United States Attorneys

Bulletin

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VOL. 26 DECEMBER 8, 1978 NO. 24

UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney Michael H. Dolinger, Southern District of New York, has been commended by William H. Webster, Director, Federal Bureau of Investigation, for his outstanding efforts in the case of Judith Clavir, et al. vs. United States, et al., a civil action against Government officials.

Assistant United States Attorney James Jensen, Nothern District of Ohio, has been commended by John G. Krogman, Acting Director of the Bureau of Alcohol, Tobacco and Firearms, for his successful prosecution of violations of the Gun Control Act of 1968 in United States v. John R. Jervis.

Assistant United States Attorney Kenneth Josephson Western District of Missouri, has been commended by Vernon D. Meyer, Regional Director, Drug Enforcement Agency, for his successful civil prosecutions of Misemer Pharmaceutical Company.

Assistant United States Attorney Alan Weisberg and Kevin Moore, Southern District of Florida, have been commended by W.F. Hanson, Postal Inspector in Charge, Atlanta, for their successful prosecution of United States v. Lenny Puglisi, a case arising out of a Workers' Compensation Claim.

Assistant United States Attorney William J. McGettigan, Eastern District of Pennsylvania, has been commended by C. Neil Benson, Cheif Postal Inspector, for successful defense of a civil action involving the fatal shooting of David Werbo, a bank messenger, held up at the main post office in Philadelphia.

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POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorney has entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

DISTRICT	UNITED STATES ATTORNEY	ENTERED ON DUTY
MD Florida	John J. Daly, Jr.	11/20/78

(Executive Office)

* * *

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POINTS TO REMEMBER

ACCESS TO TAX INFORMATION IN NONTAX CRIMINAL CASES: IT'S BEING EXPEDITED

Efforts by the Criminal Division and IRS have reduced the excessive delays initially experienced by prosecutors seeking access to tax information in nontax criminal cases. Applications for authorization to seek court orders for taxpayer return information under 26 U.S.C. 6103(i)(1) [hereinafter, (i)(1)] and for "head of agency" requests for nonreturn information under 26 U.S.C. 6103(i)(2) [hereinafter, (i)(2)] are now being decided within an average of four business days. And the national IRS office now acts upon (i)(1) court orders and (i)(2) requests within 13 business days. Of course, IRS requires some additional time following authorization to retrieve and reproduce records; this period varies with the IRS district involved. Both IRS and the Criminal Division will expedite processing in emergency situations; prosecutors are urged, however, to anticipate disclosure needs to avoid unnecessary emergencies.

Use of (i)(1) and (i)(2) varies widely, but many U.S. Attorneys' offices are successfully seeking tax information; approximately 900 returns were disclosed pursuant to (i)(1) court orders during the five-month period ending December 31, 1977. A total of 174 (i)(1) court orders and 277 (i)(2) head of agency requests were approved during the twelve-month period ending August 31, 1978.

In summary, while the 1976 Tax Reform Act imposes substantial burdens upon law enforcement and unavoidably causes significant delay, prosecutors should be aware that (i)(1) and (i)(2) do offer avenues of access to tax information in nontax criminal cases and that the Criminal Division will continue to do everything possible to expedite and facilitate use of these statutory provisions. Complete instructions and forms for seeking disclosure under (i)(1) and (i)(2) appear in the United States Attorneys Manual at 9-4.900 et seq.

(Criminal Division)

* * *

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JOINT TAX-NONTAX INVESTIGATIONS ENCOURAGED

United States Attorneys' offices are reminded that joint tax-nontax investigations should be undertaken in appropriate cases to avoid a subsequent bar to prosecution of tax offenses that might otherwise result from the Department's policy against successive federal prosecutions. The United States Attorneys' Manual sets forth joint investigation procedures at 9-4.970. An important collateral benefit of a joint investigation is the simplified access to tax records available through 26 U.S.C. 6103(h).

Tax records obtained under §6103(h) during the course of a joint investigation may continue to be used if tax aspects of the case are terminated -- provided a court order is obtained under §6103(i)(1). While it has always been Department policy to obtain an (i)(1) order before proceeding to use tax records in the residual nontax case, such an order is now required by virtue of an amendment to the Treasury Department's Temporary Regulations on Procedure and Administration, §404.6103(h)(2)-1(a)(2), [43 Fed. Reg. 29115]. The tax information previously obtained during the joint investigation may be used, however, in making the showing necessary to secure the §6103(i)(1) order required for continued access in the residual nontax case.

(Criminal Division)

* * *

CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Copeland v. Marshall, No. 77-1351 (D.C. Cir., October 30, 1978) DJ 170-16-184

Title VII; Attorney's Fees

The court of appeals has reversed an award of $160,000 in attorney's fees in a Title VII sex discrimination suit against the Department of Labor. The case, which involved extensive discovery proceedings and a one-week trial, resulted in back pay awards to plaintiffs totalling slightly more than $30,000 and in a new Department affirmative action and training program. Counsel, billing at what they asserted to be the normal commercial rates in Washington, D.C., claimed from the Government over $200,000 in fees, of which $160,000 was allowed by the district court. The court of appeals reversed, and remanded for reconsideration. The court held that "special caution" is appropriate where the Government is involved due to the incentive for inflated fee claims induced by the Government's "deep pocket." The court of appeals suggested a number of attorney's fee standards to the district court for use in Government cases--including the abandonment of the customarily-claimed hourly-fee rates in favor of a principle of reimbursment to a law firm for its actual costs plus a reasonable profit. The court emphasized the necessity for an evidentiary foundation for attorney's fee awards and for a district court explanation of its decision to award a particular amount of fees.

Attorney: Neil I. Levy (Assistant U.S. Attorney)
FTS 426-7285

Raven v. Panama Canal Co., No. 78-1656 (5th Cir., November 2, 1978) DJ 145-138-14

Freedom of Information and Privacy Acts; Aliens; Exemption 1.

Plaintiff, a Panamanian citizen employed by the Panama Canal Company, sought access to classified documents relating to herself pursuant to the Privacy Act and the Freedom of Information Act (FOIA). The court of appeals, affirming a district court judgment, has held that the Privacy Act, by its own terms, applies only to United States citizens and to certain alien residents, and not to foreign citizens residing outside the United States. The court further ruled that the Act's distinction between aliens and citizens was not violative of the Equal Protection Clause. Finally, the Fifth Circuit joined a number of other circuits, e.g., Weissman v. CIA, 565 F.2d 692 (D.C. Cir.,

1977), in ruling that classified documents are exempt from FOIA or Privacy Act disclosure pursuant to Exemption 1 so long as proper procedures have been followed and agency affidavits sufficiently describe the withheld documents. The court declined to order in camera inspection, leaving that to the discretion of the district courts.

Attorney: Paul Figley (Civil Division)
FTS 724-7462

Town Court Nursing Center, Inc. v. Cooper, Nos. 77-2221, 77-2222, 77-2444 (3d Cir., September 29, 1978) DJ 137-62-598
Klein v. Califano, No. 77-1896 (3d Cir., September 29, 1978) DJ 137-48-582

Nursing Homes; Relocation; Procedural Due Process

The Third Circuit, sitting en banc, has ruled in these cases that nursing home patients are entitled to procedural due process protections when HEW terminates federal Medicaid funding for failure to comply with federal quality standards. Additionally, in such cases, the existing administrative procedures were held to protect adequately the due process rights of the terminated nursing homes themselves. The patients were held to have a "property interest" sufficient to trigger procedural due process because the termination in Medicaid would result in the patients' forced relocation to another nursing home, and Medicaid statutes and regulations "create a legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer."

Attorneys: William Kanter (Civil Division)
FTS 633-3354
Walter S. Batty (Assistant U.S. Attorney)
FTS 597-9495

Vergara v. Hampton, No. 77-2101 (7th Cir., August 24, 1978) DJ 35-23-60

Civil Service; Aliens, Due Process

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Supreme Court held invalid a Civil Service Commission regulation barring resident aliens from the federal competitive civil service. The President then issued an executive order renewing the bar. The Seventh Circuit has upheld the validity of the executive order. The court of appeals first held that the President was statutorily authorized to bar aliens from the civil service. The court then ruled that 42 U.S.C. §1981, giving equal rights to all persons "to make and enforce contracts", was not intended by Congress to apply to the citizenship qualifications for

federal civil service. Finally, the court decided that the executive order was constitutional. The court pointed to the suggestions in Mow Sun Wong that such an order would not be violative of the Due Process Clause because it could be justified as a presidential determination that the national interest required the citizenship qualification.

Attorney: Bruno Ristau (Civil Division)
FTS 724-7179

CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Caplan v. Bureau of Alcohol, Tobacco and Firearms, No. 78-6097 (2nd Cir., October 31, 1978) DJ 145-3-1827

Freedom of Information Act; Investigatory Manual; Exemption 2

Disclosability of a manual entitled "Raids and Searches," issued by the Bureau of Alcohol, Tobacco and Firearms for the training and guidance of its agents, was the issue in this FOIA case. The district court (Southern District of New York) held that no exemption applied, but refused to order release of the manual on the basis of "equitable discretion." The Second Circuit has affirmed on the basis of Exemption 2, holding that that exemption protects investigatory manuals release of which has the potential of assisting law violators to evade detection.

Attorney: Carl T. Solberg (Assistant U.S. Attorney)
FTS 662-0055

Evans v. Wright, No. 78-1192 (5th Cir., October 16, 1978) DJ 145-16-1241

Tort Suits Against Government Officials; Official Immunity

Plaintiffs, providers of medical equipment, sued two HEW program integrity specialists for alleged tortious interference with plaintiffs' contracts with Medicare patients. Plaintiffs claimed that the HEW employees had told patients not to deal with plaintiffs or to pay bills sent by plaintiffs. The HEW employees filed affidavits indicating that their actions were taken pursuant to their function to prevent fraud and double-billing. The district court dismissed the lawsuit on the ground of official immunity. The Fifth Circuit affirmed, holding that Butz v. Economou applies to constitutional claims only, and does not affect federal employees' absolute immunity from tort claims based on activities within the "outer perimeter" of federal employees' official duties.

Attorney: Robert J. Castellani (First Assistant United States Attorney)
FTS 242-6954

Ginsburg, Feldman & Bress v. Federal Energy Administration, No. 76-1759 (D.C. Cir., October 31, 1978) DJ 145-0-682

Freedom of Information Act; Auditing Manual; Exemption 2

A Washington, D.C. law firm sought disclosure under the Freedom of Information Act of a manual of auditing techniques used by Department of Energy auditors to check whether oil refiners are complying with oil price regulations. The government argued that release of the manual would enable oil refiners to evade the regulations. The district court agreed, holding that most of the manual was exempted from disclosure by Exemption 2, which makes the FOIA inapplicable to matters that are "related solely to internal personnel rules and practices of an agency." The court of appeals, sitting en banc, and without opinion, has affirmed by an equally divided court. The judge who did not participate (Judge Leventhal) indicated, however, in a concurring opinion in a related case (Jordan v. U.S. Department of Justice) that he would apply Exemption 2 to an investigatory or auditing manual whose release would enable regulated entities to evade enforcement of the law.

Attorney: Michael Kimmel (Civil Division)
FTS 633-3418

Tigue v. Swaim, No. 77-1349 (8th Cir., October 20, 1978) DJ 145-14-1110

Libel and False Imprisonment; Official Immunity

An Air Force officer complained of a base practice requiring $1.00 contributions for gifts to departing officers. Apparently, this complaint and other actions triggered a series of psychiatric examinations of the officer pursuant to the Health Reliability Program for access to nuclear weapons. During this process, the Base Hospital Commander made certain statements which the officer asserted to be defamatory. The officer was also hospitalized in a mental ward for 22 days, an action characterized by the officer as false imprisonment and an unconstitutional deprivation of liberty. The officer ultimately was found fit and was restored to duty. His lawsuit against the Hospital Commander was dismissed by the district court on the ground of official immunity. The Eighth Circuit affirmed. The court held that, under Butz v. Economou, all military superior officers are not entitled to absolute immunity from constitutional claims, but that where the military official takes action closely connected to national security interests (in this case, access to nuclear weapons), absolute immunity for such "special functions" is appropriate under Economou.

The court declined to reach the government's alternative argument that the policies of Feres v. United States, 340 U.S. 135 (1950) and its progeny, also immunize military personnel from lawsuits for service-connected injuries.

Attorney: Fletcher Jackson (Assistant U. S. Attorney)
FTS 740-5342

United States v. Kearns, No. 77-1841 (D.C. Cir., November 13, 1978) DJ 46-16-1032

Government Suit for Breach of Employee Trust

The United States filed this common law action to recover approximately $350,000 in profits derived by two former heads of the Export-Import Bank in a private stock sale to a leading foreign customer of the Bank. Our complaint charged that the sale violated standards of federal employee conduct--as well as the express terms of a "blind trust" agreement one of the employees had executed with the United States--and that the funds were thus earned by the employees in breach of their "fiduciary duty." The district court dismissed our complaint for failure to establish either that the United States had sustained any financial loss or that the employees had practiced any fraud on the government as a result of the transaction. On our appeal, the District of Columbia reversed. The Court held that the United States is entitled to pursue an action based on the breach of employee trust without express statutory authorization and further held that recovery may lie solely upon proof that receipt of the funds could possibly compromise the loyalty of the government employees.

Attorney: Mark Gallant (Civil Division)
FTS 633-2689

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

Kinscherff v. United States, ____ F.2d ____ No. 77-1083 (10th Cir. November 1, 1978) DJ 90-1-23-2111

Quiet Title Actions

Plaintiffs in this action sought, under the Quiet Title Act, a declaration that they had a right to use a road built by the United States over its land. The court of appeals held that the alleged public's right to use the road is not a property right assertable in an action under the Quiet Title Act. Plaintiffs further asserted an easement or way of necessity as successors in interest to a guarantee of the United States. Such an alleged easement was found to be cognizable under the Quiet Title Act. As the district court had dismissed without receiving evidence on this issue, a remand for further proceedings was ordered. Otherwise, the district court's dismissal of the Pueblo of Santa Ana, which we also represented, was held proper, as that tribe had not consented to this suit.

Attorneys: Larry A. Boggs and Carl Strass (Land and Natural Resources Division) FTS 633-2753/5037

Shell Oil Co. v. Russell E. Train & Environmental Protection Agency, ____ F.2d ____ No. 76-1870 (9th Cir. November 3, 1978) DJ 90-5-1-7-277

Jurisdiction; Federal Water Pollution Control Act

The Ninth Circuit affirmed the dismissal, for lack of subject matter jurisdiction, of Shell's complaint challenging the decision by a California agency rejecting Shell's permit and variance applications for its Martinez, California, industrial complex, under the Federal Water Pollution Control Act. Judge Wallace dissented.

Attorney: Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2762

City of Klawock v. Gustafson, ____ F.2d ____ No. 77-3328 (9th Cir. November 3, 1978) DJ 90-2-11-7006

Attorneys Fees

The Ninth Circuit held that under the common fund doctrine, attorneys for the city who prevailed in a case involving 14 vacant townsite lots in Klawock, were entitled to reasonable attorneys' fees for some 333 vacant townsite lots, which will be deeded to the city along with similar vacant lots elsewhere, based upon the changed opinion of the Regional Solicitor of the Department of the Interior.

Attorneys: Jacques B. Gelin (Land and Natural Resources Division) Frances M. Green (Deputy Associate Attorney General) FTS 633-2762/3117

King v. United States, ____ F.2d ____ No. 77-1907 (4th Cir. October 30, 1978) DJ 90-1-5-1450

Quiet Title Action

In this Quiet Title Act case, the Fourth Circuit reversed the district court's holding that the action was barred by the 12-year limitation of the Act on the ground that the district court had made insufficient findings to determine this issue. The district court had found that the United States had exercised dominion and control (through granting special use permits) over part of a tract of land to which it held a deed, but did not exercise over the portions of this tract which were in dispute. Relying on North Carolina adverse possession law, that provides that exercise of dominion over part of a tract where a party holds a deed to the whole tract is effective as to the entire tract, the district court ruled that the United States' exercise of dominion as to part of the tract was effective to impart notice for the purposes of the Quiet Title Act regarding the entire tract. The court of appeals noted, however, that North Carolina law also provides for an exception to this rule where there are overlapping deeds which arguably exist here. Thus, the court remanded with instructions that the district court made findings as to whether the deeds overlap, and whether any additional acts by the United States would be sufficient to impart notice under the Quiet Title Act.

Attorneys: Robert W. Frantz and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4426/2762

United States v. 478.34 Acres in Spencer County, Kentucky (Cook), ____ F.2d ____ No. 76-1706 (6th Cir. October 17, 1978) DJ 33-18-299-1

Condemnation; costs

In a two-page order, the Sixth Circuit modified the mandate in this case so as to delete the awarding of costs on appeal against the United States. In its previous decision on the merits, the Sixth Circuit had ruled in favor of the landowners (the appellants) and had remanded the case for a new trial. The court's subsequent mandate awarded costs on appeal against the United States. In response to the government's motion to modify the mandate, the court issued this order holding that costs on appeal could not be awarded against the United States in condemnation cases unless the taking is unauthorized or the proceeding had been abandoned. The court reasoned that costs can be taxed against the United States only if statutorily authorized and that 28 U.S.C. 2412 does not authorize the taking of either trial or appellate costs against the United States in condemnation cases.

Attorneys: Michael A. McCord and Raymond N. Zagone (Land and Natural Resources Division) FTS 633-2774/2748

Hat Ranch v. Andrus, ____ F.2d ____ No. 78-1605 (10th Cir. October 18, 1978) DJ 90-1-12-463

Taylor Grazing Act

The district court entered an order declaring that the Secretary had not violated the Taylor Grazing Act in denying the plaintiff's request for a 10-year renewal of its grazing permit but also held, in the same order, that the case must be remanded to the IBLA to reconsider its determination in light of the BLM Organic Act which became effective just a few days prior to the Secretary's decision and which was not considered in the administrative proceedings. Granting our motion to dismiss Hat Ranch's appeal for lack of jurisdiction, the court of appeals held that the remand order was not a final judgment nor otherwise appealable.

Attorneys: Robert L. Klarquist and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2731/2769

County of Thurston v. Andrus, ____ F.2d ____ No. 77-1790 (8th Cir. November 6, 1978) DJ 90-2-5-397

Indians

The Eighth Circuit affirmed a district court determination that Omaha and Winnebago trust patent allottees hold a vested right to tax-immunity under the General Allotment Act, for the period of trusteeship, which cannot be abrogated without their consent. The court decided that the Brown-Stephens Act, which provides for the imposition of local taxes on Omaha and Winnebago trust lands, cannot be enforced without the Indians' consent. Accordingly, the court held that since the Indians had revoked their consent they could no longer be held responsible for local taxes under the Act. In accordance with the holding, the court vacated the district court's mandamus order, which called for the Secretary of the Interior to collect rents to pay taxes which the Indians had in the past agreed to pay, but which the Secretary had mistakenly failed to pay. The court found that although the Secretary must pay the taxes if the Indians consent, a mandamus order calling for the Secretary to take future rents to pay back taxes is not authorized by the Brown-Stephens Act.

Attorneys: Nancy B. Firestone and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2757/2762

Adrian Edwards v. Kleppe, ____ F.2d ____ No. 77-3315 (9th Cir. October 26, 1978) DJ 90-1-18-1073

Mining

At the administrative level in this case, Interior invalidated a rock and gravel placer mining claim within a national forest for want of a valid discovery prior to the 1955 withdrawal of such materials from location under the mining laws. On review, the district court held that the Secretary's decision was not supported by substantial record evidence. Because that court gave no explanation of its reasoning and rejection of the Secretary's analysis of the facts, we appealed. The Ninth Circuit not only vacated the judgment, it reversed, specifically holding, after discussing the facts, that the Secretary's decision was supported by substantial evidence.

Attorneys: John J. Zimmerman and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4519/2762

Brothers v. Newhall, ____ F.2d ____ No. 77-1093 (9th Cir. October 17, 1978) DJ 90-1-18-1143

Mining

After the Interior Department invalidated a mining claim on national-forest land, Forest Service employees notified the former mining claimant that, if she failed to remove two cabins from her former claim by a specified deadline, the cabins would become property of the United States. Two days before the deadline, plaintiffs, who were friends of the former claimant, filed a mining claim coinciding with the boundaries of the earlier claim. On the deadline date, Forest Service employees posted the cabins with "no trespassing" signs, which stated that the cabins were federal property. Plaintiffs' suit against several Forest Service employees was based on an alleged conspiracy to deprive them of their property. Summary judgment for the Forest Service employees, affirmed by the Ninth Circuit (in an opinion not to be reported) was based on immunities accorded federal employees performing their official duties reasonably and in good faith. The court of appeals also held that "buildings abandoned by a former claimant whose claim was invalidated become the property of the United States," and that plaintiffs, beyond filing a new mining claim, had failed to prove any facts establishing their possessory interest in the abandoned cabins.

Attorneys: George R. Hyde and Dirk D. Snel (Land and Natural Resources Division) FTS 724-6762; 633-2769

Manatee County, Fla. v. Train, ____ F.2d ____ No. 76-4115 (5th Cir. November 3, 1978) DJ 90-5-1-7-203

Federal Water Pollution Control Act

The court of appeals ruled that under Section 202(b) of the 1972 Amendments to the FWPCA, the certification of a state water board that a sewage project would improve ground water (resulting in a large increase in the size of the grant for the sewage plant) was binding upon EPA, in the absence of fraud. EPA had objected upon the ground that the certification could not possibly be correct. The court of appeals did not discuss either the fact that the State did not dispute the impossibility of the certification, or the fact that there was no evidence either before the state board or the courts that the project would aid ground water.

Attorneys: Carl Strass and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-5037/2762

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

OCTOBER 31 - NOVEMBER 14, 1978

The following bills, supported or sponsored by the Department, were passed in the closing days of the 95th Congress:

S. 1566 — Foreign Intelligence Surveillance
-Provides a system for judicial approval of national security wiretaps and electronic surveillance. It establishes a statutory procedure covering all foreign intelligence electronic surveillance in the U.S.

H.R. 7843 — Omnibus Judgeships
-Creates 113 new district court judgeships and 4 temporary judgeships, and 35 new circuit court judgeships and provides that courts of appeals with more than 15 active judges may use administrative units to perform en banc functions with a reduced number of members.

H.J. Res. 638 — ERA Extension
-Extends deadline for ratification of the Equal Rights Amendment until June 30, 1982.

H.R. 8200 — Bankruptcy Reform
-Creates bankruptcy courts as adjuncts to district courts; overhauls bankruptcy laws and creates a pilot program of U.S. Trustees.

S. 555 — Ethics and Special Prosecutor
-Establishes a mechanism for appointment of a special prosecutor in appropriate cases; sets financial disclosure requirements for officials of the Executive, Legislative and Judicial branches of government; Sets post-employment restrictions for federal officials.

S. 995 — Pregnancy Disability
-Amends the Civil Rights Act to prohibit discrimination on the basis of pregnancy. An outgrowth of holding in General Electric case that authorized exclusion of pregnancy benefit in disability benefits in labor contract. The new law prohibits such discrimination, in

effect, overcoming that holding.

S. 2411 Marshals Payment for Offenders Transportation
-Authorizes payments by U.S. Marshals for transportation for indigent offenders who must appear in another district.

S. 2049 Witness Fees
-Raises fees for witnesses before federal courts from $20 to $30 per day and provides for appropriate per diem and travel expenses.

S. 2075 Jury Fees
-Raises fees for federal jurors from $20 to $30 per day and provides for per diem and travel.

S. 1487 Cigarette Bootlegging
-Makes the transfer of large quantities of untaxed cigarettes a federal offense.

H.R. 12509 Nazi War Criminals
-Facilitates deportation of Nazi war criminals.

S. 2399 Psychotropic Substances
-Permits the United States to meet its obligations under provisions of the Convention on Psychotropic Substances; provides for forfeiture of proceeds of illegal drug transactions.

S. 3336 Services for Drug Dependent Offenders
-Transfers authority to provide services for federal drug dependent offenders from the Bureau of Prisons to the Administrative Office of the U.S. Courts Probation Service.

H.R. 14030 Court Interpreters
-Provides for interpreters in judicial proceedings involving persons with linguistic or hearing problems.

H.R. 13471 Financial Institutions Regulatory Act
-This is an overall bank reform bill. Title XI covers privacy in financial transactions and offers protection for bank customers, including requirements for notification of a customer that a government agent is seeking his records.

H.R. 4727 Rape Victim Privacy
-Sets restrictions on the introduction of evidence of prior sexual conduct of a rape victim.

H.R. 11002 Government Contract Disputes
-Makes major changes in procedures for resolution of disputes arising out of government contracts.

H.R. 12393 Subpoenas Under the False Claims Act and Forfeiture of Vehicles Used to Smuggle Aliens
-Provides for nationwide service of subpoenas in False Claims Act cases; also provides for forfeiture of vehicles used to smuggle illegal aliens.

H.R. 13892 Residency Requirements for U.S. Attorney in Guam
Allows the U.S. Attorney and the U.S. Marshal to serve for Guam and the Northern Marinanas.

These bills did not pass.

H.R. 9622 Diversity of Citizenship
-Would repeal jurisdiction in federal district courts based on diversity of citizenship of the parties involved.

S. 1613 Magistrates
-Would substantially expand the criminal and civil jurisdiction of U.S. Magistrates.

S. 2253 Arbitration
-Would create a minor dispute resolution resources center within the Department and would provide seed money grants to state for creation of minor dispute resolution projects.

S. 1437 Federal Criminal Code Reform
-Would revise and recodify the Federal Criminal Code, including establishment of a new sentencing structure.

H.R. 9400 Rights of Institutionalized Persons
-Would authorize the Attorney General to bring action for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Conttitution or U.S. law.

S. 2252 Undocumented Aliens
-Would grant permanent resident status to undocumented aliens who have resided in the United States continuously since prior to January 1, 1970. Also would create five-year temporary resident alien status for undocumented aliens who have lived in the United States continuously since before January 1, 1977. Also, would restrict opportunities for undocumented aliens in the U.S.

H.R. 9219 Federal Tort Claims Amendments
-Would provide for substitution of the U.S. government as defendant in place of any federal employee as long as the employee was acting within the scope of his duty when the tort arises. Would remove the threat of civil suit from employees and end the government's having to pay for private counsel for employees so sued. Also, sets a procedure for allowing victims who have sued successfully to initiate and appeal disciplinary proceedings against the offending employee to provide a substitute form of accountability.

S. 1874 To Restore Effective Enforcement of the Antitrust Laws
Would allow consumers who are victims of price-fixing conspiracies to collect damages from manufactures.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection.

On appeal from their convictions for violation of the Dyer Act, the defendants contended, inter alia, the trial court erred in admitting physical evidence, specifically certain vehicle identification number plates and a sack of automobile locks and ignition switches, which had not been produced by the Government for examination prior to trial. The Court of Appeals, however, upheld the admission of these objects. First, with respect to the identification plates, the Court found the Government had sufficiently informed the defendant that these items were in its possession, thereby shifting to defense counsel the burden of submitting a request for inspection. In any event, the Court noted, the trial court did grant a half-day continuance to permit the defendants to inspect the plates.

As to the automobile locks and ignition switches, which the defendants had been unaware existed, the Court held they were outside of the pretrial discovery and inspection order since they were introduced not as part of the Government's case-in-chief, but as impeachment evidence during cross-examination of the defendant. Also, the Court found the defendants had not preserved this issue for appeal since they failed to specify this ground when the evidence originally was admitted.

(Affirmed.)

United States v. Danny K. Lambert and Donald Basden, 580 F.2d 740. (5th Cir., September 20, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection.

One of the defendants appealed his conviction of a series of marijuana related violations contending, inter alia, that his constitutional rights were violated by the admission into evidence of portions of a conversation recorded between him and a government informer. This allegation was based upon the admitted failure by the Government to deliver the tape for inspection under Rule 16, and the subsequent admission by the trial court of an edited transcript of the tape for impeachment purposes. The tape had been suppressed by the court in the Government's case in chief.

The Fifth Circuit found the tape admissible impeachment evidence. An error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant. United States v. James, 495 F.2d 434, 436 (5th Cir. 1974). The tape here contained nothing exculpatory, according to the Court, and was relevant and incriminating.

(Affirmed.)

United States v. Nina Helene Fogelman, et al., 581 F.2d 1167 (5th Cir., October 11, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 33. New Trial.

The defendants were convicted of conspiracy to distribute and import marijuana. While their appeals were pending they sought and were granted a "temporary remand" to allow the district court to entertain a motion for a new trial based on newly discovered evidence. The Court of Appeals in dicta held it would have been appropriate for the defendants to present their motions for a new trial directly to the district court. In that situation, the district court "may not grant the motion but may deny it, or it may advise the Court of Appeals that it would be disposed to grant the motion if the case were remanded." This decision followed a series of Fifth Circuit cases decided prior to United States v. Johnson, 487 F.2d 1318, (5th Cir. 1974), cert. denied, 419 U.S. 825. In Johnson the Court had held the proper procedure for obtaining consideration of such motions "[was] to move that the circuit court remand for good cause shown."

(Case remanded.)

United States v. Rodosvaldo Fuentes-Lozano, et al. 580 F.2d 724 (5th Cir., September 7, 1978).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure.

The defendants appealed their convictions of conspiracy to manufacture phencyclidine (PCP) in violation of 21 U.S.C. §§841(a)(1) and 846. One defendant alleged that the warrant used in securing important evidence from two homes and a garage was invalid. The warrant was issued under State rather than Federal authority upon the application of a California narcotics agent. There was no attempt to comply with the requirements of Rule 41, although Federal officers participated in all aspects of the investigation, participated in the searches, and made the arrests at the conclusion of the searches. Additionally, the Government in attempting to take advantage of the fact that under Federal law, unlike State law, the defendant would have no standing to contest two of the three searches, contended it was in reality a "federal" investigation and thus a "federal warrant." This argument, according to the Court, was a "very dangerous one for the government to have made because the involvement of which it spoke, . . . , made it incumbent on them to comply with [Rule 41]."

According to the Court, "[t]he Federal Rules are designed as standards for Federal officers and it is the obligation of the officers to obey them, but that policy is defeated if the Federal agent can flout them . . . ." See Rea v. United States, 350 U.S. 214 (1956). In United States v. Burke, 517 F.2d 377 (1975), the Second Circuit found that suppression was appropriate when: "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." The Ninth Circuit adopted the Second Circuit reasoning and remanded for a determination of whether or not, there was intentional and deliberate disregard of Rule 41.

(Affirmed in part, remanded in part.)

United States v. Philip Chris Radlick and George Henry Willers, 581 F.2d 225 (9th Cir., August 31, 1978).

FEDERAL RULES OF EVIDENCE

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

The defendant was convicted of two counts of wire fraud in violation of 18 U.S.C. §1343. Evidence adduced at trial indicated the defendant had posed as a farm chemical salesman in order to defraud a farmer out of $350,000. The key issue at trial was the identification of the defendant as one of the perpetrators of the fraud. The defendant alleged that the trial court erred in admitting very prejudicial testimony from a witness who identified the defendant as the individual who defrauded him in a similar scheme two and one-half months prior to the fraud alleged here. The admissibility of the challenged testimony was upheld by the Court of Appeals because of its relevance under Rule 404(b) for proving identity. The Court relied on the fact that identity was so strongly contested, the similarity in schemes, and the closeness in time to the crime charged at trial. To reverse a district court admission of other crimes evidence, the Court of Appeals must find the testimony so prejudicial that its probative value is outweighed by unfair prejudice. Here, according to the Court, the other evidence of identity was "not so strong that resort to evidence of this other scheme was unnecessary and unfairly prejudicial."

(Affirmed.)

United States v. Louis K. Bohr, 581 F.2d 1294 (8th Cir., July 26, 1978).

FEDERAL RULES OF EVIDENCE

Rule 801(d)(2). Definitions. Statements Which are Not Hearsay. Admission by Party-Opponent.

The Court of Appeals held the trial judge erred in excluding certain evidence from the jury in defendant's trial for possession of phenmetrazine with intent to distribute. Specifically, the Court found that the disputed evidence was relevant and did not constitute inadmissible hearsay. The contested evidence was statements made by an informant which were contained in an affidavit used to support a search warrant. These statements indicated that a person other than the defendant was selling phenmetrazine from the house in which the defendant was arrested for possession with intent to distribute. The incriminating evidence presented at trial included seventy-seven pills and a stash of money found in the basement of the house.

The Court of Appeals found that evidence that another person was selling phenmatrazine from the house was "decidedly" relevant. If the jury had believed this other person was a dealer in residence, it might have concluded that the twelve pills found in the defendant's possession had been purchased from this person, and that this dealer, rather than the defendant, exercised dominion and control over the seventy-seven pills with intent to distribute them. There was no evidence presented of any actual sales by the defendant.

Under Rule 801(d)(2)(B) an out-of-court statement is not barred as hearsay if a party-opponent "has manifested his adoption or belief in its truth. . . ." The Court held the government was a party-opponent, finding that when the "government has indicated in a sworn affidavit to a judicial officer that it believes particular statements are trustworthy, it may not sustain an objection to the subsequent introduction of the statements on grounds that they are hearsay." Further stating, that "when the government authorizes its agent to present sworn assurances that certain matters are true and justify issuance of a warrant, the statements of fact or belief in the officer's affidavit represent the position of the government itself, not merely the views of its agent." The Court distinguished prior precedents holding the party-opponent exception not applicable to the government, most of which were decided before the adoption of the Federal Rules of Evidence, as establishing only that the prosecution is excepted from the general rule that admissions made by an agent during the course of the agency and concerning matters within the scope of the agency are binding on his principal. Clearly, the Court suggested, statements in which the government has manifested its "adoption or belief" stand on more solid grounds than mere out-of-court assertions by a government agent.

(Reversed and remanded.)

United States v. William D. Morgan, 581 F.2d 933 (C.A.D.C., June 7, 1978).

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ADDENDUM

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

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

DATE	AFFECTS USAM	SUBJECT
11/8/78	1-11.901	New Request Form for Authorization to Apply for Compulsion Order (Immunity)
11/13/78	4-2.433	Payment of Compromises in Federal Tort Claims Act Suits
11/9/78	9-1.178	Strike Forces--Appointment of Strike Force Attorneys
11/9/78 11/9/78	9-7.000; 9-7.317	Defendant Overhearings & Attorney Overhearings Wiretap Motions
11/9/78	9-73.300	Surrender of Certificate of Naturalization
11/9/78	9-75.040	Broadcasting Obscene Language

(Executive Office)

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