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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney Michael Quinton, Southern District of California, has been commended by Guy H. McMichael, III, General Counsel, Veterans Administration, for his outstanding prosecution in the case of Amos Johnson v. United States.

Assistant United States Attorney John M. O'Connor, Southern District of New York, has been commended by Robert A. Derzon, Administrator, Department of Health, Education, and Welfare, for his excellent work in the 1976 Hospital Association of New York State (HANY) v. Toia litigation.

Assistant United States Attorney Robert N. Shwartz, Southern District of New York, has been commended by H. S. Knight, Director, United States Secret Service, for his tireless efforts in United States v. Mannino, et al.

Assistant United States Attorney Michael A. Johns, District of Arizona, has been commended by A. Daniel O'Neal, Chairman, Interstate Commerce Commission, for his successful prosecution in the cases of United States v. Bolin, et al., United States v. Butler, and United States v. Carter, et al.

POINTS TO REMEMBER

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

No Bluesheets have been sent to press in accordance with 1-1.550 since the last issue of the Bulletin.

(Executive Office)

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CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Cell Associates, Inc. v. National Institutes of Health, No. 76-1978 (9th Cir., August 11, 1978) DJ 145-16-913

Privacy Act; Injunctive Relief Unavailable to Prevent Disclosure

Plaintiff sought an injunction to prevent the National Institutes of Health from releasing two reports of investigations of plaintiff's activities as a biological researcher while working under contract with NIH. NIH received several requests for the reports pursuant to the Freedom of Information Act and determined that they should be released. Before releasing them, however, NIH informed plaintiff of its intention to honor the FOIA requests. Plaintiff brought suit under the Privacy Act, 5 U.S.C. §552a, to enjoin disclosure. The district court denied the injunction, and the Ninth Circuit affirmed.

The Court of Appeals held that the Privacy Act provides a specific remedial scheme for particular violations of the Act and that this precise legislative scheme deprives the courts of their general equity powers. The specific remedy provided for unwarranted disclosure of agency records is damages, costs and attorneys fees under 5 U.S.C. §552a(b),(g)(1)(D) and (g)(4). While that remedy "might seem an inadequate safeguard against unwarranted disclosures," the court concluded that Congress intentionally "limited injunctive relief to the specific situations in 5 U.S.C. §552a(g)(1)(A) and (2) and (1)(B) and (3)."

Attorney: Vincent B. Terlep, Jr. (Civil Division)
FTS 739-3528

United States v. Neves, No. 76-2423 (9th Cir., August 22, 1978) DJ 61-12-351

Admiralty; Licenses required for operators of fishing vessels

The district court in this case held that the Coast Guard may not require commercial fishing vessels to be operated by licensed personnel pursuant to 46 U.S.C. 224a because, in 46 U.S.C. 223, fishing vessels are given an exemption from laws requiring a minimum number of licensed personnel to be on board. Accordingly, the district court dismissed the government's civil penalty action against a fishing vessel owner who permitted his ship to be navigated by an unlicensed mate. On our appeal, the Ninth Circuit reversed the district court's judgment. The court of appeals agreed with our argument that section 224a's licensing requirement is unimpaired by section 223's fishing vessel

exemption from minimum manning requirements. The court held that an exemption from minimum manning requirements does not allow a fishing vessel to employ non-licensed persons actually to operate the ship. The Ninth Circuit's decision should be of considerable assistance to the Coast Guard in its effort to require the West Coast fishing industry to comport with minimum safety requirements.

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

Green v. Carlson, No. 77-1334 (7th Cir., August 3, 1978)
DJ 157-26S-340

Tort; Survival of a Bivens-type action governed by federal common law

Plaintiff, the mother of a federal prisoner who died as a result of inappropriate medical treatment, filed an action as administratrix of the estate of her deceased son. She alleged that her son died as a result of medical treatment so inappropriate as to evidence intentional maltreatment and that defendants' acts violated the Due Process Clause and the Eighth Amendment's prohibition against cruel and unusual punishment. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, holding that state law governed plaintiff's survival action and that the state law limitation on recovery of wrongful death damages prevented plaintiff from satisfying the jurisdictional amount.

The Seventh Circuit reversed, holding that the survival of a Bivens-type action is a matter of federal common law. In reaching this conclusion, the court pointed to one of the underlying policies of the Bivens-type claim, i.e, to prevent abuses of power by officials. Where claims of constitutional violations are against federal officials, the court held that they should receive uniform treatment. Thus, when a state survival statute effectively would abate "a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

Attorney: Bradley L. Williams (Assistant United States Attorney, Indianapolis, Indiana)
FTS 331-6333

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

Edward D. Neuhoff v. Secretary of the Interior, ____ F.2d ____ No. 75-3284 (9th Cir., July 17, 1978) DJ 90-1-4-767

Forest Lieu Land Selections

Affirming the judgment below, the Ninth Circuit held that a land grant railroad's release of its outstanding land claims against the Government under the Transportation Act of 1940 extinguished the forest lieu selection rights of persons who had purchased powers of attorney from the railroad.

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

Edwin Werner v. United States Department of the Interior, ____ F.2d ____ No. 77-1958 (8th Cir., July 20, 1978) DJ 90-1-0-99

Jurisdiction under Tucker Act; Estoppel

The court of appeals affirmed the district court's dismissal of plaintiffs' action, which sought cancellation of wetland easements in North Dakota and damages. The court held that the district court lacked jurisdiction under the Tucker Act to grant the equitable relief of cancellation, and that the APA provided no basis for jurisdiction. The court declined to consider mandamus statute jurisdiction because that statute was first invoked in the court of appeals. The plaintiffs were not entitled to damages because the oral representations of the Government negotiators relied upon by plaintiffs were unauthorized and hence not binding against the Government.

Attorneys: Kathryn A. Oberly and Carl Strass (Land and Natural Resources Division) FTS 739-3921/5037

Adams v. Morton, ____ F.2d ____ No. 75-3577 (9th Cir., July 18, 1978) DJ 90-2-4-257

Indians

In this case, part of continuing litigation regarding funds appropriated by Congress to satisfy a judgment in favor of the Gros Ventre Tribe, the Ninth Circuit upheld the Secretary's interpretation of the distribution statute in favor of the Adams group, over the Tribe's challenge that tribal membership was required. The Tribe may determine its membership, the court said, but Congress determines beneficiaries of a judgment fund. The Tribe here was never a party or formal intervenor, but participated in the proceedings, brought the appeal, and so is bound by the judgment. The Secretary's refusal to distribute funds to Adams, even though agreeing with the Adams' interpretation of the statute, preserved a "case or controversy."

Attorneys: Maryann Walsh and George R. Hyde
(Land and Natural Resources Division)
FTS 739-5053/2731

United States v. Virginia Russell, ____ F.2d ____ No. 76-1811 (9th Cir., July 17, 1978) DJ 90-1-10-1143

Mining

The court ruled that the district court did not abuse its discretion in denying a mining claimant's Rule 60(b) motion to vacate default judgment. The court of appeals concluded that there was ample evidence to support the district court's finding that the claimant's default was willful and knowing, and that she had filed a new mining claim (on land where prior claims had twice been found invalid) in bad faith and for purposes of delay. The court stated: "Where the issue is one of good faith of the occupancy of government property for mining uses rather than the validity of the claim, there is no reason to withhold judgment pending an administrative determination of the court's validity."

Attorneys: Jacques B. Gelin and George R. Hyde
(Land and Natural Resources Division)
FTS 739-2762/2731

Osceola v. Kuykendall, ____ F.2d ____ No. 78-1440 (D.C. Cir., August 14, 1978) DJ 90-2-9-403

Indians

On appeal from denial of request, under Rule 60(b), F.R.Civ.P., for relief from judgment, the Government moved for summary affirmance. The court, by order, denied the motion. Further, the court remanded for reconsideration, directing that if the lower court again denies such relief, it must prepare a statement of reasons. This is the latest development in the continuing effort by the plaintiff, who claims to represent a distinct group of Seminole known as the Everglades Miccosutee Tribe of Florida, to avoid the Indian Claims Commission judgment in The Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma v. United States.

Attorneys: Larry A. Boggs and Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 739-2753/2748

Environmental Defense Fund, Inc. v. Costle, ____ F.2d ____ Nos. 78-1471 and 78-1515 (D.C. Cir., July 31, 1978) DJ 90-5-1-5-76

Intervention

EDF filed an action seeking to set aside EPA's approval of water quality standards and implementation plans developed by the Colorado River Basin States for the control of salinity in the Colorado River. The district court allowed the seven Colorado River Basin States and several public interest groups to intervene in the litigation, but denied intervention by the Utah Power & Light Company and several water districts. Granting summary affirmance, the court of appeals held that the district court did not abuse its discretion in denying the intervention motions because the interests sought to be asserted were already adequately represented by other parties who had already intervened.

Attorneys: Erica L. Dolgin and Robert L. Klarquist (Land and Natural Resources Division) FTS 739-4496/2731

Huginnie v. HUD, ____ F.2d ____ No. 78-1137 (7th Cir., July 18, 1978) DJ 90-1-1-2519

Pleading; Failure to State a Claim

On the Government's motion, the Seventh Circuit summarily affirmed the district court's dismissal of disappointed bidders' complaints that HUD improperly rejected their offer to purchase real estate in Chicago and received less than fair value from local redevelopment and housing authorities. Specifically, the court agreed that "plaintiffs have not alleged such facts as to state a redressable claim under Federal law * * *."

Attorneys: Staff of United States Attorney, N.D., Ill., Neil T. Proto and Carl Strass (Land and Natural Resources Division) FTS 739-3888/5037

Sierra Club v. Hathaway, ____ F.2d ____ No. 75-3216 (9th Cir., August 11, 1978) DJ 90-1-4-1205

National Environmental Policy Act

Interior had entered into geothermal leases without preparing an EIS for the particular area in question, a large desert area. The district court denied a preliminary injunction and the court of appeals affirmed. The appellate court based its decision primarily on the facts that (1) there was a programmatic EIS for all geothermal development; (2) no work could be done on the leases except work of a harmless nature, without obtaining Interior's permission; and (3) the district court required monthly reports to assure that no environmental harm would occur. The court of appeals accordingly found that the district court had not abused its discretion.

Attorneys: Edward J. Shawaker and Carl Strass (Land and Natural Resources Division) FTS 739-2813/5037

State of Utah v. Kleppe, ____ F.2d ____ No. 76-1839 (10th Cir., August 8, 1978) DJ 90-1-18-1055

Jurisdiction

The Tenth Circuit held that the State of Utah, in selecting certain Federal public land to replace prior Federal land grants for schools, originally provided for in Utah's Statehood Act but subsequently lost because of Federal reservation or preemption, was entitled to acre-for-acre replacement by selected land of the former grant land, and, therefore, the Secretary of the Interior lacked authority to condition his approval of State selections on whether the selected land substantially differed in value from the value of the original grant (or "base") land being replaced by selection. The Secretary contended unsuccessfully that taking into account comparative values of selected land and "base" land was the lawful exercise of his discretion, provided by Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, in classifying public land as available or nonavailable for selection and disposal. The Tenth Circuit held that the Secretary's Section 7 discretion did not apply to the selections at issue, which Utah had made pursuant to 43 U.S.C. 851-852. The Tenth Circuit also refused to set aside an order of the district court impounding Federal mineral-leasing revenues from some of the selected lands. On appeal the Secretary contended that this seizure of Federal assets, and diverting them from the distribution scheme provided for mineral leasing revenues by the Mineral Leasing Act, constituted an unconsented suit against the United States and an unlawful expansion of Federal court jurisdiction. The Tenth Circuit held that, since this contention was not made in the district court, it could not be raised for the first time on appeal.

Attorneys: Dirk D. Snel, Carl Strass and Raymond N. Zagone (Land and Natural Resources Division) FTS 739-2769/5037/2748

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

AUGUST 22 - SEPTEMBER 5, 1978

LEAA. On August 23 the Senate Judiciary Subcommittee on Criminal Laws and Procedures held its second hearing on the LEAA reauthorization. Like the first hearing on August 16, all witnesses supported the extension of LEAA and were also basically supportive of the Administration's bill, S. 3270, introduced by Senator Kennedy, et al. Althouth no additional hearing dates have been announced, Senator Biden indicated earlier he would have field hearings this year.

Proposed Drug Trafficking Control Act. On August 22 DEA Administrator Peter Bensinger testified before Senator Culver's Judiciary Subcommittee on Juvenile Delinquency concerning the Senator's proposed Drug Trafficking Control Act, introduced as S. 3437 on August 18. Mr. Bensinger and other Administration spokesmen strongly supported S. 3437. The bill would prohibit possession of a Schedule I or II controlled substance aboard a vessel on the high seas with intent to import such substance into the United States. S. 3437 would also make it a crime to fail to file a customs report if one intends to leave the country with more than $5,000 in cash or negotiable instruments, and would require prompt reporting of vessels arriving from foreign ports. Subcommittee staffers have indicated that after the bill is marked up in Subcommittee it will be offered as an amendment after the recess to one of a number of tariff bills which are currently pending on the Senate calendar. The House Ways and Means Committee, which has jurisdiction over tariff bills on the House side, is apparently favorably disposed toward the provisions in the Culver bill. Cognizant members of the Ways and Means Committee would be willing to push for the House to accede to Senate amendments to a tariff bill incorporating the provisions of Senator Culver's drug bill. However, there is a possibility that a jurisdictional dispute may arise in the House because the Coast Guard and Navigation Subcommittee of the Merchant Marine and Fisheries Committee has conducted extensive hearings on a bill, H.R. 10371, which would prohibit possession with intent to distribute of marihuana, cocaine or heroin on board a vessel of the United States.

Stanford Daily. Representative Kastenmeier's Subcommittee on Courts, Civil Liberties and Administration of Justice will hold at least one and probably two days of

hearings the week of September 18 on legislation to overcome the impact of the Stanford Daily decision by restricting the use of search warrants aimed at the news media. The Department will be asked to testify.

Senator Bayh's Subcommittee on the Constitution held a third hearing on August 22. For the first time there was testimony in opposition to legislation -- from the National District Attorneys Association.

Representatives Anderson (Ill.), Crane, and Sawyer have all introduced legislation, bringing the total number of bills to 18 and the co-sponsor list to 97 in the House and 15 in the Senate. The House sponsors include 15 members of the Judiciary Committee. Representative Sawyer's bill was introduced in conjunction with a press statement that a House Republican Task Force on the Stanford Daily decision has been created to push for legislation.

Non-public Schools Amendment. The Committee- approved version of the Elementary and Secondary Education Act (ESEA) bill, S. 1651, contained a title that would have authorized certain forms of federal aid to non-public schools. The Office of Legal Counsel, in an August 22 letter to Senator Earnest Hollings, stated its view that the title would, if challenged, be held unconstitutional. It was deleted from the bill by a 60-30 vote. Senators Biden and Roth attempted to attach to the bill the antibusing legislation that passed the Senate Judiciary Committee late last year. It would have limited the authority of judges to order busing as a remedy in school desegregation cases. The Administration has opposed this provision because of policy reasons and serious reservations about its constitutionality. The amendment was defeated through a motion to table that passed 49-47.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

The Fifth Circuit again reversed a defendant's conviction based on a plea of guilty where the trial court judge did not literally comply with the mandates of Rule 11. The Appellate Court, without reaching the merits of any of the defendant's contentions, found sua sponte the trial judge's use of the U.S. Attorney to advise the defendant of the maximum possible sentence for the charges, rather than addressing him personally, improper and reversed. When the issue of non-compliance with Rule 11 is raised on appeal, any consideration of actual prejudice to the defendant is unnecessary because the rule is prophylactic. United States v. Lincecum, 568 F.2d 1229 (5th Cir. 1978).

(Reversed.)

United States v. William B. Clark, ___ F.2d ___, No. 77-5508 (5th Cir., June 15, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

The defendant collaterally challenged his plea of guilty on the ground that the trial court failed to advise him, at the time he entered his plea, of the maximum sentence which could be imposed. At the time of his plea to violation of the Dyer Act the defendant was advised that he could receive a maximum sentence of five years imprisonment; he should have been advised that the maximum possible sentence which could be imposed under the Youth Corrections Act was six years. He was sentenced to two years probation, which was revoked following the defendant's arrest on a drug charge. He was then sentenced to a straight five year term of imprisonment.

The Tenth Circuit characterized the error in failing to advise the defendant of the possible six year term as "at best technical." He was not prejudiced nor misled by the failure of the district court to advise him. According to the Court, a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice or where there exists exceptional circumstances justifying such relief.

(Affirmed.)

Jerald Lee Evers v. United States, ___ F.2d ___, No. 77-1896 (10th Cir., July 17, 1978).

FEDERAL RULES OF EVIDENCE

Rule 201(f). Judicial Notice of Adjudicative Facts. Time of Taking Notice.

Rule 201(g). Judicial Notice of Adjudicative Facts. Instructing Jury.

The Government appealed the district court's granting of a new trial following defendant's conviction by a jury of illegally intercepting telephone conversations of his estranged wife. The order was based on the failure of the Government to offer evidence to show that the telephone company was a "person engaged as a common carrier in providing or operating . . . facilities for the transmission of interstate or foreign communications." The Government's proof was, therefore, alleged to have failed to satisfy the prima facie case which the Government must place before the jury.

The Court of Appeals rejected the Government's contention that the telephone company's status may reasonably be characterized as a fact within the common knowledge of the jury and that no further record evidence was necessary. The Court also rejected the Government's argument that the phone company's status is the proper subject of judicial notice which may be taken at any stage of the proceeding, including appeal, under Rule 201(f). The Court reasoned that the Congressional intent in adopting the Rule 201(g) provision, whereby in a criminal case a jury may make its own evaluation of a judicially noticed fact, "plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed." Since if notice were taken for the first time after the jury was discharged and the case was on appeal, this could not be done the court found that Rule 201(f) authorizing judicial notice at the appellate level, must yield in the fact of express congressional intent manifested in Rule 201(g) for criminal trials.

(Affirmed.)

United States v. William Allen Jones, Jr., ___ F.2d ___, No. 77-5269 (6th Cir., July 31, 1978).

FEDERAL RULES OF EVIDENCE

Rule 201(g). Judicial Notice of Adjudicative Facts. Instructing Jury.

See Rule 201(f), this issue of the Bulletin for syllabus.

United States v. William Allen Jones, Jr., ___ F.2d ___, No. 77-5269 (6th Cir., July 31, 1978).

FEDERAL RULES OF EVIDENCE

Rule 803(6). Hearsay Exceptions; Availability of Declarant Immaterial. Records of Regularly Conducted Activity.

Rule 803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public Records and Reports.

Among other issues the Ninth Circuit was concerned with the admissibility of certain computer data cards from the Treasury Enforcement Communications System (TECS) which indicated that defendant's car had been recorded crossing the Mexican border on the same night of defendant's arrest for possession of narcotics. While the district court admitted these computer cards under the "business records" exception of Rule 803(6) the Court of Appeals found the Rule 803(8) "public records" exception more applicable. The Court upon review of the legislative history of Rule 803(8) concluded that Congress in excluding "matters observed by . . . law enforcement personnel" from the hearsay exception did not intend to exclude records of routine, nonadversarial matters such as those in question in this case. The simple recordation of licence plate numbers by a customs inspector of all vehicles which pass his station is not of the adversarial confrontation nature which might cloud his perception.

(Affirmed.)

United States v. Maria Orozco and Jose Liva-Corona, ___ F.2d ___, No. 77-2241, 77-1711 (9th Cir., August 9, 1978).

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FEDERAL RULES OF EVIDENCE

Rule 803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public Records and Reports.

See Rule 803(6), this issue of the Bulletin for syllabus.

United States v. Maria Orozco and Jose Liva-Corona, ___ F.2d ___, No. 77-2241, 77-1711 (9th Cir., August 9, 1978).