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Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

J. MATTHEW CAIN (Ohio, Northern) by Special Agent-in-Charge Joseph E. Griffin, Federal Bureau of Investigation, for his successful prosecution of a Wells Fargo robbery case.

RICHARD N. COX (Illinois, Central) by Special Agent-in-Charge Philip V. Fisher, Drug Enforcement Administration, for his presentation on the Controlled Substances Act at a DEA Law Enforcement Seminar, May 14, 1986.

D. MICHAEL CRITES (Ohio, Southern) by Special Agent-in-Charge Terence D. Dinan, Federal Bureau of Investigation, for his successful prosecution of a drug case.

JEANNE K. DAMIRGIAN (Pennsylvania, Eastern) by Attorney General Edwin Meese III for her successful prosecution of a major drug dealer.

DALE A. GOLDBERG (Ohio, Southern) by Director Alan G. Harper, Veterans Administration Medical Center, for her successful conclusion of an EEO complaint against the Center.

MEL SCOTT JOHNSON (Wisconsin, Eastern) by Inspector General Paul A. Adams, Department of Housing and Urban Development, for his outstanding contributions to the successful investigation of HUD's single family mortgage program.

DANIEL G. KNAUSS, DAVID R. RAMAGE-WHITE, WILLIAM R. STEVENS, JR., and JOHN MCCARTHY ROLL (Arizona) by Special Agent-in-Charge Herbert H. Hawkins, Jr., Federal Bureau of Investigation, for their participation in the Moot Court Training Session for FBI agents in Tucson, Arizona.

KRIS ALLEN MCLEAN (Montana) by District Counsel Michael D. Thompson, Veterans Administration, for his successful representation in a tort claims case.

EMILY BENNETT METZGER (Kansas) by Special Agent-in-Charge Kenneth G. Cloud, Drug Enforcement Administration, for her successful prosecution of a drug distribution case.

ALAN I. MISHAEL (Florida, Southern) by Director William H. Webster, Federal Bureau of Investigation, for his invaluable efforts in arranging forfeiture to the government of an aircraft seized in connection with a narcotics case.

FRANKLIN L. NOEL (Minnesota) by Special Agent-in-Charge Thomas A. Pabst, United States Secret Service, for his work in a complex tele-marketing credit card fraud case.

ROBERT A. PALLEMON (California, Central) by Special Agent-in-Charge Richard T. Bretzing, Federal Bureau of Investigation, for his successful prosecution of a conspiracy, interstate commerce violations, and possession of an unregistered firearm case.

JOHN F. PANISZCZYN (Texas, Western) by District Counsel Richard J. Jones, Veterans Administration, for his diligent efforts in a Federal Tort Claims Act case.

KAREN LEE PATTERSON (California, Eastern) by Colonel Wayne J. Scholl, Corps of Engineers, Department of the Army, for her successful representation of the Corps in a case involving Section 404 of the Clean Water Act.

STEPHEN D. PETERSEN (California, Central) by Regional Counsel Paul E. Wilson, United States Customs Service, for his excellent work in a forfeiture case.

JOHN F. PEYTON, JR. and Special Assistant United States Attorney THOMAS LEDVINA (Hawaii) by Associate Attorney General Arnold I. Burns for their outstanding lawyering in litigation involving President Marcos and his party.

ROBERT H. PLAXICO (California, Southern) by Deputy Chief United States Probation Officer Martha J. Crockett, United States District Court, for his presentation on liability issues at a training session for probation officers.

STEVE PREISSER and MIKE MOORE (Florida, Northern) by Special Agent-in-Charge Gary Wright, United States Customs Service, for their participation in the successful prosecution of an export licensing law violations case.

CARYL PENNEY PRIVETT (Alabama, Northern) by the Food and Drug Administration to receive the Commissioner's Special Citation in recognition of her exceptional legal skill, commitment and cooperation in enforcement litigation.

ROBERT E. RAWLINS (Kentucky, Eastern) by Special Agent-in-Charge Joel A. Carlson, Federal Bureau of Investigation, for his successful prosecution of a gambling case.

THOMAS J. RUETER (Pennsylvania, Eastern) by Chief C. Michael Daley, Criminal Investigation Division, Internal Revenue Service, for his prosecution of a tax case.

RICHARD L. SCHEFF (Pennsylvania, Eastern) by Special Agent-in-Charge David E. Warren, United States Customs Service, for his prosecution of child pornography cases.

S. DAVID SCHILLER (Virginia, Eastern) by United States Trustee William C. White, District of Columbia and Eastern Virginia, for his superb work in a bankruptcy case.

MARK P. SCHNAPP (Florida, Southern) by Director William H. Webster, Federal Bureau of Investigation, for his part in the prosecution of a major bank fraud and embezzlement case.

RICHARD M. SCHWARTZ (New York, Southern) by General Counsel Daniel R. Levinson, United States Consumer Product Safety Commission, for his excellent representation in a Federal Tort Claims Act case.

PAUL L. SEAVE (California, Central) by Assistant Special Agent-in-Charge Al Dovetko, Drug Enforcement Administration, for his successful prosecution of a drug case.

RICHARD J. STOUT (Pennsylvania, Eastern) by Assistant General Counsel Ann C. Wilson, Office of Personnel Management, for his representation in an accident case involving a SEPTA bus and a government vehicle.

DAVID TITMAN (Louisiana, Western) by Acting General Counsel Spence W. Perry, Federal Emergency Management Agency, for his continuous excellent performance in representing FEMA in flood insurance cases.

PETER JOSEPH TOMAO (New York, Eastern) by Inspector General Paul A. Adams, Department of Housing and Urban Development, for his outstanding work in a fraud case.

MARIANNE K. TOMECEK (Texas, Southern) by Regional Attorney W. J. Weltler, Department of Agriculture, for her admirable performance in a complex case involving a plenary casualty loss action, a Chapter 11 bankruptcy, an adversary proceeding contesting a warehouse facility sale, a federal storage contract and performance bond, the formation of a new warehouse entity and other agreements.

D. PAUL VERNIER, JR. (Guam) by Officer-in-Charge James M. Bailey, Immigration and Naturalization Service, for his outstanding dedication, professionalism and service to INS.

CATHERINE L. VOTAW (Pennsylvania, Eastern) by Major General Mark J. Sisinyak, Department of the Army, for her representation of a civil case against the Army's procurement of a Liquid Incinerator for the Johnston Atoll Chemical Agent Disposal System.

JACKIE N. WILLIAMS (Kansas) by Special Agent-in-Charge Robert B. Davenport, Federal Bureau of Investigation, for his successful prosecution of a drug case.

Organized Crime Strike Force Attorneys RICHARD J. MARIEN, LLOYD B. MONROE, JR., and A. MARY STERLING (Kansas) were commended by Director William H. Webster, Federal Bureau of Investigation, for their outstanding work in a casino skimming case.

CLEARINGHOUSE

Legal/Policy Advisories on Asset Forfeiture Matters

The Asset Forfeiture Office of the Criminal Division prepares advisories on numerous legal/policy issues each month in the course of their regular duties.

A copy of the following advisories may be obtained by contacting the Office of Legal Services, Executive Office for United States Attorneys, at FTS 633-4024.

L86-4 Guidelines for Release of Seized and Forfeited Property to State and Local Law Enforcement Agencies, 51 Fed. Reg. 6608 (Feb. 25, 1986).

L86-5 June 25, 1986, memorandum from D. Lowell Jensen to all United States Attorneys regarding "Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets."

Please request item number CH-37.

(Executive Office)

POINTS TO REMEMBER

Forfeiture and Abandoned Property Manual

The Legal Counsel and the Administrative Services Divisions of the Federal Bureau of Investigation (FBI) have prepared the Forfeiture and Abandoned Property Manual (dated July 1986).

The Manual, which includes the new forfeiture provisions of the "Comprehensive Crime Control Act of 1984" enacted on October 12, 1984, explains forfeiture procedures pursuant to statutes enforced by the FBI permitting civil forfeiture. In addition, the Manual delegates responsibility for different aspects of the civil forfeiture process and sets forth FBI policy. The Manual replaces the 1984 manual, "Civil Forfeiture Under the Controlled Substances Act," and is for official use only.

On July 21 and 22, 1986, a copy of the Manual was mailed to each United States Attorney's office, Attention: Asset Forfeiture Contact.

(Executive Office)

Personnel

Effective July 14, 1986, P. Raymond Lamonica was court-appointed United States Attorney for the Middle District of Louisiana.

Effective July 16, 1986, Robert L. Teig was court-appointed United States Attorney for the Northern District of Iowa.

(Executive Office)

United States Attorneys and United States Marshals Are Advised To Work Together To Avoid Problems Relating to Seized and Forfeited Property

By memorandum of June 25, 1986, to all United States Attorneys, Deputy Attorney General D. Lowell Jensen urged United States Attorneys' and United States Marshals' personnel to "coordinate their efforts and devote the requisite time and attention to the [forfeiture] case." Forfeiture, a relatively new area

of law, was described in the memorandum as a powerful and effective tool in the [government's] fight against organized crime and drug trafficking. It empowers the government to remove the proceeds of crime from individual defendants and to destroy the economic power of drug trafficking organizations. However, it must be used fairly, honestly, efficiently, and justly.

To meet this objective, Mr. Jensen has established guidelines "which must be observed in order to help minimize or avoid the possibility that the government will assume unnecessary difficult or insurmountable problems in the management and disposition of seized assets."

A copy of the memorandum is available through the Office of Legal Services, see "Legal/Policy Advisories on Asset Forfeiture Matters," in this issue of the Bulletin.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Connecticut v. Barrett, 495 A.2d 1044 (1985). The issue is whether a defendant who makes a voluntary oral statement invokes his Miranda rights by an equivocal reference to his attorney.

A brief amicus curiae in Richardson v. Marsh, 781 F.2d 1201 (6th Cir. 1986). The question presented is whether the rule in Bruton v. United States, 391 U.S. 123 (1968), should apply to codefendant statements that do not expressly mention the defendant but which do, when linked with other evidence in the case, furnish incriminating evidence against the defendant at a joint trial.

A petition for certiorari in Ellender v. Heckler, No. 85-6274 (2d Cir. 1986). The questions presented are (1) whether the district court's judgment was "final" for purposes of supporting appellate court jurisdiction under 28 U.S.C. §1291; and (2) whether that judgment satisfied the requirements of Federal Rules of Civil Procedure 58 so as to set the time for appeal running.

CIVIL DIVISION

SUPREME COURT HOLDS THAT ENHANCEMENT OF TITLE VII ATTORNEYS FEE AWARD TO COMPENSATE FOR DELAY IN PAYMENT CONSTITUTES AN AWARD OF INTEREST PROHIBITED BY SOVEREIGN IMMUNITY.

The Supreme Court reversed a ruling by the D.C. Circuit which allowed a 30 percent enhancement of a Title VII attorneys fee award against the government, because of the delay that occurred between the rendering of the services and the payment of the fee. The Court held that enhancement for delay amounted to the

imposition of interest against the United States and that Congress had not expressly waived the government's traditional immunity from interest in Title VII. Specifically, the Court rejected the view that by making the United States liable "the same as a private person" or by mandating the award of "reasonable" attorneys fees, Congress acted unambiguously enough to render the government liable for interest here.

The Court's categorical rejection of delay as a proper basis for enhancement of a Title VII award should also lead to reversal of cases authorizing use of "current" rates rather than historical rates to compensate for delay. For instance, Shultz v. Palmer, which raised that issue, was vacated and remanded for further consideration in light of Shaw.

Library of Congress v. Shaw, ___U.S.___, No. 85-54, (July 1, 1986). D. J. # 35-16-1320. Attorneys: William Kanter (FTS 633-1597) and Al J. Daniel (FTS 633-3518), Civil Division; argued by Charles Rothfeld (FTS 633-5638), Office of the Solicitor General.

SUPREME COURT HOLDS THAT FAMILY HOUSEHOLD UNIT PROVISION OF FOOD STAMP ACT DOES NOT INFRINGE ON CONSTITUTIONALLY PROTECTED FAMILY RIGHTS.

In 1981 and 1982, Congress amended the Food Stamp Act, 7 U.S.C. §2012(i), to require that parents, children and siblings residing together be treated as a single unit for purposes of the Act, regardless of whether they actually eat together; the Act had contained no such limitation previously, and unrelated individuals residing together but eating separately continued to be eligible for separate household status. Plaintiffs thereafter brought this action alleging that 7 U.S.C. §2012(i) impermissibly discriminates against related individuals who choose to reside together, and infringes protected family rights. The district court applied heightened scrutiny to plaintiffs' claim and held the statute unconstitutional.

On direct appeal pursuant to 28 U.S.C. §1252, the Supreme Court reversed. The Court agreed with the government's argument that the case involves neither fundamental rights nor suspect or quasi-suspect classifications, and that the government was not directly interfering with family living arrangements. Accordingly, the Court held that only "rational basis" scrutiny was appropriate, and that the statute was a legitimate and reasonable measure aimed at preventing fraud and abuse in the multibillion dollar Food Stamp program.

Lyng v. Castillo, ___U.S.___, No. 85-250 (June 27, 1986). D. J. # 147-74-16. Attorneys: Robert S. Greenspan (FTS 633-5428) and John S. Koppel (FTS 633-5460), Civil Division.

SUPREME COURT AFFIRMS JUDGMENT AWARDING FEES IN AN AMOUNT SEVERAL TIMES GREATER THAN THE DAMAGES RECOVERED IN THE UNDERLYING CIVIL RIGHTS CASE ON THE MERITS.

Eight individuals brought a civil rights action under 42 U.S.C. §1983 against the City of Riverside and several of its police officers in connection with an incident involving the officers' disruption of a party in two of the

individuals' homes. After many years of litigation, the plaintiffs ultimately won a jury verdict of $33,350 against the City and a few police officers. No injunctive relief was issued. Plaintiffs then filed for attorney's fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, and was awarded $245,456.25 for their litigative efforts. The court of appeals affirmed. The Supreme Court, however, vacated and remanded the award for further consideration in light of Hensley v. Eckerhart, 461 U.S. 424 (1983). On remand, the district court issued the same award, and the court of appeals once again affirmed.

In a plurality opinion, the Court affirmed the attorney's fees judgment; but rejected the view that a civil rights fee award need necessarily bear any proportion to the underlying damage judgment, since a civil rights suit may vindicate broader, public rights that go beyond an individual's personal recovery. Justice Powell, although troubled by the disproportionality of the award, concurred, but added the observation that no rule of proportionality governed the fee award in such cases. Justice Rehnquist, joined by three other dissenters, argued that the award plainly was disproportionately large, was arrived at in a manner inconsistent with the principles of Hensley, and should be reversed and remanded for recomputation.

City of Riverside v. Rivera, ___ U.S. ___, No. 85-224 (June 27, 1986). D. J. # 157-12C-3076. Attorneys: William Kanter (FTS 633-1597) and Michael Jay Singer (FTS 633-4815), Civil Division.

SUPREME COURT HOLDS THAT COMPENSATORY DAMAGES FOR VIOLATION OF CONSTITUTIONAL RIGHTS ARE TO BE BASED ON ACTUAL INJURY SUFFERED RATHER THAN ANY ABSTRACT INHERENT VALUATION OF THE RIGHT INVOLVED.

The Supreme Court has resolved a conflict among the circuits regarding the standard that governs damages awards for deprivations of constitutional rights. The issue arose in an action by a teacher who had been suspended, without a presuspension hearing, for allegedly using improper teaching methods. Although respondent continued to receive pay throughout the period of suspension and later was reinstated to his duties, the jury awarded him over a quarter of a million dollars. The instructions to the jury permitted it to place some intrinsic value on respondent's constitutional rights, without regard to his actual injury or petitioners' responsibility for that injury. Because this issue also arises in suits against federal officials, the Solicitor General authorized the government's participation as amicus. The government urged that damages awards for constitutional deprivations should be guided by compensatory principles rather than abstract notions of the value of constitutional rights, and the Supreme Court agreed. Reaffirming its earlier decision in Carey v. Piphus, 435 U.S. 247 (1978) (which respondent urged should be limited to "procedural" rather than "substantive" constitutional rights), the Court held that "no compensatory damages could be awarded . . . absent proof of actual injury" (slip op. 9 (emphasis in original)). Otherwise, according to the Court, "juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants" (id. at 11).

Memphis Community Schools v. Stachura, ___ U.S. ___, No. 85-410 (June 25, 1986). D. J. # 145-0-1804. Attorneys: Barbara L. Herwig (FTS 633-5425) and Larry L. Gregg (FTS 724-6732), Civil Division.

SUPREME COURT BACKS UAW'S RIGHT TO CHALLENGE LABOR DEPARTMENT HANDBOOK AND AFFIRMS ASSOCIATIONAL STANDING DOCTRINE.

Eleven members of the UAW and the union itself filed this action claiming wrongful denial of benefits under the Trade Act of 1974, 19 U.S.C. §2101, et seq. Even though under the Act benefit decisions are made by "cooperating state agencies," plaintiffs sued only the Secretary of Labor. The district court agreed with plaintiffs that a Department of Labor interpretative handbook misrepresented the Trade Act's provisions prior to 1981, and ordered the Secretary of Labor to "direct" all state agencies to reprocess all benefit claims denied in reliance upon the handbook. The D.C. Circuit reversed, holding that the UAW lacked standing since it had alleged no injury to itself or its membership's associational rights. It also held that the individual claims should be dismissed because of the failure to join the state agencies as parties.

The Supreme Court reversed, holding that the UAW has standing and that state agencies do not have to be parties since the agencies will without doubt obey any directive from the Secretary of Labor that he is ordered to promulgate. However, the Court left the D. C. Circuit to decide what will happen if a state is ordered by Labor to reprocess applications for benefits which cannot be reviewed under the applicable state's administrative law.

The Court asserted further that associations make valuable plaintiffs due to their "pre-existing reservoir of expertise and capital," and "a judgment won against [the association] might not preclude subsequent claims" by the members. The four dissenting justices, while differing with the majority's decision to remand the case for a decision on the merits, did not support changing the associational standing doctrine.

International Union, UAW v. Brock, ___U.S.___, No. 84-1777 (June 25, 1986). D. J. # 102-2242. Attorneys: Leonard Schaitman (FTS 633-3441) and William G. Cole (FTS 633-2786), Civil Division; argued by Carolyn B. Kuhl of the Solicitor General's Office).

SUPREME COURT RULES THAT "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT CONSTITUTES A VIOLATION OF TITLE VII, BUT SIGNALS LIMITATIONS ON EMPLOYERS' IMPUTED LIABILITY.

Respondent, a former employee of the petitioner bank, filed a Title VII action alleging that her supervisor had subjected her to sexual harassment. The district court granted judgment for the bank, based on its findings that respondent's promotions at the bank had been based on merit and that any sexual relationship between respondent and her supervisor had been voluntary. The D.C. Circuit reversed and remanded, holding that even if respondent had failed to show that she had lost tangible job benefits, she may have made out a Title VII claim based on her supervisor's creation of a discriminatory hostile working environment. It also held that the employer would be strictly liable for any acts of harassment by the supervisor, regardless of its lack of notice, and that evidence regarding respondent's provocative dress and talk had "no place" in such litigation.

The Supreme Court, while affirming the court of appeals' remand order, confirmed that hostile environment harassment can form the basis for a Title VII claim, pointing out that the lower courts had applied this principle to race, religion, and national origin as well as sex. However, the Court made clear that all relevant evidence, including that ruled inadmissible by the court of appeals, must be considered. The Court declined to "issue a definitive rule" on the imputed liability issue, holding that the lack of full factual findings or a final resolution of the issue of liability precluded such a ruling.

Meritor Savings Bank, FSB v. Vinson, ___U.S. ___, No. 84-1979 (June 19, 1986). D. J. # 145-0-1800. Attorneys: John F. Cordes (FTS 633-3380) and John F. Daly (FTS 633-3688), Civil Division.

SUPREME COURT RULES ON FIRST AMENDMENT CHALLENGE TO SOCIAL SECURITY NUMBERS.

The Supreme Court issued a split decision reversing, on direct appeal, a district court decision barring the Secretary of Health and Human Services from using and disseminating a Social Security number issued in the name of a child whose parents applied for AFDC benefits but initially objected on religious grounds to their obtaining a Social Security number. The district court also barred HHS from denying benefits because of the parents' refusal to supply a Social Security number.

A clear majority of the Supreme Court held that the First Amendment cannot dictate the conduct of the government's internal procedures when the government had in fact ultimately obtained a number for the child. The Court split on the more difficult question of whether the First Amendment protected the parents' initial refusal to supply a number: two Justices believed this issue was moot; three Justices supported HHS's position that there was no First Amendment violation; and four Justices supported plaintiffs' position that there was a First Amendment violation; in dictum, Justice Blackmun agreed with plaintiffs' views "on the facts as determined by the District Court." Because of the combination of votes on the broader question, the judgment below was reversed and remanded.

Bowen v. Roy, ___U.S.___, No. 84-780 (June 11, 1986). D. J. # 145-16-2361. Attorneys: Leonard Schaitman (FTS 633-3441) and Peter R. Maier, FTS 633-4052), Civil Division.

SUPREME COURT HOLDS THAT STATUTORY AND REGULATORY ISSUES ARISING IN SECRETARY OF HHS' ADMINISTRATION OF THE PART B MEDICARE PROGRAM ARE SUBJECT TO JUDICIAL REVIEW.

This case involves the question whether Congress has precluded judicial review of procedural and statutory claims arising under Part B of the Medicare Act. In United States v. Erika, Inc., 456 U.S. 201 (1982), the Supreme Court held that Congress had foreclosed review of benefit determinations, and in Heckler v. Ringer, 466 U.S. 602 (1984), the Court apparently extended that holding to include review of the Secretary's method of making those benefit determinations. In light of those decisions and a favorable decision in the Fourth Circuit, Starnes v. Schweiker, 748 F.2d 217 (4th Cir. 1984), cert. denied,

105 S. Ct. 2022 (1985), the government petitioned for certiorari from the adverse ruling in the Sixth Circuit.

The Supreme Court affirmed, reiterating the "strong presumption that Congress intends judicial review of administrative action." According to the Court, the legislative history of the Part B provisions revealed only a general intent to preclude review of claim calculations, not necessarily rules and regulations which affected those determinations. The Court stated that irrespective of the discussion of the Part B Program in Ringer, its holding in Erika was never meant to extend beyond purely ministerial calculations of benefit determinations.

Bowen v. Michigan Academy of Family Physicians, ___U.S.___, No. 85-225 (June 9, 1986). D. J. # 145-16-1033. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Harold J. Krent (FTS 633-3159), Civil Division.

FIFTH CIRCUIT HOLDS THAT UNDER THE CIVIL SERVICE REFORM ACT OF 1978 THERE IS NO JUDICIAL REVIEW OF EMPLOYEE RECLASSIFICATION CLAIMS.

Plaintiff, a GS-14 attorney, sought judicial review of OPM's denial of his claim that his position should be reclassified at the GS-15 level. The district court rejected the government's argument that reclassification claims are not subject to judicial review under the Civil Service Reform Act (CSRA), and held that OPM's denial of plaintiff's claim had been arbitrary and capricious. Accordingly, it ordered OPM to promote plaintiff, but denied plaintiff's application for attorney's fees under the EAJA.

On appeal, the Fifth Circuit reversed on the merits. It agreed that there is no judicial review of minor personnel matters such as reclassification claims under the CSRA, and held that plaintiff's sole remedy under the Act is a "prohibited personnel practice" claim to the Office of Special Counsel of the Merit Systems Protection Board. Although plaintiff had also raised an equal protection claim which the district court had not reached, the court found that this claim lacked in merit and remand to the district court was not required. Finally, since plaintiff is no longer a "prevailing party," the court held that he is not eligible for fees under the EAJA.

Towers v. Horner, ___F.2d___, Nos. 85-3001 and 3172 (5th Cir. June 18, 1986). D. J. # 145-156-378. Attorneys: William Kanter (FTS 633-1597) and John S. Koppel (FTS 633-5450), Civil Division.

EIGHTH CIRCUIT WITHDRAWS OPINION HOLDING THAT AGENCY ACTION FOUND TO BE UNSUPPORTED BY SUBSTANTIAL EVIDENCE IS PRESUMPTIVELY UNJUSTIFIED WITHIN THE MEANING OF THE EAJA.

In granting an unopposed fee application under the Equal Access to Justice Act (EAJA), the court of appeals held that the recent amendments to the EAJA changed the standard for determining the "substantial justification" of the government's position under 28 U.S.C. §2412(d). It ruled that Congress intended to change the standard from one of "reasonableness" to one where the position of the United States is presumptively unjustified once the underlying action has

been found to be unsupported by substantial evidence in the record. Because of the importance of this issue to EAJA litigation, and because of the belief that the panel overlooked critical indicia of legislative history, the government moved the court to withdraw its opinion.

The government's motion acknowledged that the House Report on the EAJA amendments contained language to the effect that agency action found to be unsupported by substantial evidence was presumptively unjustified under the new Act; but it pointed out that this language was expressly disavowed by the bill's sponsors on the floor of the House, that Senate leaders had similarly taken exception to the language, and more importantly, that the President in signing the bill had indicated understanding that "the substantial justification standard is a different standard, and an easier one to meet than either the arbitrary and capricious or substantial evidence standard." The court granted the government's motion and withdrew its opinion.

Peterson v. United States Railroad Retirement Board, ____F.2d____, No. 85-5062 (8th Cir. May 1, 1986). D. J. # 124-39-21. Attorneys: William Kanter (FTS 633-1597) and Harold J. Krent (FTS 633-3159), Civil Division.

TENTH CIRCUIT UPHOLDS PLAIN MEANING AND CONSTITUTIONALITY OF FEDERAL UNEMPLOYMENT TAX ACT REQUIREMENT FOR REDUCTION OF UNEMPLOYMENT BENEFITS BY THE AMOUNT OF SOCIAL SECURITY RETIREMENT BENEFITS.

Social Security recipients in Colorado challenged that State's implementation of a Labor Department interpretation of the Federal Unemployment Tax Act requiring that unemployment benefits must be reduced by the amount of any Social Security pension benefits, but need not be reduced in the case of most private pensions. The district court rejected this interpretation on the basis of legislative history, and also on equal protection grounds, and enjoined Colorado from complying with DOL's interpretation. DOL participated as amicus in Colorado's appeal.

Reversing the district court, the court of appeals accepted the argument already endorsed by three other circuits that the plain meaning of the statute required the challenged offset, and precluded construction of a contrary meaning from legislative history. In addition, the court held that offsetting unemployment benefits by Social Security pensions, but not by private pensions in most circumstances, was rationally related to saving of public funds and ease of administration.

Edwards v. Valdez, Director, Colorado Dept. of Labor, ____F.2d____, Nos. 85-1552, 85-1650 (10th Cir. May 5, 1986). D. J. # 145-10-2574. Attorneys: Michael Kimmel (FTS 633-5714), Civil Division; and Bette Briggs (FTS 523-8247), Department of Labor.

ELEVENTH CIRCUIT RULES THAT APPEALS COUNCIL HAS COMPLETE AUTHORITY UNDER EXISTING REGULATIONS TO REVIEW AND REVERSE ANY ALJ DECISION IN SOCIAL SECURITY DISABILITY CASES.

The Eleventh Circuit in an en banc decision vacated its panel's decision and reaffirmed the authority of the Secretary (through the Appeals Council) under his regulations to review any Administrative Law Judge (ALJ) decision in Social Security Disability cases. It also reaffirmed the administrative law principle that when an agency is the final decision-maker, it is the final decision of the agency that is reviewed and not the decision of any of the intermediate decision-makers who render decisions along the way.

Parker v. Bowen and Hand v. Bowen, ___ F.2d ___, Nos. 84-7678, 84-8630 (11th Cir. May 13, 1986) (en banc). D. J. # 137-1-1177. Attorneys: William Kanter (FTS 633-1597) and Howard S. Scher (FTS 633-4820), Civil Division.

ELEVENTH CIRCUIT REVERSES DISTRICT COURT DECISION AND HOLDS THAT A HOSPITAL MUST EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE PROVIDER REIMBURSEMENT REVIEW BOARD UNDER 42 U.S.C. §139500(A)(1)(A)(I) BEFORE OBTAINING JUDICIAL REVIEW OF ITS MEDICARE REIMBURSEMENT RATE UNDER THE NEW PROSPECTIVE PAYMENT SYSTEM.

In 1983, Congress changed the reimbursement method to hospitals for services they provide to Medicare beneficiaries. Under the old system, hospitals received the "reasonable cost" of the services provided. Under the new Prospective Payment System, the Secretary sets rates in advance of the provision of services for each category of illness. These rates apply no matter what costs the hospitals incur; hospitals are thus encouraged to cut costs.

In a number of cases, hospitals have sought review of the Secretary's reimbursement rates. The Secretary's regulations construe the Medicare Act as providing for administrative and judicial review only after the issuance of a final decision by the Secretary (a "Notice of Program Reimbursement") on the amount of payment due to a hospital for any given cost year. However, hospitals have sought immediate review, arguing that the Secretary's regulations establish a kind of Catch-22: that is, that the regulations force hospitals to wait until the end of their cost year to obtain review of a reimbursement rate, but that other regulations provide that only prospective relief (i.e., relief from the point of review forward) is available upon that review. Review, according to the hospitals' arguments, is therefore deprived of much of its meaning. The district court's decision, one of thirteen consecutive losses for the government on this issue, allowed the hospital to seek early review.

The Eleventh Circuit reversed, accepting the government's argument that the prospective relief regulations apply only in certain, limited situations; and that hospitals will not be prejudiced by following the scheme of review, since the Secretary's regulations allow hospitals to recover full, retroactive relief if they can establish an entitlement to such relief. Thus, for hospitals invoking the jurisdiction of the court under 42 U.S.C. §1395oo(a)(1)(A)(i), judicial review must await the issuance of the Secretary's Notice of Program Reimbursement.

On the ground that the hospital in this case had requested the district court to review its PPS rate under §1395oo(a)(1)(A)(i) only, the Court declined to decide whether a Notice of Program Reimbursement is also a condition precedent for review under 42 U.S.C. §1395oo(a)(1)(A)(ii), that portion of the Medicare statute that provides for review of issues arising under the Prospective Payment System. However, the court's ruling on the potential Catch-22 issue would appear to deprive hospitals of any meaningful basis upon which to challenge the Secretary's regulatory scheme on this alternate basis.

Charter v. Bowen, ___F.2d___, No. 85-8378 (11th Cir. May 6, 1986). D. J. # 137-19M-254. Attorneys: John F. Cordes (FTS 633-3380) and Alfred R. Mollin (FTS 633-4116), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

QUIET TITLE ACT 12-YEAR LIMITATIONS PERIOD BARS HEIR TO INDIAN ALLOTTEE'S SUIT.

An action seeking a declaration that plaintiff alone possessed valid title to inherited Indian lands and that the title the United States asserted was defective, and an order requiring the United States to pay her the value of her interests in order properly to transfer title was barred by the Quiet Title Act's 12-year limitations period. The suit was a "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." By 1967, at the very latest, the plaintiff was on notice that the government did not recognize her title to the allotments in question.

United States v. Mottaz, ___U.S.___, No. 85-546 (June 11, 1986). D. J. # 90-2-4-795. Attorneys: J. Carol Williams (FTS 633-2757) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

TAKING CLAIM BY LAND DEVELOPER DEEMED PREMATURE.

The Supreme Court held, that a California partnership had not proved the restrictions on its land use precluded all development amounting to taking their property for public use. For the fourth time in six years the Court declined to decide whether persons, who are prevented by local zoning laws from developing their land in a way they desire, may recover compensation for a taking. The partnership, which owns 44 acres of undeveloped land near Davis, California, argued it was entitled to compensation by the city and county governments which had rendered its property worthless by land regulations to block residential development and relegating the land to farming, for which it was unsuitable. Justice Steven's majority opinion said it would be premature to decide that issue, because state court rulings in the case "leave open the possibility that some development will be permitted."

MacDonald, Sommer & Frates v. Yolo County, ____U.S.____, No. 84-2015 (June 25, 1986). D. J. # 90-1-24-174. Attorneys: Raymond B. Ludwiszewski (FTS 633-2756) and Peter R. Steenland, Jr. (FTS 633-2748), Land and Natural Resources Division.

NEPA CHALLENGE REJECTED WHERE OPPONENTS OF FEDERAL MEDICAL CENTER FAILED TO RAISE SIGNIFICANT ENVIRONMENTAL ISSUE.

The Bureau of Prisons (BOP) purchased a former state mental institution in Rochester, Minnesota, for conversion to a Federal Medical Center. The process required the addition of high-powered lighting, fencing, a patrol road, and the building of a guard house at the entrance. BOP prepared an Environmental Impact Statement for the project, which was challenged in the district court. After denying a preliminary injunction, the district court held that BOP had done more than was required under NEPA in preparing its EIS because the action of retrofitting the state institution had no major environmental impact. The court of appeals affirmed.

Finding that the main impact from the project was aesthetic, the court held that Olmsted Citizens had failed to raise a significant environmental issue within the meaning of NEPA. For that reason, summary judgment for the BOP was properly granted by the district court. Judge Arnold dissented, believing that a trial should have been held on the issue of whether an EIS was necessary.

Olmsted Citizens for a Better Community v. United States Bureau of Prisons, No. 85-5141 (8th Cir. June 9, 1986). D. J. # 90-1-4-2712. Attorneys: Claire L. McGuire (FTS 633-2855) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

NOTICE AND HEARING ON LEGISLATIVE WITHDRAWAL PROPOSAL UNDER NEPA ALSO SATISFIED ADMINISTRATIVE WITHDRAWAL UNDER FLPMA.

In connection with the proposal to establish the Snake River Birds of Prey National Conservation Area, the Secretary of Agriculture prepared a draft and final EIS and held hearings. The original proposal was for a permanent legislative withdrawal. An alternative proposal was for an administrative withdrawal of 20 years for a lesser number of acres. Sagebrush Rebellion, which opposed the creation of the Conservation Area, argued that the Secretary had failed to satisfy the notice and hearing requirements of FLPMA when he acted under NEPA. The district court rejected Sagebrush's argument that the Secretary was required to hold a separate set of FLPMA hearings in addition to the previously conducted NEPA hearings.

On appeal, the Ninth Circuit affirmed. It held that while the notices "did not comply in every respect with the terms of Section 204(b)," the error was harmless since the purposes of FLPMA were fully satisfied. The notices under NEPA for a contemplated legislative withdrawal satisfied the administrative withdrawal under FLPMA. Likewise the hearings held pursuant to NEPA satisfied FLPMA's hearing requirement. The NEPA hearings provided the public with a full and fair opportunity to be heard on concerns relevant under FLPMA to the administrative withdrawal of the Conservation Area.

Sagebrush Rebellion, Inc. and National Audubon Society v. Clark, ___ F.2d ___, No. 84-4371 (9th Cir. May 28, 1986). D. J. # 90-1-4-2177. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-5580), Land and Natural Resources Division.

SUIT CHALLENGING PERMIT TO TAKE KILLER WHALES NOT LIMITED BY SECTION 104(d)(6) OF MARINE MAMMAL PROTECTION ACT.

The Marine Mammal Protection Act ("MMPA") 16 U.S.C. §1361-1407, generally prohibits the taking of marine mammals except where authorized under a permit issued by the National Marine Fisheries Service ("NMFS"). Sea World applied to NMFS for a permit to permanently remove 10 killer whales from Alaskan and Californian waters for research and display and up to 90 killer whales to be held temporarily (up to three weeks) for research purposes. After public notice and hearing on the permit application, NMFS granted the permit to Sea World, subject to certain conditions. NMFS did not prepare an EA or EIS prior to issuing the permit.

More than 60 days after the permit had been issued, plaintiffs filed an action in the district court alleging that NMFS was required by NEPA to prepare an EIS prior to issuing the permit. The district court agreed and entered a judgment declaring the permit to be null and void and enjoining Sea World from capturing the whales, pending completion of an EIS. NMFS and Sea World appealed.

The Ninth Circuit affirmed in part and reversed in part. First, the court found that the action was not barred by Section 104(d)(6) of the MMPA, 16 U.S.C. §1374(d)(6), which requires suits for "judicial review of the terms and conditions of any permit" to be brought within 60 days of the date on which the permit is issued. Second, the court ruled that Section 104(d), which requires NMFS to process a permit application within 90 days of giving the public notice, is not in irreconcilable conflict with the EIS requirements of NEPA. Third, the Ninth Circuit found that the grant of the permit application was not categorically excluded from NEPA under NMFS' regulations as it was the subject of controversy based on potential environmental consequences and had certain environmental impacts or unique or unknown risks.

Jones v. Gordon, ____F.2d____, No. 85-3739 (9th Cir. June 19, 1986). Attorneys: Eileen Sobeck (FTS 724-7371), James C. Kilbourne (FTS 724-7371) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

SEVERANCE DAMAGE AWARD BASED WHOLLY ON APPRAISER'S TESTIMONY, WITHOUT ANY MARKET DATA, SUSTAINED.

The United States acquired a 100-foot-wide perpetual easement, plus some easements for access roads, totalling about 59 acres, over a 6,200-acre ranch in Eastern Washington. The district court denied the government's in limine motion and allowed the landowner to introduce evidence that ground disturbance activities within the easement area diminished the value of nearly 5,700 unencumbered acres of the remaining ranch by $25 per acre--about $141,500 (in addition to the compensation for the easement area).

On the government's appeal, the Ninth Circuit affirmed. It held that the district court did not abuse its discretion in admitting the evidence allowing the landowners' expert to testify to the adverse effect of the taking by the perceived effect of knapweed on the value of the ranch. Objective market data is not required, the court wrote, where no comparable sales exist and where a

knowledgeable expert makes a reasoned evaluation of the risk of weed damage at the time of the condemnation. Finally, characterizing the government's argument as attacking the weight of the evidence, the court said that unless a motion for a directed verdict is made this claim is waived (unless there is "plain error"--which did not exist).

United States v. 33.5 Acres in Okanogan County, Wa. (Smith), ___F.2d___, No. 35-3631 (9th Cir. May 19, 1986). D. J. # 33-49-215-6500. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

NAVIGATIONAL SERVITUDE EXTENDS TO ARTIFICIALLY CREATED OUTER PERIMETER OF LAKE.

Pursuant to the Flood Control Act of 1950, the United States Army Corps of Engineers built the Albeni Falls Dam and Reservoir Project. The project raised the level of Lake Pend Oreille in Idaho from 2,051 to 2,062.5 feet above sea level. The Corps, which had acquired flowage easements from plaintiff and other riparian landowners sought to compel them to apply for after-the-fact permits under Section 10 of the River & Harbors Act of 1899, for structures plaintiff had caused to be built within the new high water mark. Plaintiff denied that the Corps had regulatory jurisdiction and, joined by a landowners association, filed suit for declaratory and injunctive relief, arguing that the Corps' rights were limited by the terms of its easement. The district court sustained the Corps' authority and directed plaintiff to apply for an after-the-fact permit.

On appeal, the Ninth Circuit affirmed, holding that the government's navigational servitude over navigable waters does not arise from title obtained by the Declaration of Taking. It derives from the Commerce Clause of the Constitution. The court also said the Corps was bound neither by past conduct nor officials' representations from asserting its regulatory jurisdiction.

Swanson v. United States, ___F.2d___, No. 85-3718 (9th Cir. May 16, 1986). D. J. # 90-5-1-6-253. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

CHICKEN PROCESSOR LACKS STANDING TO CHALLENGE EPA'S DISBURSAL OF FUNDS TO HELP FINANCE UPGRADING OF WASTEWATER TREATMENT PLANT.

The operator of a chicken processing plant and a local resident of Jasper, Alabama, who are charged user fees for discharges of wastewater into publicy-owned treatment works, appealed dismissal of complaint for lack of standing. Suit had been brought seeking declaratory and injunctive relief to prevent disbursal of federal funds by EPA or the Alabama Department of Environmental Management. The funds had been awarded to the Jasper Utilities Board to help finance construction of a plant upgrade after EPA had issued a NPDES permit, pursuant to the Clean Water Act, establishing stringent effluent limitations for the plant. The Eleventh Circuit affirmed, holding that plaintiffs had no standing because even if they were economically injured by a rate increase

imposed as a result of plant expansion, the relief they sought would not necessarily remedy that injury by causing user rates to remain at their current level.

Marshall Durbin Co. v. EPA, ___F.2d___, No. 85-7331 (11th Cir. May 9, 1986). D. J. # 90-5-1-1-2291. Attorneys: Robert L. Klarquist (FTS 633-2731) and Arthur E. Gowran (FTS 633-2754), Land and Natural Resources Division.

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DISTRICT COURT RULED THAT A FUGITIVE CANNOT LITIGATE A CLAIM IN A CIVIL FORFEITURE ACTION; AND, EXPANDED THE DEFINITION OF FUGITIVE TO INCLUDE A PERSON WHO LEARNS OF CHARGES WHILE LEGALLY OUTSIDE THE JURISDICTION "CONSTRUCTIVELY FLEES" BY NOT RETURNING TO FACE CHARGES.

Defendant currency was seized at Miami International Airport, and forfeited to the government under 31 U.S.C. §5317 because no report of the transportation of the currency was filed with the United States Customs Service, as required by 31 U.S.C. §5316 and the regulations promulgated by the Secretary of Treasury. The United States issued a warrant against the party for aiding and abetting the failure to file United States Customs Form 4790 in connection with the export of the defendant currency. The government later filed an in rem forfeiture action against the defendant currency. The party interposed a claim in the forfeiture action, but failed to appear for scheduled dispositions without benefit of court order.

The district court dismissed party's claim and ordered forfeiture. The court held that a fugitive can't litigate a claim in a civil forfeiture action. Moreover, it significantly expanded the definition of fugitive by holding that a person who learns of charges while legally outside the jurisdiction "constructively flees" by not returning to face the charges; that person is therefore a fugitive from justice and not entitled to litigate claims in federal court.

United States v. One Lot of United States Currency Totalling $506, 537.00, 628 F. Supp. 1473 (S.D. Fla. 1986). Attorney: Jonathan Goodman, Assistant United States Attorney, Florida, Southern, (FTS 350-6832).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see United States Attorneys' Bulletin, Vol. 34, No. 1, Page 25, January 17, 1986.

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