of honor and ethics code hearings, the district court held that the requested information was exempt from disclosure under Exemption 2 of the Act which protects matters "related solely to the internal personnel rules and practices of an agency." The Second Circuit reversed, holding Exemption 2 inapplicable. However, the court held that since the case summaries were "personnel" or "similar" files their release in unedited form would constitute a clearly unwarranted invasion of personal privacy, and thus make them exempt in that form from disclosure by Exemption 6 of the Act. Concluding that the government had not established that disclosure of edited summaries would result in such an invasion, the court of appeals remanded the case with directions that the summaries be submitted to the district court for in camera inspection and ordered the government to cooperate in redacting the records so as to delete personal references and all other identifying information. The court stated that it thought "it highly likely that the combined skills of court and agency,* * *, will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy."

The Supreme Court granted the government's petition for certiorari, and in a 5-3 decision affirmed the court of appeals judgment. Rejecting the government's argument that personnel and medical files are totally exempt from disclosure, the Court held that those files, like "similar" files, are only exempt to the extent that their disclosure would constitute a clearly unwarranted invasion of privacy. Indeed, the Court held that the case summaries were "similar" files, and agreed with the court of appeals that in camera inspection was necessary to determine whether the documents could be redacted to protect the privacy interests of the affected cadets.

The Court also held Exemption 2 inapplicable since that exemption only protects information, unlike the documents here, for which there is no genuine and significant public interest.

Staff: Paul Blankenstein and Donald Etra (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

SUPREME COURT

ENTRAPMENT DEFENSE

GOVERNMENT INFORMANT'S ALLEGED SUPPLYING OF ILLEGAL DRUG LATER SOLD BY DEFENDANT DOES NOT RESULT IN DENIAL OF DUE PROCESS. DEFENDANT'S REMEDY WITH RESPECT TO ACTS OF GOVERNMENT AGENTS LIES SOLELY IN ENTRAPMENT DEFENSE.

Hampton, a/k/a Byers v. United States, (Sup. Ct. No. 74-5822, decided April 27, 1976).

The Court's opinion was rendered by a plurality of three Justices; two others concurred in the judgment. Common ground among the five justices was that a government agent's supplying illegal narcotics later sold by the defendant is not outrageous government conduct, does not violate Due Process, and, where the defendant was predisposed to make the sale, does not constitute entrapment.

The defendant claimed at trial that a government informant had supplied him with heroin, which he subsequently sold to two undercover agents with whom the informant was cooperating. Defense counsel requested an instruction that would have required acquittal, regardless of predisposition, if the jury found that the drugs were in fact supplied by the government. The court refused to give the instruction, and the court of appeals affirmed the ensuing conviction over the defendant's contention that the Due Process clause required the trial court to give the requested charge. United States v. Hampton, 507 F.2d 832 (C.A. 8 1974).

The plurality of the Supreme Court concluded that when the accused acts in concert with agents of the government, the Due Process clause does not bar his conviction regardless of the agents' activity. His remedy "lies solely in the defense of entrapment" (Slip. op. at 6), which, the plurality re-affirms, turns exclusively on predisposition. United States v. Russell, 411 U.S. 423; Sherman v. United States, 356 U.S. 369; Sorrells v. United States, 287 U.S. 435. Even if "the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police. . ." (Slip. op. at 6).

The concurring Justices agreed that the government's supplying contraband is not per se a denial of due process. They believed that this case was wholly controlled by Russell, supra, in which the Court affirmed the drug manufacturing conviction of a defendant to whom government agents supplied a rare and essential chemical used only for making "speed". The Justices noted, however, that there might arise a case in which due process principles or the Court's supervisory power should be invoked to bar a conviction on the basis of outrageous government conduct, even where predisposition was proved, citing Rochin v. California, 342 U.S. 165; cf. United States v. Archer, 486 F.2d 670, 676-677 (C.A. 2 1973).

Taken together, the plurality and concurring opinions implicitly overrule United States v. Bueno, 447 F.2d 903 (C.A. 5 1971), United States v. West, 511 F.2d 1083 (C.A. 3 1975), and their progeny.

Staff: Robert H. Bork,
Solicitor General
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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Peter R. Taft

COURTS OF APPEALS

ENVIRONMENT

NEPA; ENDANGERED SPECIES ACT.

Sierra Club v. Robert F. Froehlke (C.A. 8, No. 75-1252, April 23, 1976; D.J. 90-1-4-574).

The Sierra Club and certain individuals brought suit to enjoin construction of the Meramec Park Lake Project, an Army Corps of Engineers' project near St. Louis, alleging that several federal statutes had been violated. Following the district court's denial of any relief, the Sierra Club appealed and focused on alleged violation of NEPA and the Endangered Species Act of 1973, 16 U.S.C. sec. 1531 et seq. The Eighth Circuit affirmed the district court decision in its entirety.

With regard to the NEPA issues raised on appeal, the Eighth Circuit held that (1) the EIS adequately discussed possible alternatives to the construction of a dam; (2) the EIS adequately discussed possible impacts of the project on the Indiana bat, an endangered species; (3) the Corps had not acted improperly in discussing this project alone in the EIS even though other similar projects had been proposed in the area; and (4) the Corps had not acted arbitrarily or capriciously in proceeding with the project after conducting its NEPA review.

In reaching the merits of the claims under the Endangered Species Act, the Eighth Circuit upheld the district court's determination that the Sierra Club's apparent failure to satisfy the 60-day notice requirement of the citizen suit provision of the Act should be overlooked in this particular case. As to the Sierra Club's allegation that Section 7 of the Endangered Species Act had been violated relative to the Indiana bat, the Eighth Circuit, citing National Wildlife Federation v. Coleman (C.A. 5, No. 75-3256, March 25, 1976), ruled that, subject to judicial review, the final responsibility for determining whether Section 7 has been satisfied rests with the agency involved and not with the Secretary of the Interior.

Furthermore, the court concluded that the Corps had not acted arbitrarily or capriciously in determining that it had complied with the requirements of "consultation" and "necessary action" under Section 7. The court also concluded there was no evidence to support a claim that the Indiana bats had been "taken" or "harassed or harmed" under Section 9 of the Act.

Staff: Michael A. McCord (Land and Natural Resources Division); Assistant United States Attorney David W. Harlan (E.D. Mo.).

INDIANS

WITHDRAWAL OF FEDERAL APPROVAL OF A TRIBAL CONSTITUTION.

Nelson Potts v. Louis R. Bruce, Commissioner of Indian Affairs, et al. (C.A. 10, No. 75-1127, April 21, 1976; D.J. 90-2-0-733).

This involved an action against certain officials of the BIA and the Secretary of the Interior for alleged unlawful withdrawal of federal approval of the tribal constitution and all of the governing body of the Prairie Band of Pottawatomi Indians. The district court ruled that the matter was basically an intra-tribal dispute over which it had no jurisdiction and the suit was barred by the doctrine of sovereign immunity.

The court of appeals, in affirming the judgment below, held (1) that there was no substance to the charge that the action of the federal officials was a violation of the constitutional rights of the plaintiff-appellant under the Federal Constitution; (2) that an individual Indian has no right to the continuance of a particular tribal constitution; and (3) that the real issue for judicial review was an intra-tribal matter which did not present a justiciable controversy.

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

INDIANS

ALASKA NATIVE ALLOTMENTS; DUE PROCESS.

Sarah Pence, et al. v. Thomas S. Kleppe, etc., et al. (C.A. 9, No. 75-2144, January 16, 1976, rehearing denied March 23, 1976; D.J. 90-2-11-7002).

Native Alaskans claiming to be eligible for allotments of public lands under the Alaska Native Allotment Act, 34 Stat. 197, as amended 43 U.S.C. secs. 270-1 - 270-3, repealed but with a savings clause for applications pending on December 18, 1971, 85 Stat. 710, 43 U.S.C. sec. 1617, brought this action against the Secretary of the Interior alleging that the procedures by which the Secretary determines whether to grant allotments deny the applicants due process. The court of appeals found that the district court had jurisdiction under 25 U.S.C. sec. 345 and 28 U.S.C. sec. 1353. It also held that allotment applicants have a sufficient property interest to warrant due process protection, and that the Secretary's procedures do not meet the requirements of due process. The court concluded that, at a minimum, applicants whose claims are to be rejected must be notified of the reasons, allowed to submit written evidence, and, if they request, be granted an opportunity for an oral hearing.

Staff: Charles E. Biblowit (Land and Natural Resources Division).

CIVIL PROCEDURE

SUMMARY JUDGMENT IN FORECLOSURE ACTION SUSTAINED.

United States v. Irwin Maniloff (C.A. 6, No. 75-1925, April 15, 1976; D.J. 90-1-1-2300).

This was an action brought by the United States to foreclose a purchase money mortgage. The district court found that the mortgagors' motion to amend their answer constituted a dilatory tactic and granted summary judgment to the United States. On appeal the Sixth Circuit held "that the district court did not err in granting the Government's motion for summary judgment, and did not abuse its discretion in denying the motion for leave to file an amended complaint."

Staff: Eva R. Datz (Land and Natural Resources Division); Assistant United States Attorney Saul A. Green (E.D. Mich.).

ENVIRONMENT

CHALLENGE TO CONSTRUCTION PERMIT FOR NUCLEAR POWER PLANT REJECTED.

Porter County Chapter of the Izaak Walton League of America, et al. v. AEC, et al. (C.A. 7, No. 74-1751, April 13, 1976; D.J. 90-1-4-1049).

The Seventh Circuit denied a petition to review an order of the Atomic Energy Commission granting a permit to construct a nuclear power plant next to the Indiana Dunes National Lakeshore. Initially the court held that, notwithstanding the objections by the Department of the Interior, AEC (now Nuclear Regulatory Commission) could properly conclude that the environmental impact of the plant on the National Lakeshore would not be substantial. In addition, the court held the environmental impact statement to be adequate. Specifically, adequate consideration was found to have been given to alternative sites in relation to a very serious type of accident which could theoretically occur.

Staff: NRC.

ENVIRONMENT

NEPA; DENIAL OF TEMPORARY INJUNCTIVE RELIEF PENDING PREPARATION OF EIS.

Conservation Council of North Carolina, et al. v. Costanzo, et al. (C.A. 4, No. 75-1906, December 16, 1975; D.J. 90-1-4-957).

The court held that the district court did not abuse its discretion in denying temporary injunctive relief pending the preparation of an EIS regarding a marina constructed under a Corps of Engineers' permit and processing of an after-the-fact permit application for discharge of dredge material.

Staff: Assistant United States Attorney
Bruce H. Johnson (E.D. N.C.).

DISTRICT COURT

PUBLIC LANDS

HIGHWAY BEAUTIFICATION ACT; RIGHT TO RETAIN BILLBOARDS ON PUBLIC LANDS; RIGHT TO COMPENSATION FOR BILLBOARDS REMOVED FROM PUBLIC LANDS.

Ryan Outdoor Advertising, Inc. v. United States (D. Nev., Civil No. LV 74-32 RDF, D.J. 90-1-4-883).

Plaintiffs, owners of outdoor advertising displays on public lands along federal-aid highways, brought suit after the Bureau of Land Management, in accord with regulations, 43 C.F.R. Subpart 2921, refused to renew special use permits for the billboards and forcibly removed two billboards. Plaintiffs' main contentions were that the Highway Beautification Act, 23 U.S.C. sec. 131, established a standard for billboards along public highways, and that the Secretary of the Interior could not completely ban such billboards. Furthermore, plaintiffs argued that they were entitled to compensation under the Highway Beautification Act for all billboards that were removed.

In granting defendants' motion for summary judgment, the court held that the Highway Beautification Act did not diminish the plenary authority of the Secretary of the Interior over public lands as provided in 43 U.S.C. sec. 1201, and that the regulation forbidding billboards was within the Secretary's discretion. The court further held that the compensation language of the Highway Beautification Act was not intended by Congress to award payment for the failure to renew revocable one-year special use permits to erect billboards on the public lands.

Staff: L. Mark Wine (Land and Natural Resources Division).

* * *