United States Attorneys

Bulletin

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VOL. 26 AUGUST 18, 1978 NO. 16

UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney Judith K. Giltenboth, Western District of Pennsylvania, has been commended by Harold T. Bushey, Director, Veterans Administration, for her handling of the case Lucy Allen, et al. v. Veterans Administration.

POINTS TO REMEMBER

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following Bluesheet has been sent to press in accordance with 1-1.550 since the last issue of the Bulletin.

DATE	AFFECTS USAM	SUBJECT
8-7-78	9-11.225	Grand Jury: Limitation on Naming Persons Unindicted Co-Conspirators

(Executive Office)

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EXECUTIVE OFFICE STAFF--AUGUST, 1978

There have been a number of personnel changes within the Executive Office during the past months. This roster is to update and replace the last one printed in December, 1977. The following roster is provided for the convenience of those persons in the U.S. Attorneys' Offices who deal directly with Executive Office personnel. Copies of the roster should be made available to all such persons.

(Executive Office)

* * *

DIRECTOR - William P. (Bill) Tyson (Acting) FTS 739-2121

DEPUTY DIRECTOR - William P. (Bill) Tyson 2123

Secretary to the Deputy Director - Maureen A. Braswell 2123
(Status of all attorney appointments)

Chief, Special Projects - Martha J. Dalby 5014
(Reports; handbooks; statistical profiles of U.S. Attorneys' Offices; transition briefing materials; coordination of Field Activities; U.S. Attorneys' Conferences; special assignments)

Staff Assistant - D. Glen Stafford 5014
(Pre-employment processing of Assistant U.S. Attorney applicants; Special Assistant U.S. Attorneys; conversions from Law Clerk to Assistant U.S. Attorney; Attorney Employment Review Committee Staff; special assignments)

Management Analyst - Linda J. Fleming 5014
(Handbooks; special reports; statistical summaries; transition briefing packages; Department of Justice newspaper liaison; other special projects)

Clerk-Typist - Joyce T. Wood 2123
(U.S. Attorney Offices' statistics; clerical support for Deputy Director, for Attorney General's Advisory Committee of United States Attorneys and for Special Projects)

FIELD ACTIVITIES

Assistant Director - Ernest R. (Ernie) Bengtson 2131
Assistant Director - Edward H. (Ed) Funston 2131
(On-site consultation and assistance to U.S. Attorneys on all aspects of operations; special conferences on problem areas of litigation; Departmental program review)

Management Analyst - Patrick C. (Pat) McAloon 2131
(On-site consultation and assistance on all administrative aspects of operations; management training seminars)

Clerk-Typist - Patricia L. (Patty) McGuigan 2131
(Clerical support for Field Activities)

LEGAL SERVICES

Assistant Director - Laurence S. (Larry) McWhorter 3276
(Supervision of all legal services, Attorney General's Advocacy Institute, United States Attorneys' Bulletin, United States Attorneys' Manual, JURIS services)

Secretary to the Asst. Director, Legal Services - Cynthia J. Robinson 3276
(Controlled Substance Unit reports; reports of subpoenas to newsmen)

Attorney - Advisor - Leslie H. (Les) Rowe 5011
(Department Speedy Trial Coordinator; Freedom of Information and Privacy Acts; legislative inquiries; general legal services)

Attorney - Donald (Don) Burkhalter 5012
(Freedom of Information and Privacy Acts; JURIS research; Congressional inquiries; citizen mail)

Law Clerk - Sandra J. (Sandy) Manners 5011
(JURIS research, legal support for Legal Services)

Editor - Patricia V. (Pat) Zawasky 2080
(U.S. Attorneys' Bulletin and U.S. Attorneys' Manual)

Attorney General's Advocacy Institute

Administrator - Geoffrey (Geoff) Beauchamp 4104
(Institute training courses; cassette lending library)

Assistant Administrator - Mary Reed 4104
(Institute training courses)

Paralegal Specialist - Susan M. Novotny 4104
(Research assistance for Institute training courses)

Secretary - Patricia A. (Pat) Campbell 4104
(Institute contact point; clerical support for Advocacy Institute)

Clerk-Typist - Valarna Schoeneman 4104
(Clerical support for Advocacy Institute)

Staff Assistant - Doris F. Johnson 5373
(Fiscal operations; requests for training; course administration)

Clerk-Typist - Dianna Ingram 5373
(Training requests; cassette lending library; clerical support for Advocacy Institute)

ADMINISTRATIVE SERVICES

Assistant Director - Francis X. (Frank) Mallgrave 5021
(Administrative activities)

Clerk-Typist - Virginia L. (Gini) Trotti 5021
(Clerical support for Administrative services)

ADP Administrator - Patricia D. (Pat) Goodrich 5021
(Review of requests for automated data processing (ADP) services, systems and equipment; analysis of management information needs; development of case weights)

Office Services Manager - L. Carol Sloan 5021
(Office furnishings, equipment (purchase and rental); libraries; printing; cleaning, repair services; records disposal; shipment (government bills of lading); consultation on office moves, word processing centers)

Financial Manager - Edward A. (Ed) Moyer 5021
(Budget; overtime and travel allocation; litigative reports)

Accounting Clerk - M. Joanne Beckwith 5021
(Status of requests for equipment; furnishings, books, printing and other services; financial reports)

Staff Assistant - Cleatus J. Ranieri 2121
(Litigative expenses; foreign travel; relocation; temporary support positions; certifying officers; health unit participation)

Space Management Officer - Richard L. (Dick) Kidwell 4663
(Space assignment, alterations, use; building services; telephone service; physical security; safety and accident reports)

Space Management Specialist - Stephanie W. (Stevie) Persico 4663
(Space layouts; work authorizations; general space management services)

Clerk-Typist, Space - Lois P. Williams 4663
(Clerical support for Space Management)

Personnel Officer - Daniel W. (Dan) Gluck 4253
(General supervision of personnel activities)

Personnel Management Specialist - Eileen S. Menton 3758
(Classification and compensation; non-attorney training courses; position management; personnel security clearances for classified material; Whitten review, Factor Evaluation System; Fair Labor Standards Act; performance evaluations; student programs; Schedule C employees; reductions-in-force)

Personnel Management Specialist - Carrie G. Kelly 3758
(Employee relations and benefits; equal employment opportunity; labor-management relations; occupational health; discipline; adverse action; grievances; leave policy; awards; suggestions)

Clerk-Typist - Rosemary T. Dziedzic (Appointment certificates; clerical support for Personnel Management Specialists)	3758
Personnel Management Specialist - Sally S. Ruble	4251
Personnel Clerk - Scarlett A. Proctor (Personnel actions for Category I districts - see attached listing)	4251
Personnel Management Specialist - Carrie M. Washington	4641
Personnel Clerk - A. Vanessa Frazier (Personnel actions for Category II districts - see attached listing)	4641
Personnel Management Specialist - Anita M. Davis	4641
Personnel Clerk - Debra J. (Debi) Puckett (Personnel actions for Category III districts - see attached listing)	4641
Personnel Management Specialist - Melinda P. Bell	4251
Personnel Clerk - Patricia C. (Pattie) Poore (Personnel actions for Category IV districts - see attached listing)	4251
Personnel Assistant - Gloria J. Allen (Supervision of and technical assistance to the personnel clerks; basic staffing and classification)	4641

CATEGORY

I	II	III	IV
DISTRICTS	DISTRICTS	DISTRICTS	DISTRICTS
Connecticut	Canal Zone	Alabama N.	Arkansas E.
Delaware	Colorado	Alabama M.	Arkansas W.
Indiana N.	Guam	Alabama S.	District of Columbia
Indiana S.	Hawaii	Alaska	Florida N.
Maine	Idaho	Arizona	Florida M.
Massachusetts	Illinois N.	California N.	Florida S.
Michigan E.	Illinois E.	California C.	Georgia N.
Michigan W.	Illinois S.	California S.	Georgia M.
Minnesota	Iowa N.	California E.	Georgia S.
New Hampshire	Iowa S.	Mississippi N.	Kentucky E.
New York N.	Kansas	Mississippi S.	Kentucky W.
New York E.	Louisiana E.	New Jersey	Maryland
New York S.	Louisiana M.	New Mexico	North Carolina E.
New York W.	Louisiana W.	Oregon	North Carolina M.
North Dakota	EOUSA	Texas N.	North Carolina W.
Ohio N.	Missouri E.	Texas E.	Puerto Rico
Ohio S.	Missouri W.	Texas S.	South Carolina
Pennsylvania E.	Montana	Texas W.	Tennessee E.
Pennsylvania M.	Nebraska	Washington E.	Tennessee M.
Pennsylvania W.	Nevada	Washington W.	Tennessee W.
Rhode Island	Oklahoma N.		Virginia E.
Vermont	Oklahoma E.		Virginia W.
Wisconsin E.	Oklahoma W.		Virgin Island
Wisconsin W.	South Dakota		West Virginia N.
Wyoming	Utah		West Virginia S.

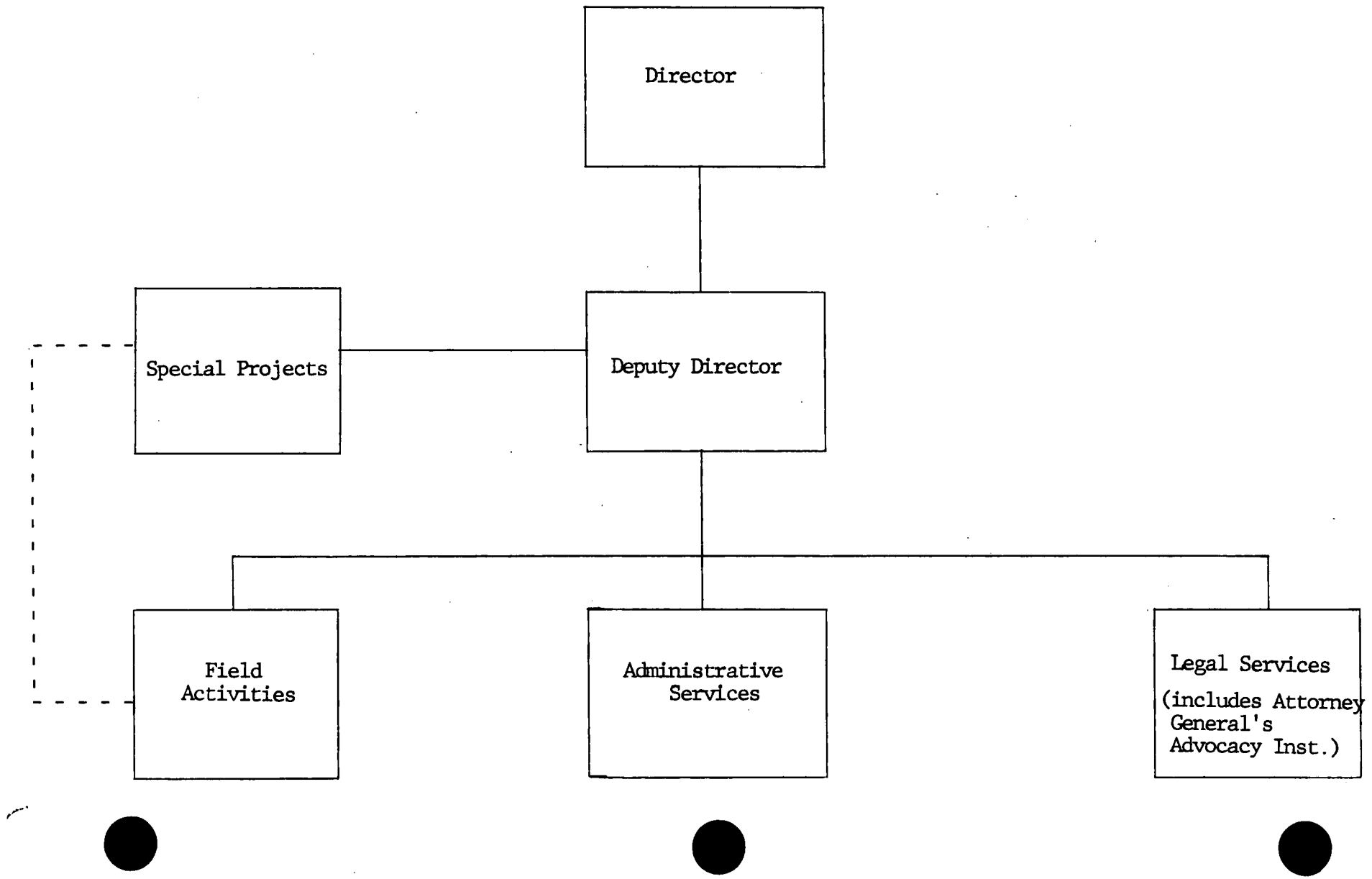
I Sally - Scarlitt

II Carrie - Vanessa

III Anita - Debi

IV Melinda - Patty

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS



RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS: ERROR IN REPORTED LANGUAGE OF TITLE 18, UNITED STATES CODE, SECTION 1962(a)

The United States Attorney's Offices for the Northern District of Illinois and the Southern District of New York have discovered an omission in the statutory language of Title 18, United States Code, Section 1962(a) contained in the green paperback volume of Federal Rules (1976 Edition) published by West Publishing Company. This same omission is contained in the Department of Justice's publication "An Explanation Of The Racketeer Influenced And Corrupt Organizations Statute" prepared by the Criminal Division. The red hardback volume of United States Code Annotated correctly sets forth the entire statute. The underscored portion below are the omitted words:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of <u>any interest in, or the establishment or operation of</u>, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the ocntrol of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchased do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

As cases are being developed under Section 1962(a), please be sure to refer to the red hardback volume of United States Code Annotated. West Publishing Company is being notified to correct its paperback volume.

(Executive Office)

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CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Diliberti v. Brown, No. 77-1412 (7th Cir., July 18, 1978) DJ 145-15-980

Military Discharges; Preliminary Injunctions

Plaintiff, an Army reservist about to be discharged for being passed over for promotion twice, obtained a preliminary injunction restraining his discharge. He contended that he had not been given a chance to review adverse officer evaluation reports in his file in violation of Army regulations and his procedural due process rights. The court of appeals reversed the preliminary injunction, endorsing our position that Sampson v. Murray, 415 U.S. 71 (1974), precludes preliminary injunctions in Government personnel cases absent extraordinary circumstances. The court also held that plaintiff was required to exhaust his administrative remedies before the Army Board for the Correction of Military Records (ABCMR), which were held to be adequate, before seeking judicial relief. The exhaustion requirement was not obviated by plaintiff's claim of unconstitutional Government action. Finally, the court indicated that the nonpromotion of plaintiff may not implicate any constitutionally-recognized "liberty" or "property" interests.

The court of appeals opinion is marked "unpublished", but we are moving for publication.

Attorney: John F. Cordes (Civil Division)
FTS 739-3426

H. W. Wilson Co. v. United States Postal Service, No. 78-6013 (2nd Cir., July 7, 1978) DJ 145-5-4323; National Auto Research Publications, Inc. v. United States Postal Service, No. 77-1174 (C.A.D.C., July 14, 1978) DJ 145-5-4169; Standard Rate and Data Service, Inc. v. United States Postal Service, No. 77-1848 (C.A.D.C., July 14, 1978) DJ 145-5-4774

Postal Rates; Second-Class Mailing Privileges

Both the Second and D. C. Circuits have ruled that the Postal Service erred in holding that publications must contain a "variety of articles" in order to qualify for the second-class "periodical" rate. The courts rejected the Postal Service's contention that the Supreme Court's decision in Houghton v. Payne, 194 U.S. 88 (1904), mandated the "variety of articles" approach. The Postal Service was ordered to adjudicate plaintiffs'

eligibility for periodical rates unburdened by the view that Houghton v. Payne required a "variety of articles".

Attorneys: Mary C. Daly (Assistant United States Attorney, Southern District of New York) FTS 662-9152
Peter E. George (Assistant United States Attorney, D. D.C.) FTS 426-7254
Kenneth M. Raisler (Assistant United States Attorney, D. D.C.) FTS 426-7163

Hofer v. Campbell, No. 77-1760 (C.A.D.C., July 13, 1978) DJ 35-16-648

Time Limit for Title VII Suit; Exclusivity of Title VII

Plaintiff, an HEW employee, brought a complaint pursuant to Title VII of the 1964 Civil Rights Act, contending that he was discriminated against on the basis of his national origin. The Civil Service Commission upheld an HEW administrative decision that there had been no discrimination, but that plaintiff should be transferred to a comparable position with a new supervisor. Plaintiff was advised of his right to file an action in U. S. District Court within 30 days pursuant to 42 U.S.C. 2000e-16. He failed to do so. Nearly a year later, however, he became dissatisfied with HEW's compliance with the Civil Service decision. The Commission denied a request to reopen the case, and reconsider the decision. Plaintiff filed an action in district court. The court of appeals held that the 30-day period for suit is jurisdictional, and barred plaintiff from filing suit. Otherwise, the court held, a plaintiff could fail to file suit within 30 days, and later, if he decides to appeal for some reason, he could seek an administrative rehearing, and then bring suit. The court rejected this anomalous result. The Court also held that plaintiff had no cause of action under the Due Process Clause, his exclusive remedy for discrimination being Title VII of the Civil Rights Act.

Attorneys: Kenneth M. Raisler (Assistant United States Attorney D. D.C.) FTS 426-7163

Kistner v. Califano, No. 77-1228 (6th Cir., July 14, 1978) DJ 137-58-1191

Summary Judgment in Social Security Cases

Plaintiff sought judicial review of the Secretary's denial of her disability claim. The district court sua sponte granted summary judgment to the Secretary based on the administrative record. The court of appeals has remanded the case to the

district court, holding that one party must move for summary judgment, upon proper notice, pursuant to Fed.R.Civ.P. 56, before the district court may grant such a judgment. Thus, the court disapproves the practice of deciding social security cases on the administrative record without a motion for summary judgment.

Attorney: Ronald R. Glancz (Civil Division)
FTS 739-3424

Mattern v. Mathews, No. 77-1629 (3rd Cir., June 30, 1978) DJ 137-62-363

Recoupment of Social Security Overpayment; Procedural Due Process

The Third Circuit has reaffirmed its earlier holding, which had been remanded by the Supreme Court for reconsideration in light of Mathews v. Eldridge, 424 U.S. 319 (1976), that social security recipients are entitled to a prior hearing before their benefits are reduced for the recoupment of overpayments. The court held that the district court had jurisdiction under section 205(g) of the Social Security Act, 42 U.S.C. 405(g), and that, under the procedural due process balancing test enunciated in Mathews v. Eldridge, supra, the individual need for a hearing, and the hearing's utility, outweigh any countervailing Government interest.

The Government has petitioned the Supreme Court for a writ of certiorari in a similar case arising in the Ninth Circuit. Elliott v. Weinberger, 564 F.2d 1219 (C.A. 9, 1977).

Attorney: William Kanter (Civil Division)
FTS 739-3354

Norton v. United States of America, No. 77-1919 (4th Cir., July 19, 1978) DJ 157-16-4388

Good Faith Defense in Tort Claims Act Suits

Acting on what proved to be inaccurate information that the then nationally-sought federal fugitive Patricia Hearst was residing in an apartment in Alexandria, Virginia, a team of FBI agents forced entry into plaintiff's home. Plaintiff then brought suit against the United States under the Federal Tort Claims Act seeking damages for the violation of her rights under the Fourth Amendment caused by the warrantless entry. In granting judgment for the plaintiff, the district court ruled that the United States could not assert as a defense to its liability the good faith and reasonable belief of its employees in the legality of the conduct which provided the basis of the suit.

(19)

We pursued an appeal solely on the question of whether the good faith defense was available to the Government under the Federal Tort Claims Act. The Fourth Circuit, essentially agreeing with our position, reversed the district court. The court of appeals held that in amending the Federal Tort Claims Act in 1974 to permit suits against the United States based on conduct of Federal law enforcement officers in violation of the Fourth Amendment, Congress intended that the liability of the United States be the same as that of its agents. Since law enforcement officers could raise the good faith and reasonable belief defense if sued individually, the Fourth Circuit concluded that the defense was available to the United States.

Attorney: Paul Blankenstein (Civil Division)
FTS 739-3427

CIVIL RIGHTS DIVISION
Assistant Attorney General Drew S. Days, III

United States v. Commonwealth of Virginia, ___F. Supp.___, CA No. 76-0623-R (E.D. Va., July 24, 1978) DJ 171-J3-13

Race and Sex Discrimination
Virginia State Police

On July 24, 1978 the District Court issued its order and memorandum in the above-styled case. In this suit, which proceeded to trial on the Crime Control Act of 1973, the United States alleged that the Virginia State Police had engaged in race and sex discrimination in the hiring of troopers and racial discrimination in the hiring of civilians. The Court found that the defendants had engaged in a pattern and practice of discriminating against female applicants, and against black applicants for the position of dispatcher. The United States has 15 days to file a brief on the appropriate relief to be ordered. The Court found for defendants on all other claims, despite its finding that the State Police had committed racial discrimination prior to July 1, 1973 and that the written test in use until 1976 had not been proven to be an effective measure of on-the-job performance.

Attorneys: Sidney Bixler (Civil Rights Division)
FTS 739-4753
Dan Searing (Civil Rights Division)
FTS 739-4751
William White (Civil Rights Division)
FTS 739-4749

Brinkman v. Gilligan, ___F.2d___, No. 76-3060 (6th Cir., July 27, 1978) DJ 169-58-6

School Desegregation

On July 27, 1978 the Sixth Circuit decided Brinkman v. Gilligan, the Dayton school desegregation case. On remand from the Supreme Court (433 U.S. 406), the district court had found no currently actionable discrimination or effects of past discrimination and had dismissed the complaint. The Sixth Circuit decision unanimously reverses the district court and directs that the previously imposed systemwide desegregation plan be maintained.

The court of appeals held that the district court made numerous findings of fact which were clearly erroneous, and committed numerous errors of law; that the defendants

intentionally operated a dual system as of 1954; that they never fulfilled their duty to eliminate the systemwide effects of their prior acts of segregation; and that their post-1954 actions demonstrated that they intentionally maintained a segregated school system to the time the complaint in the present case was filed.

The court held that the term "incremental segregative effect" as used by the Supreme Court in the present case "was not intended to change the standards for fashioning remedies in school desegregation cases;" that the district court erred in "examin[ing] each alleged constitutional violation as if it were an isolated occurrence and [seeking] to determine the incremental segregative effect of that occurrence. * * * The district court's act by act approach is no more valid than the school by school approach rejected in Keyes;" and that "the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination."

Finally, the court held that "[w]here plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations".

Attorney: Joel Selig (Civil Rights Division)
FTS 739-2141

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General James W. Moorman

Natural Resources Defense Council v. United States Nuclear Regulatory Commission, ___ F.2d ___ No. 77-4157 (2nd Cir. July 5, 1978) DJ 90-1-4-1700

Administrative Law

The court of appeals held that NRC is not required to conduct a rulemaking proceeding to determine whether high-level radioactive wastes generated in nuclear power reactors can be permanently disposed of safely or to withhold operating licenses until an affirmative determination has been made. The court stated that Congress has impliedly approved NRC's construction of the Atomic Energy Act under which the safety of interim storage at commercial reactor sites is determined independent of the safety of Government-owned permanent storage facilities which have not yet been established.

Attorneys: Charles E. Biblowit and Jacques B. Gelin (Land and Natural Resources Division) FTS 739-2722/2762 and NRC staff

Meade Township v. Andrus, ___ F.2d ___ No. 78-1004 (6th Cir. July 5, 1978) DJ 90-1-0-1003

Preliminary Injunction

The court of appeals held that the district court did not abuse its discretion by denying the Township's motion for a preliminary injunction directing the Secretary to make payments under the Payments in Lieu of Taxes Act to Michigan townships instead of Michigan counties.

Attorneys: Robert L. Klarquist and Carl Strass (Land and Natural Resources Division) FTS 739-2754/2720

Commonwealth of Virginia ex rel. Natural Area Council v. Adams, ___ F.2d ___ No. 78-1429 (4th Cir. July 21, 1978) DJ 90-1-4-1847

Injunction Pending Appeal

Following oral argument on Monday, July 17, 1978, the Fourth Circuit denied a motion for injunction pending appeal which would have prevented the FAA from initiating construction of an Air Route Surveillance Radar on Signal Mountain, Virginia. The district court had ruled that the FAA's negative declaration did not violate NEPA and that the irreparable injury to the public resulting from a delay of construction outweighed any harm which the appellants may suffer.

Attorneys: Peter R. Steenland and Neil T. Proto (Land and Natural Resources Division) FTS 739-2748/3888

Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority; Inman Park Restoration v. The Urban Mass Transportation Administration, ____ F.2d ____ Nos. 76-1978 and 76-2712 (5th Cir. July 12, 1978) DJ 90-1-4-1168

National Environmental Policy Act

Affirming the judgment below, the court of appeals held that UMTA, in regard to the Atlanta urban mass transit system, had complied with NEPA, Section 14(c) of the Urban Mass Transportation Assistance Act, Section 4(f) of the Department of Transportation Act, and Section 106 of the National Historic Preservation Act. The court stated that the EIS was properly prepared on the system as a whole, that an "atomistic evaluation" of individual stations and segments is not required, and that the record supported the district court's conclusion that the EIS permitted a reasoned choice among systematic and component alternatives.

Attorneys: Charles E. Biblowit and George R. Hyde (Land and Natural Resources Division) FTS 739-2772/2731

Tia Juana Valley Water District v. City of San Diego (and City of Imperial Beach), unreported, No. 16592 (Cal. 4th App. Dist., July 12, 1978) DJ 90-1-2-1089

International Water Projects

Pursuant to an international agreement, the United States and Mexico agreed to construct a flood control project on the Tia Juana River as it flows through both countries. The City of Imperial Beach, California, brought suit,

claiming that a land acquisition contract it had entered with San Diego required construction of the project in a manner that was unsatisfactory to the United States and San Diego. In the alternative, it attempted to halt construction altogether. The brief filed by the Federal Government asserted that the international flood control project is not the subject matter of State judicial intervention, and that it was essential to our treaty commitments and relations with Mexico that construction not be postponed. The court accepted our position.

Attorneys: Neil T. Proto and Peter R. Steenland
(Land and Natural Resources Division)
FTS 739-3888/2748

VOL. 26 AUGUST 8, 1978 NO. 16

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JULY 25 - AUGUST 8, 1978

Witnesses, juror fees. On July 26, the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice unanimously reported to the full Judiciary Committee S. 2049, the Department's bill to increase fees for witnesses in United States Courts. The Subcommittee also approved for full Committee consideration S. 2075, an omnibus jury reform bill. Both bills have been passed in substantially similar form by the Senate.

Omnibus Judgeship Bill. On July 26, House and Senate conferees met to resolve the remaining differences between the Senate and House-passed versions of the omnibus judgeship legislation, H.R. 7843. The major topic of discussion was the provision in the Senate-passed version of the bill which would designate Alabama, Florida, Georgia, Mississippi and the Canal Zone as the Fifth Circuit and Louisiana and Texas as the Eleventh Circuit. It was clearly established during the conference committee sessions last May that the House conferees would not accept the provision in the Senate bill which would split the Fifth Circuit. Accordingly, the July 26 meeting was devoted to a discussion of various compromise formulas which might be acceptable to both the House and Senate conferees. However, nothing was resolved during the meeting. The conferees adjourned in an effort to seek a solution through informal contacts and staff work prior to another meeting. Senator Eastland offered a proposed compromise. It would create a joint en banc panel, composed of nine judges from both the Fifth Circuit and the new Eleventh Circuit, with jurisdiction to resolve any conflict between the two circuits. Congressman Seiberling outlined a proposal which would create an Eastern and a Western Division for the Fifth Circuit with each division having "appropriate and sufficient autonomy" (similar to provisions in S. 729 and S. 2752 in the 94th Congress). Conflicts between the two divisions would be resolved by all judges of both divisions sitting en banc. Congresswoman Jordan presented a proposal, endorsed by a majority of the House conferees, which would entail the use of a reduced en banc panel consisting of eight or nine judges. Under the Jordan proposal the Fifth Circuit would not be split. There was considerable discussion of the method to be used to select the membership of such a reduced en banc panel; however, no consensus was reached. Moreover, it was apparent that a majority of the Senate conferees

would not accept the Jordan proposal because it did not include a circuit-splitting provision. Toward the end of the meeting there was some discussion of a possible compromise which would couple the Jordan proposal with a provision to split the Fifth Circuit into two divisions for administrative and support purposes.

Revision of Bail Laws - District of Columbia. On July 24, the Senate Governmental Affairs Committee ordered favorably reported H.R. 7747, a bill which would amend the D.C. Code with respect to the release or detention prior to trial of persons charged with certain violent or dangerous crimes. The bill as reported by the Governmental Affairs Committee differs significantly from H.R. 7747 as passed by the House in September of 1977. We strongly prefer the House version.

Institutions bill. H.R. 9400 passed the House on July 28. It has emerged from the Senate Judiciary Committee 11-6. Efforts are now afoot to obtain more moderate-conservative sponsors, defuse Senator Thurmond's opposition and gain bipartisan support in the Senate. Since it is an item in Mrs. Carter's Mental Health Commission Task Force Report, we hope for White House assistance. Betty Ford has made several calls to Republican Senate Judiciary Committee members and will repeat the effort in the full Senate. This bill deals with protecting the constitutional rights of those in mental institutions, jails and prisons.

Inspector General. The Senate Governmental Affairs Committee reported out this bill, H.R. 8588, on July 27 with two provisions that may have constitutional problems. One requires direct reports from Inspectors General to Congress; the other requires the President to state his reasons for firing Inspectors General. The Committee staff has agreed to a Committee floor amendment resting the first and to work with the Department to modify the second to meet our objections.

Privacy. We are working with Congressmen and House staff members to eliminate the only two remaining provisions in the bank records privacy legislation to which Justice objects. One of these (an amendment by Congressman McKinney, R-Conn.) would limit the way government agencies could use bank records information. The other (an amendment by Congressman Mattox, D-Tex.) would limit bank records information obtained by grand juries. We are assembling a strong coalition of Congressmen (Rodino, Kastenmeier and key Banking Committee members) to offer two floor amendments. Chances look fairly good to get a bill out of the House which we can support in all respects.

Nationwide Subpoenas under the False Claims Act. On July 25, the House Judiciary Committee ordered favorably reported H.R. 12393, our legislative proposal to authorize nationwide service of subpoenas under the False Claims Act. This is a significant item as it will facilitate financial recoveries in such cases as the grain scandals and other major frauds.

Federal Tort Claims Act. Chairman Danielson's Subcommittee reported the bill during the week of July 17 without any disciplinary amendment. During the week of July 24 Senator Metzenbaum's Subcommittee voted it out without recommendation (3-0) with not only a disciplinary amendment but election of remedies for Presidential appointees and former government employees. Senator Metzenbaum says he will not bring the bill up in full committee unless the Department agrees to work out remaining differences or not oppose his version in full committee. This is, in part, a reaction against the House action of not adopting any disciplinary amendment. They say they must go to conference with a strong "liberal" bill. Although we are free to fight on the floor or in conference, it does not appear that a bill will come out of Senate Judiciary in time to go to the floor unless Metzenbaum is on board (Senators DeConcini and Wallop would go further than Metzenbaum in providing for election). The ABA and ACLU are still actively campaigning for total election with the Committee, an unacceptable position for the Department. House Committee markup is on August 16 and a disciplinary amendment is expected to be added on at that time.

Illinois Brick Legislation. This bill, overturning the Illinois Brick case, is out of committee in both House and Senate and ready for floor action. However, because of extremely active lobbying by the Business Roundtable, etc., it will be controversial and Senators Hatch and Thurmond have put a "hold" on it; Senator Hatch has said he has 95 amendments. A letter to get 60 sure votes in case of cloture is circulating among Senators; on the House side the International Relations Committee has asked for a referral because of the Pfizer amendment; Chairman Rodino is trying to work it out. This one needs White House help in getting it to the floor and overcoming business lobbying efforts.

Wiretap legislation. H.R. 7308, the "foreign intelligence wiretap bill," is expected to come to the floor the week of August 7. Despite the Republican Policy Committee's endorsement of the McClory substitute, the bill is expected to pass handily. Congressman Boland and Kastenmeier will share the time on the floor. The Department and the White House are working on ensuring all bases are touched. The

House Intelligence Committee hosted a breakfast for 50-60 key House members to brief them on the bill with FBI Director Webster and Admiral Turner participating.

Federal Criminal Code Revision. The House Judiciary Subcommittee on Criminal Justice has completed its work on the criminal code revision. The full Judiciary Committee could take up the bill as soon as August 8, with a goal of reporting it to the House before the August recess. The likelihood of a good bill within this time frame is very slim.

Diversity. The Senate Subcommittee on Judicial Machinery is trying to find a way to report out the Department bill curtailing diversity jurisdiction of federal courts, despite a 2 yes (DeConcini and Byrd) and 2 no (Biden and Wallop) vote. The bill, which has passed the House, would have a good chance in the full Senate Judiciary Committee, if it could get on the agenda. The ABA, and especially state bar associations, have intensively lobbied against it.

Department Appropriations. On August 3, the Senate passed H.R. 12934, the State, Justice and Commerce Appropriation bill, after adopting the following significant amendments:

1. Added back the 35 Criminal Division positions which had been cut by the Committee.
2. Cut LEAA approximately $5 million.
3. Restricted message switching by requiring the Attorney General to obtain Committee approval before acquiring new equipment or authorizing switching operations.
4. Made arson a major crime for purposes of the Uniform Crime Reports and earmarked $1 million of LEAA funds for study of arson.
5. Adopted language making it clear that the Department has authority to hire a special prosecutor, but did not add any particular funds for this purpose.
6. Added $2,591,000 for the FBI Bank Robbery program.
7. Adopted an amendment concerning parole of Cambodian refugees.
8. Added back $400,000 for Federal Justice Research ($1,000,000 had been cut in Committee).

Controlled Carriers. On July 31, the House passed under suspension of the rules H.R. 9998, a bill providing for the regulation of rates by certain state-owned ocean carriers engaged in shipping in the U.S. foreign trades. In essence, the bill would require that certain foreign-government controlled ocean carriers prove to the satisfaction of the Federal Maritime Commission that their rates are just and reasonable.

The Department has opposed certain provisions in H.R. 9998 on several grounds, including the potentially discriminatory and anticompetitive effects of the provisions in question. Some significant amendments were adopted in response to suggestions from the Department, such as a provision granting the President the right to stay the effect of an FMC rate order under the bill for reasons of national defense or foreign policy. However, objectionable features remain in the bill. For example, the House Merchant Marine and Fisheries Committee rejected a Department-supported amendment which would have permitted a controlled carrier's rate unless it was more than 15 percent below those offered by any competing shipping conference. This "zone of reasonableness" amendment was offered because the Administration is concerned that failure to include such a provision may be viewed as an indication that the rates of controlled carriers should not be allowed to drop below those of a competing conference, i.e., that any departure from conference rate practices is unjust or unreasonable.

Paraquat, DEA Overseas Activities. On August 2, the House passed the International Security Assistance Act, H.R. 12514, with an amendment offered by Congressman Wolff that would prohibit the use of international narcotics control funds to eradicate marihuana through the use of paraquat, unless the paraquat is used in conjunction with another substance or agent which will warn potential users of marihuana that paraquat has been used on it. The comparable Senate bill, S. 3075, was passed on July 26 with an amendment which had previously been added by Senator Percy concerning the use of paraquat. The Percy amendment would prohibit the use of international narcotics control funds for the spraying of herbicides to eradicate marihuana if such herbicides are "likely to cause serious harm" to the health of persons who may use or consume the sprayed marihuana. Under the Percy amendment the Secretary of HEW would advise the Secretary of State if a herbicide intended for use in marihuana eradication is likely to cause serious harm. S. 3075 also contains a section, entitled "Drug Enforcement Agency Overseas Activities", which prohibits participation by U.S. personnel in any direct police arrest action in any foreign country with respect to narcotics control efforts. This provision would also forbid interrogation by U.S. officers or employees, or even the presence of U.S. personnel, during the interrogation of "any United States person" without the written consent of such person arrested in any foreign country with respect to narcotics control efforts. There is no comparable provision in the House bill.

Dispute Resolution. On August 2, Assistant Attorney General Daniel Meador (Office for Improvements in the Administration of Justice) testified before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice in favor of S. 957, the proposed Dispute Resolution Act. We expect this bill, which has already been passed by the Senate, to move quickly through the House Judiciary Committee. The only remaining question is whether or not the Commerce Committee, which also has jurisdiction under the terms of the joint referral, will also decide to move the bill.

ERA extension. On August 2, Assistant Attorney General Patricia M. Wald (Office of Legislative Affairs) testified before the Senate Judiciary Subcommittee on the Constitution on S.J. Res. 134, to extend the time for ratifying the Equal Rights Amendment. Ms. Wald presented the views of the Department that an extension is permissible; that a simple majority vote would be sufficient; and that States cannot rescind prior ratifications, nor can Congress provide for a right of rescission by any means short of proposing an amendment to Article V of the Constitution. The Administration strongly endorses the extension, which was reported by the House Judiciary Committee on a 19 to 15 vote. The Rules Committee granted a rule on August 3. On the Senate side, it was apparent from the hearings that Senator Hatch strongly disagrees with our position while another witness, Senator Garn, hinted at a filibuster.

Magistrates Bill. On August 8 the Rules Committee granted a rule for our bill to expand the jurisdiction of U.S. Magistrates, S. 1613, thereby ensuring consideration on the floor of the House. There had been some concern that too many other matters would take precedence in the Rules Committee and the bill would be pushed aside in the crush of legislative business toward the end of the 95th Congress. The Senate version of S. 1613 was passed by that body on July 22, 1977.

Department Authorization bill. The House did not get to H.R. 12005, our authorization bill, on July 28, as scheduled. It will be rescheduled after the August recess, but in view of the passage of our appropriation bill by both Houses, the fate of the authorization bill is uncertain.

NOMINATIONS:

On August 1, 1978, the Senate received the following nominations:

Thomas A. Wiseman, Jr., to be U.S. District Judge for the middle District of Tennessee.

Norma Levy Shapiro, to be U.S. District Judge for the Eastern District of Pennsylvania.

On August 3, 1978, the Senate received the following nomination:

Theodore McMillian, of Missouri, to be U.S. Circuit Judge for the Eighth Circuit.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(e)(1)(B). Pleas. Plea Agreement Procedure. In General.

Rule 11(e)(3). Pleas. Plea Agreement Procedure. Acceptance of Plea Agreement.

Rule 11(e)(4). Pleas. Plea Agreement Procedure. Rejection of Plea Agreement.

On appeal the defendant claimed the district court erred in not permitting him to withdraw his guilty plea pursuant to Rule 11(e)(4) when the court declined to accept the Government's sentence recommendation which was made as part of a Rule 11(e)(1)(B) plea agreement. The plea agreement provided that the defendant would plead guilty to the original charges of violations of 18 U.S.C. §§2, 495, and 1708 and in exchange the Government would recommend to the Court that the defendant be given concurrent three year terms of each indictment, with all but ninety days suspended. Prior to accepting the plea, the trial judge carefully explained to the defendant that the judge would not be bound by the Government's recommendations, and in fact chose to sentence the defendant under the provisions of the Youth Corrections Act to an indeterminate sentence with the probability of a far greater jail term.

The Sixth Circuit reversed defendant's conviction. The court found that when utilizing a Rule 11(e)(1)(B) agreement the trial court must either accept the recommendations embodied in the plea agreement and comply with Rule 11(e)(3) or reject the agreement, in which case the defendant may withdraw his plea pursuant to Rule 11(e)(4). According to the Court "[t]here is no third alternative under the Rules by which the court neither accepts nor rejects the plea agreement, but the defendant is nonetheless bound by his plea of guilty." In so holding the Court reached a conclusion different than the Courts of Appeals for the Fourth and Ninth Circuits. See United States v. Savage, 561 F.2d 554 (4th Cir., 1977); United States v. Henderson, 565 F.2d 1119 (9th Cir., 1977).

(Vacated and remanded.)

United States v. Wendell White, ___ F.2d ___, Nos. 77-5289/90 (6th Cir., July 25, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(e)(3). Pleas. Plea Agreement Procedure. Acceptance of Plea Agreement.

See Rule 11(e)(1)(B), this issue of the Bulletin for syllabus.

United States v. Wendell White, ___ F.2d ___, Nos. 77-5289/90 (6th Cir., July 25, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(e)(4). Pleas. Plea Agreement Procedure. Rejection of Plea Agreement.

See Rule 11(e)(1)(B), this issue of the Bulletin for syllabus.

United States v. Wendell White, ___ F.2d ___, Nos. 77-5289/90 (6th Cir., July 25, 1978).

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(c)(5). Pleas. Advice to Defendant.

See Rule 11, this issue of the Bulletin for syllabus.

United States v. Adelle Ray White, ___ F.2d ___, No. 77-1379 (4th Cir., March 28, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

Rule 11(c)(5). Pleas. Advice to Defendant.

In another of a series of conflicting recent Circuit Court decisions, the Fourth Circuit held, following rehearing, that the defendant was not entitled to have her conviction overturned and her plea set aside because of a technical violation of Rule 11. The District Court had failed to inform her under Rule 11(c)(5) that if she pled guilty she might be asked questions, and if she answered under oath, on the record and in the presense of counsel, her answers might be used against her in a prosecution for perjury. The Court found the defendant was not prejudiced by non-observance of this rule. She was not interrogated under oath by the district court and it would be hard to imagine a case in which a defendant who otherwise decided to plead guilty would be encouraged or discouraged to tender his plea by lack of knowledge that he may be questioned under oath.

(Affirmed.)

United States v. Adelle Ray White, ___ F.2d ___, No. 77-1379 (4th Cir., March 28, 1978).

FEDERAL RULES OF EVIDENCE

Rule 404(b). Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes. Other Crimes, Wrongs or Acts.

Defendant appealed his conviction for making false statements in documents submitted to the Department of Housing and Urban Development, in violation of 18 U.S.C. §§1010 and 2(b). The defendant was convicted for two of the five counts for which he was indicted while his codefendant was convicted on all sixteen counts. On appeal, he contended that testimony about his participation in illegal activities, for which he wasn't indicted and relating to activities of his codefendant, were inadmissible attempts to prove his guilt of the crimes charged by proving his participation in other crimes. He also contended the trial judge erred under Rule 404(b) and violated his due process rights in not instructing the jury that the evidence objected to by the defendant could only be considered as to intent, or as to the existence of a plan, but not as substantive proof of his guilt.

The Sixth Circuit found the Government's proffer of proof of a scheme common to a number of similar transactions admissible. The Court, however, found the trial court's failure to give a limiting instruction to the jury "clear error" and reversed. The court believed that although the error by the trial judge was unintentional, "a simple mistake," the warning sought was essential to a fair trial.

(Reversed and remanded.)

United States v. John Yopp, ___ F.2d ___, No. 77-5238 (6th Cir., May 31, 1978).