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Executive Office for U.S. Attorneys
William P. Tyson, Acting Director

POINTS TO REMEMBER

Litigation in Cases over which the Wildlife Section has Supervisory Responsibility

On October 1, 1979 , the Land and Natural Resources Division created the Wildlife Section to coordinate all civil and criminal cases, matters, and proceedings arising under the following wildlife laws:

1. Endangered Species Act of 1973, 16 U.S.C. 1531-1543;
2. Lacey Act, 18 U.S.C. 41-44, 47;
3. Black Bass Act, 16 U.S.C. 851-856;
4. Airborne Hunting Act, 16 U.S.C. 742 j-1;
5. Migratory Bird Treaty and Conservation Acts, 16 U.S.C. 701 et seq.;
6. Wild Horses and Wild Burros Act, 16 U.S.C. 1338;
7. Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d;
8. Fish and Wildlife Coordination Act, 16 U.S.C. 666a;
9. Fish and Wildlife Act of 1956, 16 U.S.C. 742 a-j;
10. Dingell-Johnson Fish Restoration Act, 16 U.S.C. 777-777k;
11. Marine Mammal Protection Act, 16 U.S.C. 1372 (b) - (e), 1375;
12. Whaling Convention Act, 16 U.S.C. 916 c(a) (2), 916 f;
13. Wildlife Restoration Act, 16 U.S.C. 669-669i; and
14. National Wildlife Refuge System Administration Act, 16 U.S.C. 668 dd, 668 ee.

Title 5 of the United States Attorney's Manual is currently being revised to include information concerning the Wildlife Section.

The Wildlife Section will expend a considerable amount of its resources in a new wildlife import enforcement program designed to reduce the massive illegal trade in imported wildlife. As part of this effort, it is now negotiating Memoranda of Understanding with enforcement agencies which will establish task forces of lawyers and agents in each of the major areas into which wildlife is imported. Lawyers from the section will visit each of these areas to discuss the task forces with you. In addition to stressing import cases, the new section will have responsibility for all civil and other criminal cases under these statutes, and they will be available to aid you in any way possible.

In this context, I wish to stress the importance of providing the Section with a copy of the complaint, information, or indictment as well as copies of all other papers filed during the course of criminal or civil litigation arising under the statutes administered by the Wildlife Section. (See United States Attorney's Manual 5-1.511). In addition, in order to provide the section with information concerning cases currently filed in each judicial district, it would be most helpful if you would send the Wildlife Section a list of cases and matters your office is handling under the above wildlife statutes along with a copy of the complaint, information, or indictment filed in each case. This information will assist the Wildlife Section in ascertaining present activity under these statutes and in determining where and how its efforts should be concentrated.

If you have any questions concerning the operation of the section or the statutes under its jurisdiction you may contact Kenneth Berlin, Chief, Wildlife Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530 or telephone (202) 633-2716.

(Land and Natural Resources Division)

Collection of Educational Loans and Educational Assistance Overpayments Referred by Department of Education and Veterans Administration

The number of defaulted educational loans from the Department of Education and educational assistance overpayment cases referred by the Veterans Administration to U.S. Attorneys for litigation has increased greatly during the last year, due to a high priority effort by both referring agencies. Some U.S. Attorneys have felt unable to absorb the additional caseload and some have reportedly refused to accept further referrals or have returned some legitimate collection matters to the referring agencies. (This is distinguished from the return of individual case files which, upon review, are found to be deficient for litigation.)

It is vitally important that collection efforts be made in all legitimate collection cases. The funds must be recovered in order to continue Government programs. Equally important is that blanket refusals or returns of legitimate cases would seriously erode the role of the Department of Justice as the primary litigator for the Government.

Several efforts are being made to assist U.S. Attorneys' Offices with these collections programs. Each U.S. Attorney should be in close communication with the Department of Education and VA contacts whose names are listed on the attached pages, to arrange for whatever assistance or further case information may be available. Further information regarding collections matters is available from the Commercial Litigation Branch of the Civil Division, by contacting Mr. David Epstein, Director (FTS 724-7450), or Ms. Jane Restani, Assistant Branch Director (FTS 724-7329).

The following efforts have been made by the Department of Justice to provide assistance and agency coordination in collection of these cases. The Civil Division is making attempts to discuss with the Department of Education the possibility of the agency's providing supplemental funding to assist U.S. Attorneys in employing temporary clerical assistance; however, any such funding may not be available.

1) Department of Education Educational Loan Collections:

For Federally Insured Student Loans (FISL), the Department of Education's Bureau of Student Financial Assistance (SFA) has identified three employees within each of the ten Regional Offices who will be available to provide mainly clerical assistance for document preparation within the respective Regional Office, at the request of the local U.S. Attorney. These clerical personnel will not be available to work in the U.S. Attorney's Office.

The Bureau of Student Financial Assistance has revised its national procedures of file preparation and case referral so that all collection cases are now transferred from the Region in which the student's school was located to the Regional Office where the former student currently resides. The litigation package is reviewed in the local Regional Office so that it conforms with the standards of the local U.S. Attorney and the local rules of court (e.g., types of credit reports, method of document preparation). Each U.S. Attorney should therefore inform the respective Regional Administrator of the Bureau of Student Financial Assistance of local standards for preparation of the litigation package. Some Regional Administrators have developed written procedures for handling collections, which should be available to U.S. Attorneys upon request, and in many districts, informal agreements have been made between the U.S. Attorney and the Regional Administrator. The former U.S. Office of Education has published a 65-page booklet, "Basic Collection Techniques, Guaranteed Student Loan Program," which also should be available upon request. The names, addresses and FTS telephone numbers of the Regional Administrators are listed on Attachment A.

2) Veterans Administration Educational Overpayments Collections:

For collection of Veterans Administration Educational Assistance Overpayments, the VA maintains a Central Accounts Receivable Section (CARS) in St. Paul, Minnesota, which has computerized records of all VA overpayment debtors. The CARS office sends demand letters to debtors and may also contact the debtor personally prior to referral of the case to the U.S. Attorney.

For debts of sufficient amounts to warrant further collection efforts, CARS prepares the litigation package, including the credit report, employment and address verification, the Certificate of Indebtedness (CI), and all case correspondence. The CARS office refers the case directly to the U.S. Attorney in the district of the veteran's last verified residence. The CARS office notifies the VA District Counsel in the VA Regional Office in the veteran's state of residence of the litigation referral, by sending only a copy of the Certificate of Indebtedness to the VA District Counsel. The VA District Counsel will have available the veteran's Claim Folder, including the original documents establishing the award and the overpayments.

The following commonly occurring problems and procedures are handled by the VA offices indicated. Names, addresses and FTS telephone numbers of the VA personnel to be contacted for each type of problem are listed on Attachment B. Please note that all correspondence and telephone inquiries must refer to the veteran's identification number.

a) If the veteran re-enters school, the VA's Illinois computer center informs the U.S. Attorney of the changed status within two weeks after receiving official notice from the school. The VA then offsets the overpayment debt against current educational payments. In such cases, the U.S. Attorney's Office litigation and collection activity should cease until such time as a new referral is received from the VA, indicating that the overpayment was not collected by offset.

b) Address verification should have been completed by CARS through the Postmaster and the credit report prior to referral to the U.S. Attorney. If address verification is not indicated on the CARS referral, or if an address has become invalid by the time the U.S. Attorney's Office institutes collection procedures, the U.S. Attorney may wish to check further with the Postmaster, Division of Motor Vehicles, or other available sources. The U.S. Attorney's Office may also request the VA to verify the address, by sending a letter (not the entire litigation package) to the Justice Referral Center at CARS, listing any offices which the U.S. Attorney's Office may have already contacted for address verification.

c) If the credit report and indication of employment supplied by CARS is insufficient or inaccurate, the U.S. Attorney's Office should send a letter (not the entire litigation package) to the Justice Referral Section of CARS, enclosing a copy of the credit report, which has not been retained by CARS, and a copy of the Certificate of Indebtedness if possible.

d) In moving for a summary judgment, the Certificate of Indebtedness furnished by CARS may not be sufficient in a particular jurisdiction. The U.S. Attorney may request CARS for the requisite affidavit.

e) If the debtor disputes that he or she received the educational assistance checks, or claims that the checks were destroyed or not negotiated, the U.S. Attorney may request the VA District Counsel to obtain copies of the cancelled checks from the Treasury Department.

f) If a veteran presents facts which, if true, would contradict the data received from CARS, the U.S. Attorney should request the VA District Counsel to resolve the dispute either by a recomputation by the Regional Office's Finance Division or an inquiry and adjudication by the Regional Office's Adjudication Division.

g) The CARS office suggests that when a case reaches judgment status, the U.S. Attorney's Office should ensure that court costs and interest are listed on the judgment, in order to facilitate proper crediting of payments and to avoid unnecessary correspondence between the U.S. Attorney's Office and CARS.

h) In the next few months, CARS plans to assume monitoring of post-judgment repayments by computer. The case would be transferred to CARS after the veteran has made two or three payments to the U.S. Attorney's Office. This new procedure will lift each U.S. Attorney's Office's burden of typing hundreds of monthly receipts. You will be advised when the CARS assumes this new function.

Bureau of Student Financial Assistance, U.S. Department of Education

Region	Regional Administrator	FTS Telephone
I.	Mr. William T. Logan, Jr. Regional Administrator Bureau of Student Financial Assistance Department of Education John F. Kennedy Federal Building Boston, Massachusetts 02203	223 - 7205
II.	Mr. Josue E. Diaz Regional Administrator Bureau of Student Financial Assistance Department of Education Federal Building 26 Federal Plaza New York, New York 10007	264 - 4045
III.	Mr. Robert Smallwood Regional Administrator Bureau of Student Financial Assistance Department of Education P.O. Box 13716 3535 Market Street Philadelphia, Pennsylvania 19101	596 - 1018
IV.	Dr. Carmen L. Battaglia Regional Administrator Bureau of Student Financial Assistance Department of Education Third Floor 101 Marietta Tower Atlanta, Georgia 30323	242 - 2348
V.	Mr. Francis J. Yarmi Regional Administrator Bureau of Student Financial Assistance Department of Education 300 South Wacker Drive Chicago, Illinois 60606	353 - 8102
VI.	Mr. Ward Lindstrom Regional Administrator Bureau of Student Financial Assistance Department of Education 1200 Main Tower Building Dallas, Texas 75202	729 - 4359

Region	Regional Administrator	FTS Telephone
VII.	Mr. J. William Keifer Regional Administrator Bureau of Student Financial Assistance Department of Education 324 - 11th Street Kansas City, Mimnouri 64106	758 - 5875
VIII.	Mr. Arthur Lee Hardwick Regional Administrator Bureau of Student Financial Assistance Department of Education Federal Office Building 1961 Stout Street Denver, Colorado 80294	327 - 4128
IX.	Mr. Charles F. Hampton Regional Administrator Bureau of Student Financial Assistance Department of Education Suite 241 50 United Nations Plaza San Francisco, California 94102	556 - 8382
X.	Mr. W. Phillips Rockefeller Regional Administrator Bureau of Student Financial Assistance Department of Education MS - 1506 Arcade Building 1321 Second Avenue Seattle, Washington 98101	399 - 0434

Veterans Administration Contacts for Collection of Educational Assistance Overpayments

(1) Central Accounts Receivable Section (CARS)

Mr. Richard Troje FTS 725 - 3024 or 3027
Justice Referral Unit
Central Accounts Receivable Section
Routing Number 28 - B
Veterans Administration Center
P.O. Box 1930
Federal Building, Fort Snelling
St. Paul, Minnesota 55111

For telephone inquiries on specific cases, please call the FTS number listed above and give the last two digits of the veteran's identification number. You will be connected to one of eight analysts who prepared your litigation package.

For policy and procedural questions, please contact Mr. Richard Troje.

(2) VA Regional Offices and District Counsels

Each state has one VA Regional Office containing a District Counsel. New York, Pennsylvania and Texas have two Regional Offices and California has three Regional Offices, each with a District Counsel.

(3) If you experience recurring problems such as inordinately long delays in recovering photocopies of checks from the Treasury Department or obtaining other needed documentation from the VA District Counsels or CARS, you may report the problems to the following VA office. Please provide specific case information for all such recurring problems encountered.

Mr. Carl Thoreson, Acting Assistant Director for Fiscal Systems
Office of the Controller
Veteran's Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420

FTS 389 - 2316

(4) The Civil Division of the Department of Justice is interested in assisting with any recurring problems which may not have been resolved by the VA, such as recurring inaccuracies or inadequacy of the litigation packages received from CARS. Please inform the following office, providing specific case information:

Mr. David Epstein, Director
Commercial Litigation Branch
Civil Division
Room 1244 Todd Building
U.S. Department of Justice
Washington, D.C. 20530

FTS 724 - 7450

(Executive Office)

THREATS AGAINST THE PRESIDENT

In cases in which the competency of a violator of statutes designed to protect the President is in question, there is an exception to the policy favoring local psychiatric examination. In such cases, the Criminal Division recommends that United States Attorneys seek an examination at the Federal Medical Center, Springfield, Missouri, or some other federal facility. See United States Attorneys' Manual 9-65.463 and 9-65.240.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General Alice Daniel

Brown v. Glines, No. 78-1006; Secretary of the Navy v. Huff, No. 78-599 (Sup. Ct., January 21, 1980) DJ 145-14-945 and 145-6-1471

Military: Supreme Court Upholds Military Regulations Which Require A Serviceman To Obtain Prior Command Approval Before Circulating Petitions To Congress On Military Bases

All of the military departments have promulgated regulations requiring servicemen to obtain the approval of their commanding officer prior to circulating petitions on military bases. The D.C. Circuit invalidated these regulations, as applied to petitions to Congress, because of 10 U.S.C. 1034, which provides that no "member" of the armed forces may be restricted from communicating with Congress. The Ninth Circuit had agreed with the D.C. Circuit's ruling, and held in addition that the prior approval regulations were unconstitutional under the First Amendment. The Supreme Court granted the government's petitions for certiorari in the two cases, and has just reversed the decisions of the lower courts. The Court, in an opinion by Justice Powell, agreed with our contention that 10 U.S.C. 1034 was intended only to protect individual communications to Congress, not the right to circulate group petitions. The Court also accepted our argument that, due to the special military need to preserve order, discipline, and morale that has no counterpart in civilian life, the prior approval regulations do not run afoul of the First Amendment. Under the Supreme Court's ruling, the military may continue to enforce the prior approval requirement that had been called into question by the lower courts.

Attorney: John Cordes (Civil Division)
FTS 633-3426

Copeland v. Martinez, No. 79-647 (Sup. Ct., January 21, 1980) DJ 35-16-843

Attorneys' Fees: Supreme Court Denies Certiorari in Title VII Case In Which The United States Was Awarded Attorneys' Fees

Section 706(k) of the Civil Rights Act, 42 U.S.C. 2000e-5 (k), provides for the award of attorneys' fees to prevailing parties "other than the . . . United States." The Court of Appeals for the D.C. Circuit held that this language did not deprive the courts of their historic equity power to award

attorneys' fees when actions are brought in bad faith and for oppressive reasons. The court reasoned that section 706(k) was intended to exclude the United States from the statutory and essentially remedial award of fees provided under the Act. The traditional common law power to award attorneys' fees when actions are brought in bad faith, however, is essentially punitive, intended to insure the integrity of the judicial process, and only incidentally remedial. The court concluded that Congress had not intended to disturb this common law power by the enactment of section 706(k). Accordingly, after a finding of bad faith, fees were assessed against plaintiff Copeland in favor of the United States. The Supreme Court's denial of certiorari leaves this decision intact.

Attorney: Alfred Mollin (Civil Division)
FTS 633-4792

Hatzlachh Supply Co. v. United States, No. 78-1175 (Sup. Ct., January 21, 1980) DJ 154-120-76

Contract: Supreme Court Remands To Court Of Claims Case Concerning Contract Remedy For Loss Of Goods Seized By Customs Agents

The Customs Service seized certain goods upon import into the United States because of errors in the documentation of the goods. After the Secretary of the Treasury agreed to remit the forfeiture in exchange for payment of a penalty, it was discovered that some of the goods were missing. The importer sued in the Court of Claims, alleging that the seizure created an implied contract of bailment for the goods. The Court of Claims dismissed the suit, reasoning that since one cannot sue under the Federal Tort Claims Act for damages arising from detention of goods by Customs, see 28 U.S.C. 2680(c), the United States cannot be said to have assented to a contract. We recognized the weakness of this rationale and, in our brief as respondent in the Supreme Court, we argued primarily that plaintiff did not have an implied-in-fact contract with the government, but rather only suffered a tort. The Supreme Court has just vacated the Court of Claims decision on the ground that the FTCA does not affect prior remedies available under the Tucker Act. The Court declined to then reach the issue of whether there was an implied-in-fact contract; instead it remanded the case to the Court of Claims so that the lower court can consider the matter first.

Attorney: Frank Rosenfeld (Civil Division)
FTS 633-3969

Stoudt's Ferry Preparation Co. v. Marshall, No. 79-614 (Sup. Ct., January 7, 1980) DJ 236452-242

Mine Safety Act: Supreme Court Denies Certiorari In Case Involving Constitutional Challenge To Mine Safety Act

The Supreme Court recently denied a petition for certiorari in this action involving a challenge by a mine operator to the warrantless search provisions of the Mine Safety Act. The Third Circuit decision, which is left standing as the result of the denial of certiorari, had rejected arguments that the warrantless administrative search provision of the Mine Safety Act was unconstitutional. In this first appellate decision on the issue, the court of appeals distinguished this case from Marshall v. Barlow's, Inc. (where the Supreme Court struck down the warrantless search provisions under OSHA) on the basis of a finding that mining is a "pervasively regulated industry." The denial of certiorari here will give still further assistance to the Secretary of Labor in fulfilling his inspection duties under the Act. The Supreme Court's denial of certiorari also leaves standing the decision by the Third Circuit that the Mine Safety Act has a broad scope and covers such plants as coal preparation facilities.

Attorney: Douglas Letter (Civil Division)
FTS 633-3427

Ash v. United States, No. 79-1433 (5th Cir., January 21, 1980) DJ 145-6-1951

Privacy Act: Fifth Circuit Affirms Holding Of No Privacy Act Violation

In this action, a seaman brought suit against the United States under the Privacy Act after the Navy published his name in a base publication following the seaman's punishment for a disciplinary infraction. The seaman had received Article 15 punishment, which is less serious and more perfunctory than a court martial. The seaman claimed that publication of his name without his permission violated his Privacy Act rights. The district court held that there was no release, as covered by the Privacy Act, because the punishment proceedings themselves were open to all members of the base unit. In addition, the district court had held that if there was a release, it was permissible under the Act's "need to know" exemption, because the members of the military are in a special situation and have a need to know details about disciplinary matters.

Without oral argument, the Fifth Circuit affirmed this result. The court first agreed that there had been no release under the Privacy Act. However, the court went on to hold that release was permissible under the "routine use" exemption. Following receipt of the opinion, we informed the court that the "routine use" exemption could not be used in this instance because it first requires notice in the Federal Register, and there had been none here. In response, the Fifth Circuit has just modified its opinion, and affirmed the result on the first ground.

Attorney: Douglas Letter (Civil Division)
FTS 633-3427

Fenster v. Brown, No. 78-2169 (D.C. Cir., December 18, 1979)
DJ 145-15-123

FOIA: D.C. Circuit Denies Attorneys Fee Award To Sellers, Conners And Cuneo In FOIA Suit Over Defense Contract Audit Manual

The District of Columbia Circuit has just affirmed a district court order denying attorneys fees under the Freedom of Information Act to two attorneys having a substantial defense contract practice, who brought suit to compel disclosure of the Defense Contract Audit Manual. After eight years of litigation the government had released the Manual while the case was pending before the district court. The court of appeals affirmed the district court's findings that the plaintiffs had a private commercial interest in the suit because of the nature of their practice, that the government had a reasonable basis for refusing disclosure, and that there was no substantial public benefit from disclosure because the information was of primary interest only for defense contractors.

Attorney: Barbara L. Herwig (Civil Division)
FTS 633-3469

Halperin v. National Security Council, No. 78-1858 (D.C. Cir., January 14, 1980) DJ 145-2-189

FOIA: D.C. Circuit Upholds Exemption From Freedom Of Information Act For National Security Council Information

Morton Halperin filed a request under the Freedom of Information Act for the titles of all National Security Study Memoranda and National Security Division Memoranda. These memoranda are the means by which the President and his National Security Adviser seek the views of agencies on important defense and foreign policy issues and then communicate the President's decision on those issues to the agencies. As such, the lists of titles would be an index of the most important foreign policy decisions of the President. The district court upheld our claim of exemption under 5 U.S.C. 552(b)(1), (the exemption for classified material) and the Court of Appeals has just affirmed.

Attorneys: Lynne Zusman (Civil Division)
FTS 633-4651
Frank Rosenfeld (Civil Division)
FTS 633-3969

United States v. GEICO, No. 79-6142 (2d Cir., January 14, 1980) DJ 157-53-427

Torts: Second Circuit Holds Insurance Company Could Not Exclude United States From Coverage In Motorist Policy Under New York Law

A Postal Service employee, on official business in his own vehicle, negligently ran into another vehicle. The government, after being held liable under the Federal Tort Claims Act, sought indemnification from our employee's insurer. The policy contained an "endorsement" which expressly excluded the United States from coverage. The insurer urged that the endorsement was authorized under New York state insurance regulations which permitted exclusions where liability was assumed under a "contract or agreement" or where the insured "may be held liable under any workman's compensation, unemployment compensation or disability benefits law, or any similar law." The district court accepted both arguments. The court of appeals reversed, holding that the Tort Claims Act resembles neither of the exclusions

permitted by the state. The decision should control a number of similar controversies where this and other insurance companies have sought to exclude the United States from coverage.

Attorney: Bruce Forrest (Civil Division)
FTS 633-3445

United States v. HH Reisman, No. 77-2335 (9th Cir., January 7, 1980) DJ 77-12C-105

Contract: Ninth Circuit Reverses District Court Decision Requiring Government To "Exhaust Administrative Remedies" In Its Claim For Breach Of Contract

The United States brought an action for damages of $353,000 against H.H. Reisman alleging a breach by Reisman of his contract with the government to purchase 803,000 tons of chronite ore. The district court had dismissed the action on the ground that the government had failed to "exhaust administrative remedies" before the Contracting Officer and Board of Contract Appeals. The court of appeals reversed and remanded for adjudication by the district court of the government's claim. The appellate court held that neither the standard disputes clause of the contract, nor any other provision of the contract, provided an "administrative remedy" for a breach of contract claim by the government.

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

February 15, 1980

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

United States v. City of Syracuse, CA No. (N.D. N.Y.)
DJ 170-50-8

Title VII

On January 16, 1980 we filed suit against the City of Syracuse Fire and Police Departments, the County of Onondaga, and the State of New York, alleging that the City had discriminated against blacks and women in its hiring practices in those departments. The suit alleges that while the labor force of the City of Syracuse is approximately 10% black and 40% female, the fire department employs 478 firefighters of whom 4 (1%) are black and none is a woman and the police department employs 461 police officers of whom 10 are black (2.2%) and 10 are women (2.2%). The City uses written and physical examinations for entry into both the fire and police departments, which are constructed by the state and administered by the county, and which are alleged to have an adverse impact upon blacks and women. Discovery is expected to commence soon, since LEAA funds are due to be cut off in 45 days.

Attorneys: Ted Merritt (Civil Rights Division)
FTS 633-3861
James Angus (Civil Rights Division)
FTS 633-3835

United States v. New York State Department of Civil Service, et al, CA No. 78-C-911 (S.D. N.Y.) DJ 170-51-90

Title VII, the Revenue Sharing Act and the Comprehensive Employment and Training Act

A suit was filed by the United States Attorney in the Southern District of New York on January 17, 1980 alleging discriminatory employment practices in the selection of firefighters by the New York State Department of Civil Service and four municipalities in Westchester County: Yonkers, New Rochelle, White Plains and Mt. Vernon. Of the 419 firefighters employed by Yonkers one was black and none was female; of the 179 firefighters employed by New Rochelle, seven were black and none was a female; of the 170 firefighters employed by White Plains four were black, two were hispanic, and none was a female; and of the 130 employed by Mt. Vernon three were black and none was a female. Efforts to obtain a consent

decree with the defendants are continuing.

Attorney: William Fenton (Civil Rights Division)
FTS 633-3168

United States v. County School Trustees of Harris County, No. H-80-143 (S.D. Tex.) DJ 166-74-58

Section 5 of the Voting Rights Act

On January 18, 1980, we filed suit alleging that a change in date for holding trustee elections had failed to satisfy the preclearance requirements of Section 5. On May 1, 1978, a Section 5 objection was interposed to a proposal to conduct trustee elections in January of even-numbered years rather than November of odd-numbered years; on January 17, 1980, we again interposed a Section 5 objection to the proposal to hold an election on January 19, 1980. At a hearing conducted on January 18, 1980, a single-judge district court refused to enjoin the election but warned the defendants that they were conducting the election at their own peril, and that the results could be overturned if we prevail in the lawsuit. The objection was originally interposed because the November date coincides with other elections in Houston and thus provides more polling places and greater incentive for minorities to participate. Regular elections within Houston are not conducted in January and in the last Harris County trustee election in January, only six Houston residents cast ballots.

Attorney: Jeremy Schwartz (Civil Rights Division)
FTS 724-7407

United States v. Alford and United States v. Price, CA Nos. 79-30023-01, 79-30027-01 (W.D. La.) DJ 50-33-28

18 U.S. C. Section 1584

Sentencing occurred on January 21, 1980. The defendants had pled guilty to violating 18 U.S.C. Section 1584, by holding undocumented Mexican aliens in a condition of peonage. The victims were chained in an effort to keep them from leaving Alford's chicken farm, where they were required to work to pay off debts allegedly owed to Alford. Alford was fined $5,000, sentenced to five years in jail, with all but three months suspended, and placed on probation for five years. The other defendants were also sentenced to serve three months in jail

and placed on probation, but were fined $1,000 each. The case was handled by the United States Attorney's Office.

Attorney: Bruce Berger (Civil Rights Division)
FTS 633-4152

Guardians Association v. Civil Service Commission of the City of New York, CA No. 79 Civ. 5314 (RLC) (S.D. N.Y.)
DJ 170-51-102

Uniform Guidelines on Employee Selection Procedures

On January 28, 1980 United States Attorney Robert B. Fiske, Jr. and the Civil Rights Division filed a brief as amicus in the Court of Appeals for the Second Circuit. In this case, Judge Carter had ruled that the new police officer examination administered by the city had a severe adverse impact on blacks and hispanics; that the city's effort to show that the test was content valid failed to satisfy professional standards and the standards of the Uniform Guidelines on Employee Selection Procedures; and ordered future hiring be 50% black and hispanic until the police force approximated the labor force in the relevant labor market until the city had developed and validated a selection procedure and shown that promotion goals were no longer necessary. The order of the district court reflected the position that we had taken as amicus curiae in district court. The Second Circuit had denied a stay pending appeal but expedited the briefing and oral argument.

Attorney: Steven Rosenbaum (Civil Rights Division)
FTS 633-3749

United States v. Woburn Massachusetts School Committee, CA No. 75-4552-C (D. Mass.) DJ 169-36-10

Title VII, Section 706(f)(1)
Sex Discrimination

On January 28, 1980, Chief Judge Andrew S. Caffrey entered a consent decree. The complaint in this sex discrimination case referred to us by EEOC under Section 706(f)(1) of Title VII was filed on October 31, 1975, and trial was scheduled for January 28. The complaint alleged that the Woburn School Committee discriminated against women with respect to custodial positions, by maintaining sex-segregated job classifications, and hiring only women for the position of

jaintress/houseworker, and only men for the positions of junior building custodian and senior building custodian. Woburn has never employed a female junior or senior building custodian, or a male houseworker. The consent decree requires inter alia that all hiring and promotion in all custodial positions be without distinction based on sex; that Woburn actively encourage and assist all current houseworkers to qualify as building custodians, and offer the next available building custodian vacancies, with full seniority carryover, to any current houseworker who so qualifies, ahead of all other applicants; to keep records and report to the United States. The Court retains jurisdiction of the action.

Attorney: Donald Lewis (Civil Rights Division)
FTS 633-4092

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

United States v. Atlantic Richfield Co., _____ F.2d _____, Nos. 77-3234 and 77-3922 (9th Cir. January 4, 1980) DJ 80-2-77

Alaska Native Claims Settlement Act

The court of appeals affirmed the district court's dismissal of the government's complaint. The government, joined by the Inupiat Community of the Arctic Slope as intervenor-plaintiff, sued the State of Alaska, approximately 20 oil companies, and their contractors for trespass damages to lands on Alaska's North Slope alleged to have been aboriginally used and occupied by Alaska Natives since time immemorial. All alleged trespasses occurred before passage of Section 4 of the Alaska Native Claims Settlement Act of 1971, which extinguished aboriginal title and all claims arising thereunder. Most of the trespasses occurred after the State issued oil leases on the North Slope to the defendant oil companies for almost $1 billion. The defense, inter alia, was that Section 4 of the 1971 Settlement Act extinguished tort damage claims founded on aboriginal use and occupancy as well as claims based upon the loss of aboriginal title. Both the district court and court of appeals agreed. Both courts discussed in detail the legislative history of the 1971 Settlement Act. No discovery or other evidentiary proceedings have taken place. The court of appeals noted that Alaska Natives had sued Interior Department officials in Edwardsen v. Morton, 369 F.Supp. 1359 (D. D.C. 1973), which had held that Interior officials were liable for possible damages to Natives for alleged breach of any fiduciary duty in failing to prevent the trespasses complained of, and that the United States had "settled the Edwardsen suit by agreeing to" bring the instant case. The court of appeals left open the question of whether the 1971 Settlement Act's extinguishment of trespass claims without compensation violated the Fifth Amendment. Whether the Natives were entitled to just compensation from the United States, the court concluded, might be decided by the Court of Claims in Inupiat Community of the Arctic Slope v. United States (No. 77-596). In that case the Natives are claiming, inter alia, compensation from the government because the Settlement Act took vested property rights from them.

Attorneys: Dirk D. Snel and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4400/2762

United States v. The Texas Pipeline Co., _____ F.2d _____, No. 78-1398 (10th Cir. December 21, 1979) DJ 62-59-29

Clean Water Act

The court of appeals affirmed the judgment of the district court upholding the administrative assessment of a $2,500 civil penalty under Section 311(b)(6) of the Clean Water Act against the company for discharging oil into "navigable waters." In concluding that the discharge in question was indeed a discharge into "navigable waters," the court of appeals noted that Congress had not intended in the Clean Water Act to use the term "navigable waters" in the traditional sense, but had instead intended to extend the coverage of the Act as far as possible under the Commerce Clause. Furthermore, the court held that, despite the fact that the company was not at fault and had taken prompt action to clean up the spill, the amount of the penalty was not excessive in light of the statutory factors to be applied and the cost to the government of policing oil spills. (Judge Barrett dissented from that part of the opinion upholding the penalty as not being excessive.)

Attorneys: Assistant United States Attorney John R. Osgood (E.D. Okla.) Carl Strass and Michael A. McCord (Land and Natural Resources Division) 633-3332/2774

Dechert v. Christopolus, _____ F.2d _____, No. 5144 (S. Ct. Wyo. January 7, 1980) DJ 90-1-2-1083

The Wyoming Supreme Court upheld an order of the district court establishing a water rights preference between two irrigation districts. One of the districts had taken its rights from the United States. Although the United States no longer had any interest in the water, it was named as a defendant. On appeal the United States argued that it was not properly before the court because it had never consented to be sued in state court on this matter. The Wyoming Supreme

Court refused to reach the issue on the grounds that the United States could not raise lack of jurisdiction without first filing a notice of cross-appeal. Under Wyoming law, this is not required. Lack of jurisdiction may be raised at any time. We are considering a rehearing.

Attorneys: Nancy B. Firestone and Carl Strass (Land and Natural Resources Division) FTS 633-2757/3332

In re Permanent Surface Mining Regulation Litigation, _____ F.2d _____, Nos. 79-2073 and 79-2116 (D.C. Cir. January 18, 1980) DJ 90-1-18-1280

Surface Mining Control and Reclamation Act of 1977

In a per curiam decision, the D.C. Circuit affirmed the district court's denial of the industry's motion for a preliminary injunction to enjoin certain regulations promulgated by the Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977. The issue on the merits was whether the Secretary is authorized to promulgate regulations setting forth permit application requirements to be contained in any state program submitted to the Secretary for his approval. The court of appeals declined to express an opinion as to the merits but ruled that the district court had not abused its discretion in denying preliminary injunctive relief. The court of appeals' decision was rather quick, oral argument having been heard January 9, 1980. There is no indication at this time that industry will seek further judicial review of this particular decision.

Attorneys: Michael A. McCord and Carl Strass (Land and Natural Resources Division) FTS 633-2774/3332

Omaha Indian Tribe v. Wilson, _____ F.2d _____, Nos. 77-1384 and 77-1387 (8th Cir. January 18, 1980) DJ 90-1-5-1477

Indians

This case was on remand from Wilson v. Omaha Indian Tribe, 99 S.Ct. 2529 (June 20, 1979). This case involved title to certain land riparian to the Missouri River which had once been part of the Omaha Indian Reservation. Because of river movements between 1875 and 1925, the land appeared across the river from the reservation from 1925 on. The case involved how the river moved: if by accretion, the land belonged to farmers who had settled it, and for some land, to the State of Iowa; if the river moved by avulsion, then the Omaha Tribe retained title. In its 1979 decision, the Supreme Court held that 25 U.S.C. 194 placed the burden of proof on the farmers against the Indians, but did not have that effect for the State of Iowa. The Supreme Court also held that federal law applied but that it adopted the law of Nebraska for its rule of decision. On remand, the Eighth Circuit held that the farmers had failed in their burden of proof and title to the land claimed by them should be vested in the United States in trust for the Tribe. It also held that Nebraska law did not differ significantly from federal common law principles of avulsion and accretion. The court remanded the case to the district court for further proceedings regarding the land claimed by the State.

Attorneys: Edward J. Shawaker and Jacques B. Gelin (land and Natural Resources Division) FTS 633-2813/2762

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JANUARY 22 - FEBRUARY 5, 1980

False Claims. Representatives of the Civil Division met with the Public Contracts Section of the ABA to clarify areas of disagreement on the Department's proposed amendments to the False Claims Act. The ABA felt that: 1) doubling the consequential damages would be too severe; 2) expanding liability to persons who "should have known" the claim submitted was false would be too broad; 3) the reduction in the burden of proof from "clear and convincing" to "preponderance of the evidence" was not burdensome enough for the government, and; 4) the cancellation of contracts tainted by bribery was too drastic a remedy. We are meeting with staffers of the subcommittee to see if compromise language can be worked out in some of these areas. The bill has enough votes to be polled out of subcommittee and is expected to be reported out this week.

Communications Act. Markup began in January in the House Subcommittee on Communications on H.R. 6121 which deregulates the telecommunications industry. Part of the bill modifies the 1956 consent decree with Western Electric and allows AT&T into new markets such as data processing through new subsidiaries. The bill's potential effect on the pending AT&T ligitation is not clearly determined. The Senate bill differs quite a bit and is scheduled for markup sometime in March.

Criminal Code Reform. The House Subcommittee on Criminal Justice held its first markup of the Second Session on January 23, 1980. Further markups were held during the week of January 28. The Subcommittee has not reached any consensus as to how much longer it will work on its bill before voting on it and sending it to full Committee. Chairman Drinan is pushing for action as soon as possible, but is not receiving the support of other subcommittee members for fast action. Some members want to wait for a section analysis before any vote, for instance.

Among issues decided at recent markups, the subcommittee voted down Drinan's effort to reconsider its earlier decision not to include an "endangerment" provision in the bill.

Interdiction of Drug Smugglers on the High Seas. At its next executive session the Senate Commerce Committee is scheduled to markup H.R. 2538, Representative Biaggi's bill to plug the loophole in existing law which prevents any individual on board a U.S. vessel or an American citizen on board a foreign vessel from being prosecuted for possessing a controlled substance outside

U.S. territorial waters. The Committee is not expected to modify the bill significantly from the form in which it passed the House on July 23.

Amendments to Currency and Foreign Transaction Reporting Act to Facilitate Drug Law Enforcement. On January 29 the Subcommittee on Financial Institutions of the House Banking Committee reported out Congressman LaFalce's H.R. 5961, a bill which would facilitate drug law enforcement efforts by (1) making it illegal to attempt to export or import large amounts of currency without filing the required reports; (2) allowing U.S. Customs officials to conduct warrantless searches for currency in the course of their presently authorized searches for contraband articles; and (3) authorizing payment of compensation to informers. The Department supported the enactment of these provisions in a letter to full Committee chairman Henry Reuss last September.

Refugees. The conference committee meeting to resolve the differences between the House and Senate versions of the Refugee Act, S. 643, is scheduled for February 7. Cognizant House and Senate staffers have already agreed to a number of compromises which they will recommend to their respective bosses. The proposed compromises are very much in line with the Department's position on the legislation, e.g., elimination of the one-House veto provision in the House bill, adoption of the narrower definition of "refugee" in the House bill, and elimination of the sunset provision in the House bill. Some key differences were not resolved at the staff level, such as the admission status of refugees (immigrants vs. conditional entrants), the limit on federal funding of domestic assistance for refugees, and the statutory creation of a refugee office in the White House.

Constitutional Amendment - Balanced Budget. Senator Bayh's staff indicate they will bring this matter to full Committee vote very shortly. At the moment the vote is considered to be very tight 9-7 in favor. Senators Biden and Mathias have been targeted as the key votes. If they would give their proxies or vote No, Senator Kennedy would then bring this up quickly and vote it down.

At the moment, though under pressure, the House appears inclined to sit on it.

Nominations. I wish there was something positive to report on the pending nominations of Charles Renfrew to be Deputy Attorney General and John Shenefield as Associate Attorney General. John has at least completed his testimony, however was held over by Senator Bayh. The Department is still involved in an exchange of letters answering, clarifying, amplifying, edifying perhaps even, stupifying the Committee.

Graymail Legislation. On January 29 the Legislation Subcommittee of the House Permanent Select Committee on Intelligence ordered favorably reported H. R. 4736, the proposed Classified Information Criminal Trial Procedures Act. The Subcommittee adopted almost all of the proposed amendments contained in the December 10 committee print. One significant modification of the committee print was made in section 107(a)(2). In its original form, that provision would have required the trial court to order the United States to provide a defendant with the identity of any witness it expected to use to rebut classified information which could be disclosed in connection with a trial. In the Subcommittee markup, section 107(a)(2) was modified to provide that the disclosure would not be required until three days before trial, or, could be dispensed with entirely "upon a sufficient showing by either party." A full Committee markup has been scheduled for February 12. Representative Edwards Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee is also planning a day or so of hearings. Assistant Attorney General, Phil Heymann, Criminal Division will be testifying February 7 before Senate Judiciary Committee, Subcommittee on Criminal Justice on S. 1482, Graymail Legislation.

Regulatory Reform. On February 6 the Senate Governmental Affairs Committee will resume markup on S. 262, the Administration's regulatory reform bill. Since January 23 when this legislation was last considered, Governmental Affairs staffers have been working with staffers of the Judiciary Committee in an effort to reach agreement between S. 262 and S. 2147, the Culver-Laxalt regulatory reform proposal.

On the House side, Chairman Danielson tentatively plans to begin marking up the House counterpart to the Administration's bill, H.R. 3263, in his Judiciary Subcommittee on Administrative Law and Governmental Relations on February 7, in an effort to get the bill considered by the full Judiciary Committee by mid-February.

Dispute Resolution Act. On January 30 the Senate agreed to the House amendments to S. 423, the Dispute Resolution Act, thereby clearing the measure for the President.

Medical Records Privacy. House Information Subcommittee (Government Operations) held a final markup session on this bill, but there are still many questions unresolved. Amendment to eliminate the balancing test was not offered as expected, and amendment to ease foreign counterintelligence access was defeated, but we will try again at full Committee, with a greater chance of success. Justice staff will meet with Subcommittee staff to try to resolve some of the other remaining problems, but do not expect

that the two big ones mentioned above will be resolved.

NOMINATIONS:

On January 22, 1980, the Senate received the following nomination:

Filemon B. Vela, to be U.S. District Judge for the Southern District of Texas.

On January 23, 1980, the Senate received the following nomination:

Truman M. Hobbs, to be U.S. District Judge for the Middle District of Alabama.

On January 30, 1980, the Senate received the following nominations:

Raymond L. Acosta, to be U.S. Attorney for the District of Puerto Rico;

John S. Edwards, to be U.S. Attorney for the Western District of Virginia;

James R. Laffoon, to be U.S. Marshal for the Southern District of California; and

John W. Spurrier, to be U.S. Marshal for the District of Maryland.

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TAX DIVISION

Assistant Attorney General M. Carr Ferguson

CRIMINAL DISCOVERY

In a recent criminal tax trial which resulted in an acquittal, a prosecution recommendation prepared by an attorney in the Criminal Section of the Tax Division which discussed weaknesses in the government case was informally furnished to the defense in advance of the trial. The defendant's attorney used the memorandum at the trial as a basis for cross-examination and also in final argument. The defense was apparently given the memorandum as a result of a misunderstanding of the scope of the "open file" policy followed in the district.

Documents such as prosecution memoranda, reports, memoranda, or other internal government documents authored by the attorney for the government or other government agents in connection with the investigation or prosecution of a case are not subject to discovery or inspection. See Rule 16(a)(2), Federal Rules of Criminal Procedure. In appropriate instances discovery can also be resisted on the grounds of the attorney-work product doctrine or the attorney client privilege.

No disclosure should, accordingly, be made of internal government documents even in those districts where an open file policy is followed and any demand for the prosecution of internal government documents should be resisted.

Assistant Attorney General M. Carr Ferguson

United States and Special Agents Barbara A. Kilty and Richard Gutierrez v. Deak-Perera International Banking Corporation v. Charles V. Stephenson, 44 AFTR 2d 79-5982 (2d Circuit, October 26, 1979) DJ 5-14-3772

Summons Enforcement: Appeal by intervening taxpayer dismissed as moot because summoned bank had complied with district court's enforcement order.

The order of the court of appeals is reprinted in its entirety:

Appeal from the United States District Court for the District of Connecticut.

Before MULLIGAN, OAKES, NEWMAN, Circuit Judges.

The district court enforced two Internal Revenue summonses issued pursuant to I.R.C. §7602, directing Deak-Perera, a financial institution, to forward documents in its possession relating to appellant Stephenson's financial status during the years 1975-1977. The documents were necessary to determine Stephenson's income tax liability in furtherance of an I.R.A. [sic] joint civil-criminal investigation. The day after the district court's order, Deak-Perera complied fully with the summons. Since this was the only relief requested, there is no longer any live controversy between the parties. We therefore dismiss this appeal as moot. Barney v. United States, 568 F.2d 116, 117 (8th Cir. 1978); Kurshan v. Riley, 484 F.2d 952, 952-53 (4th Cir. 1973).

It is so ordered.

Attorneys: Assistant United States Attorney George J. Kelly, Jr. (Connecticut)
Marilyn E. Brookens (Tax Division)
FTS 633-3012

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Assistant Attorney General M. Carr Ferguson

United States of America and Special Agent Larry D. Thompson v. Marshall MacKay, Assistant Vice-President, First National Bank of Gillette v. Jimmie D. and Cheryl Rodgers (10th Circuit, October 30, 1979) DJ 5-87-418

Summons Enforcement: Those opposing enforcement of a summons bear the burden of proving that the civil aspect of the investigation has been abandoned.

Summons Enforcement: That the investigation was being conducted by the Criminal Investigation Division does not prove that the civil aspect of the investigation has been abandoned.

Summons Enforcement: The requirement, in Section 7605(b), that written notice be given in cases involving additional inspections, only applies to inspection of a taxpayer's records. It does not apply to inspections of records which are in the hands of a third person.

Summons Enforcement: Compliance by the Internal Revenue Service with the Internal Revenue Manual is not required by either United States v. Powell, 379 U.S. 48 (1964), or United States v. LaSalle National Bank, 437 U.S. 298 (1978).

Summons Enforcement: The provisions of the Right to Financial Privacy Act of 1978, P.L. No. 95-630, 92 Stat. 3697 (12 U.S.C. §§ 3401, et seq.), are inapplicable in summons enforcement proceedings.

Sometime in 1978 the Internal Revenue Service came into information indicating that taxpayers (Jimmie D. and Cheryl Rodgers) may have been involved in the receipt and subsequent sale of stolen oil, and had not reported the gains from this activity on their federal income tax returns. This information was obtained from an agent of the Federal Bureau of Investigation and a local sheriff. In October, 1978, IRS Special Agent Thompson served a "third-party recordkeeper" summons (26 U.S.C. § 7609) on MacKay, as assistant vice-president of the First National Bank of Gillette, requesting all of the bank's records which related to taxpayers.

Taxpayers directed MacKay not to comply with the summons. MacKay did not produce the requested records, and this enforcement action was commenced. Taxpayers intervened. The District Court ordered the summons enforced and taxpayers appealed.

The court of appeals rejected all of the taxpayers' numerous factual contentions and held that: (1) the investigation was being conducted pursuant to a legitimate purpose (to ascertain the correctness of taxpayers' income tax returns); (2) the bank records sought were relevant to that purpose; (3) the information was not already within the Government's possession; (4) all administrative steps required by the Internal Revenue Code had been complied with; and (5) taxpayers failed in their burden of demonstrating that the civil aspects of the investigation had been abandoned. See United States v. Powell, 379 U.S. 48 (1964) and United States v. LaSalle National Bank, 437 U.S. 298 (1978).

The court of appeals also rejected taxpayers' arguments that the provisions of the Right to Financial Privacy Act of 1978, P.L. No. 95-630, 92 Stat. 3641, 3697, made it unlawful for a bank to comply with a summons, noting that this Act does not override the summons authority contained in the Internal Revenue Code. The court also held that the second inspection provisions found in 26 U.S.C. Sec. 7605(b) are not applicable when the inspection does not involve the taxpayer's own records. Finally, the court held that there was no showing of bias or prejudice by the district judge.

Attorneys: Aaron Rosenfeld and
Charles E. Brookhart (Tax Division)
FTS 633-3057

Assistant Attorney General M. Carr Ferguson

United States of America and Special Agent Robert H. McCorry v. Garden State National Bank, et al.; United States of America and Special Agent Alexander Dombroski v. Orange Savings Bank, et al. (3rd Circuit, October 10, 1979) D.J. Nos. 5-48-9438, 5-48-9442, 5-48-9454, and 5-48-9871

Summons Enforcement: Third Circuit holds that unsupported allegations of sole criminal purpose are insufficient to establish the right to an evidentiary hearing and discovery in summons enforcement proceedings.

In June, 1978, and January, 1979, Special Agent Robert H. McCorry issued Internal Revenue Service summonses to four financial institutions seeking the production of books and records relating to the tax liabilities of taxpayers Ben and Marilee Shafer and Boot Strap Ltd. On instructions from the taxpayers under Section 7609 of the Code (26 U.S.C.), the bank refused to comply with the summonses and the Government sought judicial enforcement. At an evidentiary hearing held over the objection of the Government, the Shafers opposed enforcement on the ground that the summonses were issued solely for a criminal purpose. The district court concluded that the taxpayers had not met the burden established by United States v. LaSalle National Bank, 437 U.S. 298 (1978), and ordered the summonses enforced. This appeal by taxpayers followed.

Consolidated on appeal were enforcement orders as to three Internal Revenue Service summonses issued by Special Agent Alexander Dombroski as part of an investigation of the tax liabilities of Roger L. Keech. These three summonses were issued to two financial institutions during July and September, 1977, and sought information relating to bank accounts maintained by that taxpayer. In February, 1979, the Government obtained orders to show cause why the summonses should not be enforced and Keech intervened in the proceedings pursuant to Section 7609. At a subsequent hearing, the district court ruled that taxpayer's allegations that the summonses had been issued solely for the purpose of a criminal investigation were insufficient to warrant an evidentiary hearing and discovery. The court ordered enforcement of the summonses and this appeal followed.

The court of appeals affirmed the enforcement orders of the district court in all cases. In the Shafer investigation, the court of appeals ruled that the taxpayer's unsupported conclusory allegations that the summonses were issued for an improper purpose fell far short of establishing the right to basic discovery or an evidentiary hearing under the standards and procedures set forth in United States v. LaSalle National Bank, supra, United States v. Genser, 595 F. 2d 146 (C.A. 3, 1979), and United States v. McCarthy, 514 F. 2d 368 (C.A. 3, 1975). The court indicated that where, as here, the taxpayer failed to refute the Government's prima facie showing of "good faith" under United States v. Powell, 379 U.S. 48, 57-58 (1964), and could not by affidavit factually support a proper affirmative defense, the district court should dispose of the proceeding on the papers before it without allowing an evidentiary hearing or discovery. Despite the fact that the district court below had afforded the Shafers an evidentiary hearing, the court of appeals further ruled that the evidence adduced at that hearing was insufficient in any event to support their allegations of "bad faith." Also, with respect to the summonses involved in the Keech investigation, the court of appeals concluded that the district court properly denied the taxpayer an evidentiary hearing and discovery. The taxpayer's sole criminal purpose allegations, even if accepted as true, were held to be insufficient to overcome the presumption that these pre-recommendation summonses were valid under the standards of LaSalle and Genser. The court repeated its ruling in Genser II that such pre-recommendation summonses are "virtually unassailable." Finally, the court firmly rejected a widely reported dictum by the district court that the Internal Revenue Service must grant a taxpayer's request for a conference to discuss possible "settlement" of a criminal investigation before a summons will be enforced.

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Re: Issuance of Show Cause Orders by Magistrates in Internal Revenue Service Summons Enforcement Cases

Judicial summons enforcement proceedings are universally and traditionally initiated by verified petitions and orders to show cause emphasizing the summary nature of these actions and avoiding the potential delays available to the taxpayer or other summoned party by resort to the full array of civil rules. This procedure has received the repeated endorsement of the courts. See, e.g., Donaldson v. United States, 400 U.S. 517, 528-529 (1971); United States v. Garden State National Bank, 607 F.2d 61 (C.A. 3, 1979); United States v. McCarthy, 514 F.2d 368 (C.A. 3, 1975); United States v. Gajewski, 419 F.2d 1088 (C.A. 8, 1969); Rule 81(a)(3), Federal Rules of Civil Procedure.

In several recent instances it has come to our attention that magistrates are issuing the orders to show cause which initiate these actions. In some cases this is because of a local rule of court. In others it is due to local usage or an individual case assignment.

We believe this practice, that is, the issuance by a magistrate of the order to show cause requiring a respondent in a judicial summons enforcement case to appear before the court (or magistrate) and show why the Internal Revenue Service summons previously served upon him should not be judicially enforced, is inappropriate and should be discontinued. This does not, of course, affect the practice in some districts of referral of these cases to a magistrate for hearing and recommended decision after issuance of a show cause order by a district judge.

The basic rationale of 28 U.S.C. § 636 is that the magistrate is empowered to assist the judge in handling the judge's caseload, but under the judge's supervision and in a manner in which the decision-making function remains with the judge. The recent amendments to the Magistrate Act enacted by P.L. 96-82 allow magistrates to enter final decisions only after the parties have consented to a reference and, thus, are inapplicable to the issuance of a show cause order. Indeed, the Conference Report states (H. Rep. 96-444, pp. 7-8):

> The conference substitute does not modify 28 U.S.C. 636(b)(3) which permits assignment to magistrates [of] such additional duties as are not inconsistent with the Constitution and laws of the United States. For example, that provision has been used as the jurisdictional basis in a number of districts for the reference of Internal Revenue summons matters to magistrates for a hearing and a recommended decision when the judge has entered an order authorizing such a hearing. This legislaton would not affect that practice.

In short, except as provided by P.L. 96-82, the decision-making function of the district court cannot be delegated to a magistrate. Dye v. Cowan, 472 F.2d 1206 (C.A. 6, 1972). Indeed, cases cannot be assigned to a magistrate routinely by a local rule. Flowers v. Crouch-Walker Corp., 507 F.2d 1378, 1379-1380 (C.A. 7, 1974). */

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*/ This statement is limited, of course, by the holding in Mathews v. Weber, 423 U.S. 261, 270 (1976), that a district court, by local rule, can automatically refer appeals from agency determinations to a magistrate for review of the record in the agency proceeding and proposed recommendations to the district court. Nothing in Mathews v. Weber, however, suggests that a court by local rule can delegate the discretionary authority and decisional authority of a district judge to a magistrate. Horton v. State Street Bank and Trust Co., 590 F.2d 403 (C.A. 1, 1979); cf., United States v. Miller, 79-2 U.S.T.C. par. 9665 (C.A. 8, October 30, 1979). In the agency proceeding local rule reference approved in Mathews v. Weber, the statute provides only for review of the closed agency proceeding file by the district court and entry of decision on the basis of that record. Until such time as the judge passes on the administrative proceeding file and/or the magistrate's recommendation thereon, there is no occasion for the judge (or the magistrate) to exercise any judicial discretion or decision-making authority. Thus, in Mathews v. Weber, the Court noted that the reference to the magistrate disapproved in Flowers was "a broader grant of authority" than the one before the Court in Mathews. 423 U.S. at 273, fn. 8.

In summons enforcement proceedings, the issuance of the show cause order is both an exercise of judicial discretion and a judicial determination on the merits. That is, we have consistently taken the position since United States v. Newman, 441 F.2d 165, 169 (C.A. 5, 1971), and on the basis of Newman, that the issuance of the show cause order by the district court represents a determination that the Government has made a prima facie showing that the Powell requirements (United States v. Powell, 379 U.S. 48 (1964)) have been met, that the Government is entitled to enforcement of the summons, and that the burden of proof has been shifted to the party challenging the summons. This argument has been singularly successful and has led to the recognition by the courts of appeals that hearings are not required in summons cases when the opposing party does not raise substantial deficiencies in the summons enforcement proceeding by his pleadings. See, e.g., United States v. Garden State National Bank, supra. This argument has also permitted the Government to sustain on appeal several summons enforcement orders because the Government could argue that defects in the Government's proof at the hearing were insignificant in that the Government had met its burden in its verified pleadings and the district court's show cause order so indicated. See, e.g., United States v. Garden State National Bank, supra; United States v. McCarthy, 514 F.2d 368 (C.A. 3, 1975); United States v. Morgan Guaranty Trust Co., 572 F.2d 36 (C.A. 2, 1978), cert. denied sub nom. Keech v. United States, 47 U.S. Law Week 3221 (Sup. Ct., October 3, 1978), reh. denied, 47 U.S. Law Week 3369 (November 28, 1978); United States v. Garrett, 571 F.2d 1312 (C.A. 5, 1978). This argument would lose its force if the magistrate were to issue the show cause order because the discretion and authority to make such a determination cannot, we believe, be delegated to a magistrate.

Additionally, as Donaldson v. United States, supra, recognizes, the Federal Rules of Civil Procedure apply to summons enforcement proceedings, but application of the rules may be suspended in summons enforcement proceedings by the sound exercise of discretion of the district courts under Rule 81(a)(3). We have taken the position that the issuance of the show cause order by the court--requiring the summoned party to appear on a set date and "show cause" why the summons should not be enforced--represents a determination

by the court that the application of the rules should be so suspended and gives notice to the parties of the suspension. There is no authority conferred on United States Magistrates to suspend application of the Federal Rules of Civil Procedure under Rule 81(a)(3), and, thus, issuance of a show cause order by a magistrate would have no greater legal effect than the issuance of a Rule 4 (F.R.C.P.) "summons" to answer a complaint issued by the clerk of the district court. Thus, it follows that if the magistrate issues the show cause order, the parties would be entitled to the benefit of the rules, including discovery and the attendant delays.

Both these considerations dictate that the Government resist permitting magistrates to issue show cause orders in summons enforcement cases. The magistrate has no authority to issue process, to suspend application of the rules under Rule 81(a)(3), or to make the determination that the Government has established its prima facie case for enforcement of the summons and order the party resisting the summons to shoulder the burden of proof. In short, while argument may be made that the magistrate does have legal authority to issue show cause orders, the considerations set forth herein mandate that we take the position the show cause order should be entered by the district judge and that we resist efforts to permit magistrates to enter the show cause order whether by local rule or local practice.

(Tax Division)

Federal Rules of Criminal Procedure

Rule 7(c)(2). The Indictment and the Information. Nature and Contents. Criminal Forfeiture.

Rule 54(b)(5). Application and Exception. Proceedings. Other Proceedings.

Defendant was convicted of conspiracy to possess cocaine with intent to distribute it, and received the maximum sentence. In addition, the Government instituted a separate civil proceeding for forfeiture of his automobile on the ground that it had been used unlawfully during the course of the conspiracy. He appealed his conviction, contending that the indictment was deficient because it did not state that his property interest in the automobile was subject to forfeiture.

The Court rejected defendant's argument since Rule 7(c)(2) requires the indictment to allege the extent of the property subject to forfeiture only when an offense is charged that may result in criminal forfeiture. However, this rule does not apply to civil forfeiture of property for violation of a statute of the United States. Rule 54(b)(5).

(Affirmed.)

United States v. Al Bucchino, 606 F. 2d 590 (November 14, 1979)

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Federal Rules of Criminal Procedure

Rule 54(b)(5). Application and Exception. Proceedings. Other Proceedings.

See Rule 7(c)(2), this issue of the Bulletin for syllabus.

United States v. Al Bucchino, 606 F. 2d 590 (November 14, 1979)

Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection.

In connection with a coram nobis motion attacking a criminal conviction, defendant made numerous discovery requests under the Federal Rules of Civil Procedure. The Government filed a motion to quash the discovery, which was granted by the district court on the ground that, since a coram nobis motion is a step in the criminal case and not a separate civil action, the Rules of Civil Procedure were inapplicable to proceedings on the coram nobis motion, and defendant was limited to discovery available under the Rules of Criminal Procedure. Defendant's appeal presented an issue of first impression in the Seventh Circuit: On a motion in the nature of a writ of error coram nobis to vacate a judgment of conviction in a criminal case, should the district court apply the Federal Rules of Civil Procedure or the Rules of Criminal Procedure?

The Court noted the similarity between coram nobis motions and §2255 motions, and the fact that discovery under both civil and criminal rules is available for §2255 proceedings, and concluded that a coram nobis motion is a step in a criminal proceeding yet is, at the same time, civil in nature and subject to the Federal Rules of Civil Procedure. Rule 16 is an unsatisfactory vehicle for discovery requests in proceedings on coram nobis motions, since facts which affect the validity of the conviction or sentence are unlikely to be found solely within the narrow scope of discovery allowed by Rule 16. Thus, a convicted defendant is entitled to the benefits of civil discovery rules in a coram nobis proceeding. However, the Court noted that coram nobis motions, since they are sometimes made long after judgment of conviction was rendered, are peculiarly appropriate candidates for the use of the district court's discretion under the civil rules to limit discovery, and concluded that the district court's limitation of discovery in this case was not an abuse of this discretion.

(Affirmed.)

United States v. Frank Peter Balistrieri, 606 F.2d 216 (October 2, 1979)