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COMMENDATIONS

Assistant United States Attorney JOHN D. BATES, District of Columbia, has been commended by Allie B. Latimer, General Counsel, General Services Administration, for his zeal, ability and exceptional representation of GSA in Associated Metals and Minerals Corp. v. Carmen dealing with the agency's actions in disposing of surplus tin.

Assistant United States Attorney THOMAS C. LEE, District of Oregon, has been commended by Mr. John P. Murphy, General Counsel, Veterans Administration and Mr. Robert P. Nimmo, Administrator of Veterans Affairs, for his comprehensive and persuasive presentation to the court concerning the provision of medical care for veterans using private facilities in the case of Coalition for Better Veterans Care, Inc. v. Administrator of the Veterans Administration.

Assistant United States Attorney REBECCA ROSS, District of Columbia, has been commended by Mr. William E. Hall, Director of the United States Marshals Service, U.S. Department of Justice, for her successful efforts in cases involving the Marshals Service and the Church of Scientology such as the case of Duke Snider v. United States.

Assistant United States Attorney HENRY H. ROSSBACHER, Central District of California, has been commended by K.H. Fletcher, Chief Postal Inspector, United States Postal Service, for his most competent and professional advice and assistance in the development of a handbook entitled Prosecution of Complex Mail Fraud Cases designed to outline the investigator's role in the various prosecutive steps that must be accomplished in major cases.

Assistant United States Attorney MAX SAYAH, Eastern District of New York, has been commended by Mr. Joseph G. Boslet, Jr., Fire Marshal of Uniondale, New York, for a job well done in the prosecution of the arson and mail fraud case of United States v. Joseph Gelb.

Assistant United States Attorneys PAUL SCHECHTMAN and EUGENE N. KAPLAN, Deputy Chief of the Criminal Division, Southern District of New York, have been commended by J.F. Williamson, Inspector in Charge, New York Office, United States Postal Service, for their outstanding work and involvement leading to the indictment of ten employees of Designer Sportswear, Inc. in a complex business fraud case.

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

POINTS TO REMEMBER

IRS Summons Enforcement - Stays Pending Appeal

In IRS summons enforcement cases which result in an enforcement order, the party opposing the summons will frequently request a stay of the enforcement order pending appeal. It is the Department's policy to oppose vigorously such requests for stays in all but the most extraordinary cases. First, a stay thwarts the investigation for the time during which an appeal is prosecuted -- at least one year in most circuits. The result is that the investigation is jeopardized regardless of the tolling of any statutes of limitations. Second, appellants are almost never successful in obtaining reversal of a district court's enforcement order. The mooting out of appeals not only facilitates investigations and unburdens the courts but also permits the appellant to seek to raise any defenses to the summons when and if the data are sought to be used against him.

The Tax Division has provided each United States Attorney's office with a mock summons enforcement case file which contains a model anti-stay brief. Tax Division personnel have successfully court-tested this brief many times. Decisions dealing with stays in summons enforcement cases are also separately issue coded in the JURIS summons enforcement library.

If a district court should grant an automatic stay pending appeal or grant a stay before an opposition can be filed, you should immediately move to vacate. Entries of stays over objection should be promptly communicated to the Appellate Section of the Tax Division (Charles E. Brookhart, FTS 633-3564) so that early consideration can be given to moving the Court of Appeals to vacate the stay.

(Tax Division)

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

National Federation of Federal Employees v. Devine, D.C. Circuit Nos. 81-2184, et al. (December 21, 1981). D.J. #145-156-295.

FEDERAL EMPLOYEES: D.C. CIRCUIT VACATES INJUNCTIONS IN FEDERAL EMPLOYEES' HEALTH INSURANCE CASES.

In these much publicized cases, the district court held that the Director of OPM acted arbitrarily in ordering a 6.5 percent reduction in benefits for federal employees' health insurance plans to become effective January 1, 1982. The Director had ordered the reduction to keep the government's share of the insurance costs within the $2.2 billion program budget established by Presidents Carter and Reagan and implicitly approved by Congress in its Continuing Resolution last October. We appealed the decision on an expedited basis, the injunctions were stayed pending appeal, and oral argument was heard on December 15, 1981.

In a per curiam decision, the court of appeals has reversed the district court and vacated the injunctions. The court held that because OPM has an obligation to consider cost to the government in approving health benefit plans, it acted in a fiscally responsible way in deciding to adhere to its budgetary guidelines. The court also held that OPM's directive was not arbitrary although it allowed the insurance carriers only 48 hours to respond, since OPM was acting under the pressure of fast approaching contract deadlines. However, because the court was concerned that some carriers might not have had sufficient time to make sound decisions in adjusting their plans to the 6.5 percent cut, it ordered the district court on remand to allow them seven days in which to modify their plans and resubmit them to OPM for approval.

Attorney: Eloise E. Davies (Civil Division)
FTS (633-3425)

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Crooker v. Bureau of Alcohol, Tobacco and Firearms, D.C. Circuit No. 80-1278 (December 8, 1981). D.J. #145-12-4320.

FOIA: D.C. CIRCUIT EN BANC DECISION HOLDING THAT EXEMPTION 2 OF THE FOIA PROTECTS LAW ENFORCEMENT MANUALS.

Exemption 2 of the Freedom of Information Act protects from disclosure "internal personnel rules and practices" of an agency. 5 U.S.C. 552(b)(2). In 1978, the D.C. Circuit ruled en banc that this exemption protects only employee housekeeping matters such as parking facilities, lunch hours and sick leave. Jordan v. U.S Department of Justice, 591 F.2d 753. Meanwhile, other circuits held that the exemption was broader and protected sensitive government law enforcement manuals whose release could risk circumvention of the law (by acquainting criminals with the specific techniques used by government agencies to detect criminal activity). Caplan v. BATF, 587 F.2d 544 (2d Cir.); Hardy v. BATF, 631 F.2d 653 (9th Cir.). In a 9-1 decision, the D.C. Circuit has now joined the Second and Ninth Circuits in holding that Exemption 2 protects sensitive law enforcement manuals of this type.

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

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

Watt v. Energy Action Educational Foundation, ___ U.S. ___, No. 80-1464 (S.Ct., December 1, 1981) DJ 90-4-93.

Outer Continental Shelf Lands Act; oil and gas leasing conducted under Act does not require any particular bidding method to be used.

Various private plaintiffs and two California governmental entities brought this action against the Secretaries of Energy and the Interior to compel the use of certain bidding systems which did not have a cash bonus as a bidding variable and which were enumerated in the 1978 Amendments to the Outer Continental Shelf Lands Act. See 42 U.S.C. 1337(a). The D.C. Circuit ultimately held that the Secretary of Energy had a duty to promulgate regulations to permit the use of those systems and that the Secretary of the Interior must use them, at least on an experimental basis, in actual lease sales.

The Supreme Court, per Justice O'Connor, held that the State had standing to bring the suit because of the possible adverse effect of the federal leasing program in situations where a pool of oil or gas on the California coast was owned partially by the State and partially by the United States. The Court did not decide the standing of the other plaintiffs. On the merits, the Supreme Court reversed the D.C. Circuit and held that the OCS Lands Act, as amended, does not require that any particular bidding system be used. The opinion did not directly address the duty of the Secretary of Energy to issue regulations for the new bidding systems, because those regulations had been issued prior to the briefing of the case, but the Court's reasoning indicates that no such duty exists under the statute.

Attorneys: Deputy Solicitor General Louis F. Claiborne; Edward J. Shawaker, Anne S. Almy (Land and Natural Resources Division) FTS 633-2813/4427

Weinberger v. Catholic Action, ___ U.S. ___, No. 80-1377 (S.Ct., December 1, 1981) DJ 90-1-4-1807.

National Environmental Policy Act of 1969; Navy not required to prepare hypothetical EIS for secret Department of Defense activities.

Reversing the Ninth Circuit, the Supreme Court held that (1) in inventing the "hypothetical Environmental Impact Statement" (to be used for secret Department of Defense activities), the Ninth Circuit departed from the express intent of Congress; (2) the express intent of Congress was that compliance with NEPA give way to the government's need to preserve military secrets; (3) although Department of Defense regulations may require the Department of the Navy to prepare an environmental impact statement for classified activities solely for internal purposes, the EIS need not be disclosed to the public; (4) in the instant case, since the Navy can neither confirm nor deny that a secret activity is taking place, it cannot be established whether the Navy has undertaken an action which would require the preparation of an EIS; and (5) ultimately, whether the Navy has complied with NEPA "to the fullest extent possible" in a matter involving military secrets is beyond judicial scrutiny. The Supreme Court directed the reinstatement of the district court's judgment of dismissal.

The opinion was written by Justice Rehnquist, and joined by six other justices. In a concurring opinion, the two other justices (Justices Blackmun and Brennan) stated that the public's inability to participate in the military decision-making process makes it particularly important that NEPA procedures be followed, and that as much information as is possible, consistent with national security, be declassified and released to the public.

Attorneys: Solicitor General Rex E. Lee; Martin Green, Raymond N. Zagone, Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 633-2827/2748

Northern Natural Gas v. Grounds (Consolidated Helium Cases II), ___ F.2d ___, Nos. 74-1886 etc. (10th Cir., November 16, 1981). DJ 90-1-18-650.

Law of the case requires application of "work-back" valuation technique to helium.

In this latest decision in the eighteen-year old helium litigation, the Tenth Circuit reversed the Kansas district court's finding that the value of helium in the natural gas stream, which was removed and sold to the United States by the Helex Companies, was $.60 to $.70 per mcf, holding that the court's prior decisions in Ashland v. Phillips required the Kansas court to use the work-back method to value the helium, and that the minimum value for the helium is $2.00 per mcf. The

work-back method, specifically rejected by the district court in Consolidated Helium II, values the helium as purchased by the Helex Companies, comingled with natural gas, by subtracting the cost of processing the comingled helium from the market value of the helium after it is removed from the natural gas stream.

In the contracts the United States had with the Helex Companies to purchase the helium, the United States agreed to indemnify the Helex Companies for any payments over approximately $3.00 per mcf that the Companies had to pay to third parties in satisfaction of claims to title of the helium. Approximately 32 to 33 million mcf of helium has been sold to the United States by the three Helex Companies involved in the Consolidated Helium litigation. Although it is unlikely that the Kansas court would find a value substantially over $3.00 per mcf, even a finding of $5.00 per mcf would subject the United States to a liability of over $60 million under the indemnity clause, before adding the prejudgment interest of 6 percent.

Attorneys: Laura Frossard and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2753/2762

Faulkner v. Watt, ___ F.2d ___, No. 80-3023 (9th Cir., November 19, 1981) DJ 90-1-23-2143.

Taylor Grazing Act; deference accorded to Secretary's interpretation that preference for entry attaches to land that has not yet been classified.

Plaintiffs sought a reclassification of land previously classified as unsuitable for entry under the Desert Land Act. Plaintiffs also claimed that if the land were reclassified as suitable for entry, they would be entitled to a preference right under the Taylor Grazing Act. The court of appeals held that it was within the Secretary's discretion to refuse to reconsider a use classification for a particular parcel when wide-range land use planning was underway for the area including that parcel. The court also gave deference to the Secretary's construction of the Taylor Grazing Act, such that the preference right applies only to land that has never been classified and not to land already classified.

Attorneys: Jerry L. Jackson, Maria A. Iizuka and Anne S. Almy (Land and Natural Resources Division) FTS 724-7354; 633-2753/4427

Alaska Miners v. Andrus, ___ F.2d ___, No. 80-3073 (9th Cir., November 23, 1981) DJ 90-2-4-462.

Alaska Native Claims Settlement Act; under Section 22(c), Secretary can convey to native corporation land subject to unpatented mining claims after five years.

The court of appeals interpreted Section 22(c) of the Alaska Native Claims Settlement Act to permit conveyances to native corporations of land which is subject to valid, but unpatented mining claims. The court gave "great deference" to Interior's construction of 22(c), which allows miners an extra five years after conveyance to go to patent, but disclaims jurisdiction over patents after that time. The miner's argument that they had a "valid existing right" to proceed to patent was rejected. The court noted that land subject to a mining claim is subject to the disposing power of the government until the miner has satisfied the conditions for issuance of a patent. The court noted in dicta that Interior is not required to adjudicate the validity of all unpatented claims on lands conveyed to native corporations.

Attorneys: David C. Shilton and Anne S. Almy
(Land and Natural Resources Division)
FTS 633-2753/4427

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TAX DIVISION
Assistant Attorney General Glenn L. Archer, Jr.

Summons Enforcement

United States v. Edwin R. Coates, Civil Action No. S-80-603 MLS (E.D. Cal., November 19, 1980).

This summons enforcement proceeding was instituted against a church for its refusal to comply with an IRS administrative summons seeking, inter alia, the church's books of account and corporate minute books for the purpose of determining its continuing status as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). The Court enforced the summons as to the corporate minute books, but denied the Government's request to examine the books of account. In reaching its decision, the Court concluded that Section 7605(c) of the Internal Revenue Code precludes the Internal Revenue Service from examining church books of account when an investigation is undertaken solely for the purpose of reviewing tax-exempt status, and that Section 301.7605-1(c)(2), Treasury Regulations on Procedure and Administration (26 C.F.R.), is invalid to the extent it conflicts with the statute. The Government is presently considering whether to recommend an appeal.

Attorney: Michael H.C. Chun
Tax Division
FTS 724-6531

United States, et al. v. Dale K. Dykema
(7th Cir. - No. 80-2750

In this case the court of appeals reversed the order of the United States District Court for the Eastern District of Wisconsin denying the Government's petition for enforcement of an administrative summons issued by the Internal Revenue Service to Dale K. Dykema in his capacity as the pastor of the Christian Liberty Church. The summons was issued in connection with an investigation being conducted by the IRS to determine (1) the tax-exempt status of the Church; (2) whether the Church was eligible to receive tax deductible contributions; (3) the Church's liability for unrelated business income taxes; and (4) Dykema's correct individual income tax liability. The summons requested that Dykema produce church records falling within any one of 14 specifically defined categories.

The district court refused to enforce the summons because it called for the production of records not shown by the Government to be "truly necessary" to enable the IRS to complete its investigation. The "truly necessary" standard applied by the court was based upon its interpretation of Section 7605(c) of the Internal Revenue Code of 1954 (26 U.S.C.), which provides that Church records may only be examined "to the extent necessary" to determine the amount of taxes imposed under Title 26.

The court of appeals, however, rejected the "truly necessary" standard created by the district court and ruled that the Government need only show that the records requested "may be relevant" to a legitimate inquiry in order to obtain enforcement of a summons seeking church records. See Section 7602 of the Code; United States v. Powell, 379 U.S. 48 (1964).

The court then analyzed each of the 14 categories of records requested by the summons in light of the factual and legal determinations that the IRS must make in an investigation such as this one and concluded that all of the information requested was "relevant and necessary to the performance of tasks entrusted to the IRS by Congress."

Attorneys: Charles E. Brookhart FTS 633-3564
R. Russell Mather FTS 633-3568
Tax Division

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

DECEMBER 8, 1981 - DECEMBER 18, 1981

Adjournment. The first session of the 97th Congress adjourned sine die on December 16, 1981. The Congress will convene for the second session on January 25, 1982.

Nominations. On December 16, 1981, the United States Senate confirmed the following nominations:

David L. Russell, to be U.S. District Judge for the Northern, Eastern, and Western Districts of Oklahoma.

Harold L. Ryan, to be U.S. District Judge for the District of Idaho.

Benjamin F. Baer, of California, to be a Commissioner of the Parole Commission.

Glenn L. Archer, Jr., of Virginia, to be an Assistant Attorney General, Tax Division.

Stanley S. Harris, to be U.S. Attorney for the District of Columbia.

Richard C. Turner, to be U.S. Attorney for the Southern District of Iowa.

Donald W. Wyatt, to be U.S. Marshal for the Eastern District of Tennessee.

Robert T. Keating, to be U.S. Marshal for the Eastern District of Wisconsin.

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Federal Rules of Criminal Procedure

Rule 6(a). The Grand Jury. Summoning Grand Juries.

Rule 54(a). Application and Exception. Courts.

The District Court of the Virgin Islands denied the government's request that a grand jury be convened to investigate possible antitrust violations, reasoning that it lacked the requisite authority. The government filed a petition for mandamus, seeking an order directing the district court to summon a grand jury, relying in part on Rule 6(a) as a source of authority for such action.

The Court first noted that neither constitutional nor organic statutory provisions can readily be construed to authorize, even by implication, the Virgin Islands District Court to convene a grand jury. However, the Federal Rules of Criminal Procedure govern in the District Court of the Virgin Islands pursuant to Rule 54(a), and, since they have the force of statute, might provide an appropriate source of authority for the district court to convene a grand jury. Looking to the language of Rule 6(a), the Court noted that if it applied with full force to the Virgin Islands, it arguably would confer such authority on the district court. However, in the Virgin Islands the authority provided by Rule 6(a) is circumscribed by Rule 54(a), which carves out a significant exception by stating that offenses there shall continue to be prosecuted by information. After an examination of the practices regarding investigatory grand juries in states which prosecute by information, and an examination of the relevant Federal Rules, the Court concluded that there is nothing in the Rules which provides authority to institute investigative grand juries in the Virgin Islands.

(Writ denied.)

United States v. Hon. Judge Almeric L. Christian, 660 F.2d 892 (3d Cir. September 30, 1981)

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Federal Rules of Criminal Procedure

Rule 54(a). Application and Exception. Courts.

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

United States v. Hon. Judge Almeric L. Christian, 660 F.2d 892 (3d Cir. September 30, 1981)

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