U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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COMMENDATIONS

Assistant United States Attorneys WILLIAM J. HIBSHER and BARBARA L. SCHULMAN, Southern District of New York, have been commended by Mr. Russell E. Dickenson, Director of the National Park Service, United States Department of the Interior, for their significant achievement in the case of United States v. Val- Kill dealing with eminent domain.

Assistant United States Attorney JANETTE PATTERSON, Southern District of New York, has been commended by Mr. Michael J. Lonergan, Regional Inspector General for Investigations, United States Department of Agriculture, North Atlantic Region, for the successful prosecution of United States v. Julio Figueroa involving a violation of the Food Stamp Act.

Assistant United States Attorney ANN C. ROBERTSON, Northern District of Alabama, has been commended by Mr. William H. Webster, Director of the Federal Bureau of Investigation, for the successful prosecution of twelve individuals who were members of a gang responsible for operating illegal confidence games and prostitution.

Assistant United States Attorney JAMES E. WHITE, Eastern District of California, has been commended by Mr. Ed O'Connor, Regional Commissioner for the Immigration and Naturalization Service, Western Region, for his work in connection with the case of Western Growers Association v. United States Border Patrol of the United States Immigration and Naturalization Service which challenged the operational authority of the Immigration and Naturalization Service.

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Acting Director

POINTS TO REMEMBER

Relationships With Client Agencies

A policy to ensure that all United States Attorneys keep their client agencies fully informed of case progress, development and decisions, is outlined in the following steps which have proved useful in a number of United States Attorney's offices:

1. Promptly upon receipt of a complaint against an agency, the Division or United States Attorney's office, as appropriate, should mail a notification letter to the General Counsel of the agency or to his or her designee. (Where time does not permit, e.g., where a motion for a TRO has been filed, it may be necessary to notify the agency by telephone.) At the same time, or as soon thereafter as possible, the agency should be provided with the name(s) and telephone number(s) of the Justice Department attorney(s) to whom the case has been assigned. The agency should be requested, in turn, to provide the Justice Department attorney(s) with the name, direct mailing address, and telephone number of the agency attorney to whom communications with respect to the case should be directed.

2. With respect to affirmative cases, receipt of a referral from a client agency should be acknowledged promptly and names of attorneys exchanged as in Paragraph 1.

3. Unless reasons of economy indicate otherwise, copies of all significant documents filed in court in both defensive and affirmative cases should be sent, immediately upon receipt or service, to the client agency. If a client agency specifically requests, copies of all documents filed should be sent. (Service of a summons and complaint on the client agency may normally be assumed, and copies of exhibits forwarded by the client agency need not be reproduced and returned.)

4. In non-delegated cases, the United States Attorney should also send copies of all documents filed in court to the Division responsible for the case.

5. An agency should be notified in advance of any significant hearings, oral arguments, depositions, or other proceedings.

6. Appropriate steps should be taken to consult adequately with agencies in advance regarding positions we intend to urge in court. Under no circumstances should a case be compromised or settled without advance consultation with a client agency, unless the agency has clearly indicated that some other procedure would be acceptable.

I appreciate your cooperation in this important matter.

Effects USAM 4-1.520. The above-stated policy will be reprinted at USAM 4-1.520.

(Executive Office)

Litigation Against State Governments, Agencies or Entities

The following is the full text of a memorandum from Attorney General William French Smith directing that the Governor and Attorney General of a state be notified prior to the bringing of litigation against state governments, agencies or entities.

OAG-1034

Office of the Attorney General
Washington, D. C. 20530

August 7, 1981

RECEIVED
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EXECUTIVE
U.S. ATTORNEY

MEMORANDUM TO: Deputy Attorney General
Associate Attorney General
Assistant Attorneys General in Charge of Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources and Tax Divisions

FROM: William French Smith
Attorney General

SUBJECT: Litigation Against State Governments, Agencies or Entities

In order to enhance productive communications with state governments and to avoid intergovernmental litigation whenever possible, it shall be Department of Justice policy to give timely notifications to the governor and attorney general of a state prior to the filing of a suit or claim against a state government, agency or entity.

Specifically, the Assistant Attorney General in charge of each litigating division shall:

1. Prior to the filing of each action or claim against a state government, agency or entity:

   (a) advise the governor and the attorney general of the affected state of the nature of the contemplated action or claim and the terms of the remedy sought and

   (b) notify the Deputy Attorney General and, if appropriate, the Associate Attorney General that the directive has been complied with;

2. Ensure that such prior notice is given sufficiently in advance of the filing of the suit or claim to:

   (a) permit the state government, agency or entity to bring to the Department's attention facts or issues relevant to whether the action or claim should be filed or,

(b) result in settlement of the action or claim in advance of its filing on terms acceptable to the United States; and

3. Ensure that each attorney in his or her respective division reads, becomes familiar with and complies with this directive.

The Associate Attorney General shall notify each United States Attorney of the requirements of this policy directive and shall develop a procedure to ensure that each United States Attorney gives the appropriate Assistant Attorney General sufficient prior notice of the filing of a suit or claim against a state government, agency or entity to allow the Assistant Attorney General to comply with this directive.

The foremost goal in applying this policy to individual cases shall be to provide fair warning to state governors and attorneys general and thus to afford these leaders the opportunity both to resolve matters prior to litigation and to prepare for inquiries from local officials and the news media if an action is commenced. This policy directive does not create or enlarge any legal obligations upon the Department of Justice in commencing any suit or claim.

Exceptions to the notice requirements of this directive are appropriate only when the Assistant Attorney General determines that good cause for such an exception exists and notifies the Deputy Attorney General and, if appropriate, the Associate Attorney General of that determination.

(Executive Office)

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CIVIL DIVISION
Acting Assistant Attorney General Stuart E. Schiffer

Armor Elevator Co. v. Phoenix Urban Corp., 1st Circuit, Nos. 80-1626 through 80-1632 (July 23, 1981) D.J. #145-17-1649.

SOVEREIGN IMMUNITY: FIRST CIRCUIT HOLDS THAT THE "SUE AND BE SUED" PROVISION OF THE NATIONAL HOUSING ACT DOES NOT WAIVE SOVEREIGN IMMUNITY IN A SUIT AGAINST THE SECRETARY OF HUD FOR CONSEQUENTIAL DAMAGES.

A provision of the National Housing Act authorizes the Secretary of Housing and Urban Development, in "carrying out" the Act, to "sue and be sued" in any court of competent jurisdiction. 12 U.S.C. 1702. In this case, various subcontractors on an insured housing project sued the Secretary for money damages alleging that the Secretary's breach of several requirements of the National Housing Act had caused non-payment of sums due them by the general contractor. The plaintiffs did not alle that they were suing to enforce any money obligations owed them by the Secretary under the Act itself or implementing regulations or contracts. The First Circuit, after canvassing a variety of opinions on the scope of §1702 in other circuits, held that plaintiffs' claims for "consequential damages" were outside of the "limited" waiver of sovereign immunity in 12 U.S.C. 1702, and were not claims "the redress of which will carry out the provisions of the National Housing Act." The decision is significant since it substantially limits the types of money claims which may be brought against the Secretary of HUD under 12 U.S.C. 1702 in the state courts or federal district courts. The court of appeals upheld the district court's transfer of the case to the Court of Claims, where, however, plaintiffs have an equally difficult task of showing that the claims are encompassed by the Tucker Act.

Attorney: Michael Kimmel (Civil Division)
FTS 633-5714

Talev v. Reinhardt, D.C. Circuit No. 79-1132 (August 31, 1981) D.J. #35-16-807.

EMPLOYMENT DISCRIMINATION: D.C. CIRCUIT HOLDS THAT THE VOICE OF AMERICA REBUTTED A PRIMA FACIE CASE OF NATIONAL ORIGIN DISCRIMINATION URGED BY A FOREIGN-BORN BROADCASTER.

The Voice of America prepares and broadcasts radio programs to foreign nations, both in English and in foreign languages. In this Title VII suit, the plaintiff offered an array of statistical evidence attempting to show that hiring

practices and personnel policies had a "disparate impact" on the employees in the European Division (who are largely foreign-born) in comparison to employees in the Worldwide English Division (who are primarily American-born). The district court granted our motion for summary judgment on the grounds that the statistical evidence did not establish a prima facie case. The court of appeals affirmed, holding that even if the statistical evidence did establish a prima facie case, the Voice of America had introduced "overwhelming" evidence that the variances between the two groups of employees are the result of substantial differences in the qualifications and job responsibilities of employees in the two divisions. Thus, even if discriminatory impact existed from the disputed personnel standards, the court held that the government had satisfied its burden to show that "these standards have 'a manifest relationship to the employment in question.'"

Attorney: Alfred R. Mollin (Civil Division)
FTS (633-4027)

September 11, 1981

CIVIL RIGHTS DIVISION
Assistant Attorney General Wm. Bradford Reynolds

Iron Arrow Honor Society v. Schweiker (sic.), No. 80-5663 (5th Cir.) DJ 169-18-15

Title IX of the Civil Rights Act

On August 3, 1981, the Fifth Circuit issued its decision affirming the district court. Iron Arrow, an all-male honor society at the University of Miami, Florida, challenged HEW's threatened termination of funds to the university pursuant to Title IX. The court upheld the regulation prohibiting substantial assistance by the university to organizations which discriminate on the basis of sex. The court also rejected the appellant's argument that it was not receiving substantial assistance because most tangible assistance had ceased. In dictum, the court concluded that any continued association between the university and Iron Arrow would constitute substantial assistance.

Attorney: Jessica Silver (Civil Rights Division)
FTS 633-2195

Gates and United States v. Collier, CA No. 73-1790 (N.D. Miss.) DJ 144-40-879

Conditions of Confinement

On August 13, 1981, Judge Keady entered our consent decree in this case, our suit involving the conditions at Parchman Penitentiary, Mississippi's only state prison. The state had sought a permanent relaxation of the 50 square feet per prisoner requirement of Gates in order to increase Parchman's population by 363 prisoners. In view of the backlog of some 1500 state prisoners in overcrowded and often inhumane local jails, we agreed to allow a temporary increase of 300 prisoners at Parchman, where conditions are relatively better, but only until February 1, 1982. A new 1500-prisoner facility is scheduled to open at Parchman on November 1, 1981, and will absorb the temporary addition to Parchman's present population, as well as most of the state prisoners now housed in local jails.

The consent decree sets forth guidelines governing which prisoners will be transferred from local jails to Parchman during the interim period. Defendants agree to comply with the American Correctional Association standards concerning classification and medical services by October 1, 1982, and to make

best efforts to hire an additional 77 guards, and thus remedy three areas where Parchman is currently substandard. Judge Keady issued an opinion praising the consent decree and admonishing the state to come into compliance with the Constitution as soon as possible. Judge Keady also set December 7, 1981, as the date for a hearing on conditions in all local jails housing state inmates, who are now members of the Gates class.

Attorney: John MacCoon (Civil Rights Division)
FTS 633-3422

United States v. City of Cincinnati, CA No. C-1-80-369 (S.D. Ohio) DJ 170-58-118

Employment Discrimination

On August 13, 1981, the Federal District Court entered a consent decree. This suit alleges employment discrimination against blacks and females in its police division. Our complaint was filed last year on July 7, 1980. At that time we submitted a consent decree signed by the City resolving all the allegations of the complaint. The police union intervened in the action, however, and the district court set the decree aside. The union alleged that its rights under collective bargaining agreement were impaired by the promotional provisions of the decree. Since that time, negotiations resulted in a new decree which is identical to the original in calling for recruitment of blacks and females for entry positions and make up of entry level classes similar to the results of the City's 1980 effort, which resulted in an eligibility list that was 34 percent black and 23 percent female. The original decree was modified to reflect the City's agreement to the union's proposal to add temporary additional positions to those ranks in the event the interim measures were incapable of achievement through use of (unvalidated) rank order eligibility lists.

Attorney: Katherine P. Ransel (Civil Rights Division)
FTS 633-3895

Taylor Company v. John Marsh, et al., CA No. CV-81-8-1203-E (N. D. Ala.)

Minority Business Enterprise

On August 4, 1981, Taylor Corporation, an Alabama construction company filed a complaint against the Secretary of the Army, and the Corps of Engineers. The complaint alleged that the Corps of Engineers had denied plaintiff due

process,and equal protection, as well as violated competitive bid statutes in offering two projects to the Small Business Administration for possible acceptance into the Section 8(a) program. Section 8(a) of the Small Business Act authorizes the SBA to act as the prime contractor on federal procurement contracts with other federal agencies and in turn to subcontract the contracts to firms owned and controlled by socially and economically disadvantaged small business concerns. Plaintiff sought to enjoin the submission and award of two military construction projects to the SBA, as well as enjoin the Army from setting goals for the utilization of economically and socially disadvantaged businesses in its procurement. On August 20, 1981, after a hearing on plaintiff's motion for a preliminary injunction, the court entered an order granting summary judgment for defendants. This case is being handled by the United States Attorney's Office in Birmingham, Alabama.

Attorneys: Harold Stephens (Assistant U.S. Attorney)
FTS 229-0639
Taylor Aspinwall (Civil Rights Division)
FTS 633-3749

Garrity and United States v. Gallen, CA No. 78-116 (D.N.H.)
DJ 168-47-1

Right to Treatment

On August 17, 1981, the court issued its opinion and order in this case, seeking to vindicate the rights of the mentally retarded residents of Laconia State School, Laconia, New Hampshire. In a 189-page opinion, including 14 pages of relief, the court found a state law right to adequate habilitative care and treatment, a right to a free and appropriate public education for school-aged residents pursuant to state law and the Education of the Handicapped Act, as well as numerous violations of Section 504 of the Rehabilitation Act of 1973. The court found under the DD Act an implied right of action for plaintiffs against the Secretary of HHS (not a defendant) to insure proper assurances under the Act and to compel performance by him of duties pursuant to the statutory scheme. The court found no implied right of action under this statute against defendant state officials. The court further held that the Constitution did not guarantee a right to treatment in the least restrictive alternative as defined as the closing of Laconia and the placement elsewhere of all residents. Pursuant to state law the court directed defendants to develop and maintain a statewide service delivery system including community based facilities and services.

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The court directed the parties to meet in an attempt to agree upon a plan to implement court ordered relief. The relief ordered included the development of individualized plans of care, prohibitions against excluding residents on the basis of their handicaps from services and programs, termination of the presumption that severely and profoundly retarded persons cannot benefit from deinstitutionalization, restrictions on the use of drugs, restraints, and seclusion (solitary confinement). Additionally, the court ordered numerous environmental improvements at Laconia and directed the defendants to effectuate the system established by law to create a statewide system of services, e. g., developmental centers, work activity programs, community residence, family care, foster care, day care and residential care and treatment. The parties are directed to meet expeditiously and submit agreed upon proposals and disagreements, if any, regarding a plan of implementation by November 1, 1981.

Attorneys: Leonard Rieser (Civil Rights Division)
FTS 633-3470
Arthur Peabody (Civil Rights Division)
FTS 633-3414

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Holmes Limestone Co. v. Andrus, _____ F.2d _____, No. 80-3666 (6th Cir., Aug. 6, 1981) DJ 90-1-18-1779.

Jurisdiction to review interim regulations under Surface Mining Control and Reclamation Act of 1977 exists in all courts.

Reversing the district court's dismissal for lack of jurisdiction, the court of appeals ruled that all federal district courts, not just one, had jurisdiction to review interim program regulations adopted by the Interior Department to carry out the Surface Mining Control and Reclamation Act of 1977. Section 526(a)(1) of the Act, 30 U.S.C. 1276(a)(1), states that "national rules or regulations," including interim program standards, shall be reviewable in the U.S. District Court for the District of Columbia. Accordingly, the government contended, and the district court in this case (N.D. Ohio) agreed, that the District of Columbia court's jurisdiction was exclusive. The Sixth Circuit, nevertheless, concluded that the removal by the Conference Committee of the word "only" from the statute evinced a congressional intent that the jurisdiction of the District of Columbia court was not to be exclusive. The Sixth Circuit, in remanding, directed the district court to determine whether the Interior regulation (30 C.F.R. 761.5), which defines "cemetery" as "any area of land where human bodies are interred," should be set aside as arbitrary and capricious. Section 522(e)(5) of the Act, 30 U.S.C. 1272(e)(5), forbids surface mining within 100 feet of a "cemetery" without defining it. The coal operator here claimed that the regulation's definition was overbroad as applied to private family burial plots on Amish farmsteads. The court of appeals noted that it was Amish custom to bury relatives on individual private land, instead of on land owned by cemetery associations. The court further noted that numerous Amish owners had permitted the coal operator to surface mine their land well within 100 feet of their burial plots. The concurring opinion faulted the majority for insinuating (without expressly holding) that Interior's regulation was invalid, concluding that the issue was initially one for the district court which had not yet decided it. The concurrence also faulted the majority for not deciding

the constitutional issues of uncompensated taking of property and denial of equal protection; the concurring judge would have resolved these issues in favor of the constitutionality of the regulation and statute.

Attorneys: Mark Squillace, Department of the Interior, FTS 343-4671 and Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400

Superior Oil Co. v. Andrus, _____ F.2d _____, No. 80-2649 (3rd cir., Jul. 27, 1981) DJ 90-4-126.

Outer Continental Shelf Lands Act; venue.

The district court had dismissed for improper venue the oil companies' suit against the Secretary, seeking issuance of an offshore lease under the OCSLA. The oil companies had brought the suit in the district of Delaware, their place of incorporation, under 28 U.S.C. 1391(e), the general venue statute for suits against federal officials. The Secretary had argued that only the special venue provision of the OCSLA, 43 U.S.C. 1349(b)(1), applied to this suit, and that it limited the choice of forum to "where the defendant resides or may be found" or the state nearest where the cause of action arose. The district court held that only the special venue provision applied, and that the "where defendant may be found" provision did not authorize suit against the Secretary in any district where Interior maintained an office.

The court of appeals reversed, holding that because the plain language of the statute provides for venue both where the defendant resides and may be found, these terms must each be given meaning as applied to both private and government defendants. Thus, federal officials may be sued where they reside (District of Columbia), or where the officials, through their Department's or Agency's activities, may be found (every judicial district). The court suggested that if Justice felt this result was onerous, the Department should seek relief from Congress.

Attorneys: Laura Frossard and Anne S. Almy (Land and Natural Resources Division) FTS 633-2753/4927

Dow Chemical Co. v. Costle, _____ F.2d _____, No. 79-1491 (6th Cir., Aug. 17, 1981) DJ 90-5-1-1-1351.

Clean Air Act; Environmental Policy Act Puts EPA under no mandatory duty to approve state implementation plan revisions.

In a one-paragraph order, the court of appeals affirmed the district court's dismissal of Dow's complaint, for the reasons set forth in the (unpublished) district court opinion. The district court held that EPA had no mandatory duty to approve state implementation plan revisions merely because they assured maintenance of national ambient air quality standards. The court also pointed out that the proposed revisions in this case had not been properly submitted by the State to EPA, let alone acted upon by that agency. The mere fact that EPA was known to disfavor the type of control technique utilized in the proposed revisions did not create a reviewable action before EPA had actually denied the revision. Finally, the district court pointed out that EPA disapprovals of plan revisions were reviewable exclusively in the courts of appeal.

Attorneys: David C. Shilton and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2737/2813

Golden Grigg v. United States, _____ F.2d _____, No. 80-3011 (9th Cir., Aug. 3, 1981) DJ 90-1-15-16.

Desert Land Act; group entry scheme violates excess holding provision and requires forfeiture of entries.

The Ninth Circuit affirmed, by memorandum opinion, a summary judgment holding that a partnership which possesses, controls, and enjoys substantially all benefits of 14 contiguous 320-acre desert land entries violates the 320-acre limitation in the Desert Land Act, 43 U.S.C. 321, and canceled those entries. In so ruling the court relied on its prior decisions in the Indian Hill case Reed v. Morton, 480 F.2d 634, cert. denied, 414 U.S. 1064 (1964), and the Sailor Creek case, Morris v. Andrus, 593 F.2d 851 (1978), cert. denied, 444 U.S. 863 (1979), rejected appellants' arguments that (1) 43

U.S.C. 329 is limited to where title is conveyed; (2) the government was estopped from asserting the illegality of the entrymens' arrangements, because the government did not know the true facts; (3) summary judgment was inappropriate; (4) IBLA's decision was a new interpretation of Section 329 which denied the entrymen constitutional due process, and violated their vested contractual rights.

Attorneys: Robert B. Schaefer and Kathryn A. Oberly (Land and Natural Resources Division) FTS 633-3906/2716

De Boer v. United States, _____ F.2d _____, No. 79-4528 (9th Cir., Aug. 17, 1981) DJ 90-1-5-1665.

Grants, standards for substantial accretion explained.

The plaintiff was issued a homestead patent to a waterfront tract which contained 165.05 acres when it was surveyed in 1920. By 1959, when the patent issued, an additional 105.22 acres had accreted to the tract and the landowner subsequently brought a quiet title action against the United States to resolve ownership of the accreted portion. The district court held that, ordinarily, when lands are conveyed with reference to a plat, the grantee takes to the actual waterline rather than the meander line depicted on the plat but this usual rule is subject to exception where the accretion is "substantial." The court further found that the 105.22 accreted acres were substantial when compared to the 165.05-acre surveyed tract and granted judgment in favor of the United States. On appeal, the Ninth Circuit reversed and remanded. The court of appeals held that, in determining whether an accretion is "substantial", a court should consider not only the relative size of the surveyed and accreted portions, but also such "equitable considerations" such as the grantee's knowledge of the accretion and the grantee's lack of actual occupation.

Attorneys: Robert L. Klarquist and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2731/2762

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Federal Rules of Criminal Procedure

Rule 24(b). Trial Jurors. Peremptory Challenges.

Defendants in a trial for first degree murder were given 16 peremptory challenges by the district court. Appealing their convictions, defendants contended that since they were charged with a capital offense they were entitled to 20 peremptory challenges under Rule 24(b).

The Court held that Rule 24(b) is designed to insure that the jury is not tainted by opinions about capital punishment, and concluded that the rule was thus inapplicable to this case because the government agreed before trial that it would not seek the death penalty.

(Affirmed in part, and vacated in part on other grounds.)

United States v. Jose Ramon Vallez, Juan Molina and Theodore Quinonez, ___F.2d___, Nos. 80-1196 to 80-1198 (9th Cir. August 10, 1980)

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Federal Rules of Criminal Procedure

Rule 42(b). Criminal Contempt. Disposition Upon Notice and Hearing.

See Rule 42(a), this issue of the Bulletin for syllabus.

In re Robert T. Gustafson, Esquire, 650 F.2d 1017 (9th Cir. June 25, 1981)

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Federal Rules of Criminal Procedure

Rule 42(a). Criminal Contempt. Summary Disposition.

Rule 42(b). Criminal Contempt. Disposition Upon Notice and Hearing.

A limited en banc panel of the Ninth Circuit, in a six to five decision, withdrew an earlier decision reversing a summary contempt holding, In re Robert T. Gustafson, Esquire, 619 F.2d 1354 (9th Cir. May 30, 1980), as reported in 28 USAB 517 (No. 15; 7-18-80), and affirmed the district court's summary contempt holding. The case contains an excellent discussion of the issue of when courts may use the summary contempt procedures contained in Rule 42(a), and when courts must instead use the contempt hearing procedures set forth in Rule 42(b).

(Earlier decision withdrawn, summary contempt holding affirmed.)

In re Robert T. Gustafson, Esquire, 650 F.2d 1017 (9th Cir. June 25, 1981)