# United States Attorneys

# Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

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## COMMENDATIONS

Mr. Lester Engler, United States Attorney for the Canal Zone, was commended by James G. Rogers, Director of the Federal Aviation Administration, for his untiring efforts, exemplary service, and professional legal assistance in a case in which two FAA employees challenged the Administration's policies.

Assistant U.S. Attorney Charles G. Bernstein, Dist. of Maryland, was commended by E.J. O'Neill, Inspector in Charge, Wash., D.C. for his skillful presentation of facts during the trial which led to the successful prosecution of Kyle H. Price for possession of stolen mail.

Assistant U.S. Attorneys Harold F. Keefe and Arthur W. Tifford, S.D. Florida, were commended by William J. Cotter, Assistant Postmaster General, for their highly expert manner in which they presented the successful trial of Sol Kaye, the leader of a nationwide post office burglary gang.

Assistant U.S. Attorney Jeff R. Laird, W.D. Okla., was commended by J. Edgar Hoover, Director, FBI, for his outstanding efforts in the preparation of the effective prosecution of William M. Acree.

United States Attorney John L. Briggs and his Assistant, Bernard H. Dempsey, Jr., Middle District of Florida were commended by Governor Reubin O'D. Askew of Florida for their invaluable assistance in the successful prosecution of extortionist Frank Sacco and his associates.

Assistant U.S. Attorney Marvin Smith, Dist. of South Carolina, was commended by J. Edgar Hoover, Director, FBI, for his thorough handling of the conviction of a gambling case. This was the first prosecution within that circuit dealing with organized crime.

Assistant U.S. Attorney Rudy Hernandez, Middle Dist. of Florida, was commended by H.J. Lesko, President of Greyhound Lines-East, for an outstanding job in the preparation and effective handling of the conviction of three former employees and their wives for theft from interstate shipments.

United States Attorney George Beall, Dist. of Maryland, was commended by the Department of State for his effective handling of the successful prosecution of Raymond and Birsen Birch, who used fraudulent military papers to flee the Federal Republic of Germany after being convicted of German criminal charges.

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## POINTS TO REMEMBER

### False Statements: Medicare - U.S. v. Katz

A judgment of conviction followed a jury verdict of guilty on five counts of filing false statements, two charging violations of 18 U.S.C. 1001 and three drawn under 42 U.S.C. 408 (c). The gist of the indictment was that Dr. Katz, Chief of Staff of Pinellas General Hospital, Largo, Florida, individually and in with others falsified and misrepresented claims to the Social Security Administration for services allegedly rendered to Medicare patients pursuant to the Health Insurance for the Aged Act, 42 U.S.C. 1395 et seq. Resolving against the defendant issues of alleged insufficiency of evidence and failure to grant a mistrial for prejudicial comments in the presence of the jury, the conviction was affirmed.

The opinion is noteworthy in that it reflects but one of a series of successful prosecutions initiated under the Medicare program. In recent years under a direct referral procedure the Social Security Administration has transmitted its investigative files to interested United States Attorneys in Medicare frauds under either Part A or B of the program, the first dealing with medical services, the second being concerned with hospital maintenance expenditures. In this connection after the referral of a particular case to the office of the U.S. Attorney we have adopted a policy of writing that office and forwarding copies of form indictments drawn in the Criminal Fraud Section and tailored to the specifics of Part A and Part B.

The opinion is important in that it reaffirms by implication the right of the prosecutor to select either a general (18 U.S.C. 1001) or a specific (42 U.S.C. 408(c)) statute as a vehicle for criminal prosecution. The latter statute is the fraud provision in the Social Security Act and is specifically incorporated by reference in Medicare pursuant to 42 U.S.C. 1395 ii. Only last month the Fifth Circuit affirmed an earlier per curiam decision in another Medicare case, U.S. v. Chakmakis, 449 F. 2d 315 rendered July 13, 1971, where the Government had indicted under both 18 U.S.C. 1001 and 42 U.S.C. 408(c). The Court there specifically sanctioned the Government's right to select either or employ both statutes in prosecuting the defendant doctor.

### Deficiencies in Investigative Procedures and Reports of Federal Investigative Agencies

In the course of discussing cases and matters with United States Attorneys and their assistants, particularly in relation to referrals for prosecution and dismissals of indictments, it has become apparent that there are a number of instances in which the conduct of the investigator (s) has made a case non-prosecutable.

Problems have included unlawful or questionable searches and arrests, inadequate warrants and complaints, incomplete investigations, poorly written reports, and reluctant or slow response in requested follow-up investigation. Such problems are particularly prevalent when investigative agents do not coordinate warrants, complaints, and investigative progress with United States Attorneys offices.

One United States Attorney has found it necessary to advise an investigative agency that he will not accept any more referrals for prosecution unless the agency takes steps to insure that its personnel refrain from conduct which adversely affects prosecution.

In order that we may be aware of such matters and thus be in a position to take them up with the appropriate national officials of the investigative agencies concerned, it is requested that, as such matters come to your attention, you provide the Criminal Division with your comments and observations on the extent of the problem together with specific examples of deficiencies such as those mentioned above.

(Criminal Division)

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ANTITRUST DIVISION
Acting Assistant Attorney General Walker B. Comegys

DISTRICT COURT

SHERMAN ACT

COURT FINDS FOR THE GOVERNMENT IN MASTER KEY SYSTEMS CASE.

United States v. Eaton, Yale & Towne, Inc. (Civ. 13264; March 1, 1972; DJ 60-36-6)

On March 1, 1972, Chief Judge M. Joseph Blumenfeld entered his findings of fact and conclusions of law in the above-entitled action.

The Government's complaint, filed on July 11, 1969, alleged that Yale had conspired with its distributors of master key systems to allocate the territories in which the customers to whom such distributors could resell such systems. This complaint, as well as three other complaints filed the same day against three other major manufacturers of master key systems (Ilco Corp., Emhart Corp., and Sargent & Co.) were predicated upon the Supreme Court's holding in U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), alleging that Yale's actions resulted in the elimination of intrabrand competition among Yale distributors. The three other cases were terminated by consent decree. The trial in the action against Yale commenced November 5, 1971 and was concluded on November 11, 1971 following which post-trial briefs were submitted.

With respect to the allocation of territory charge, Judge Blumenfeld found that the Government's evidence merely showed an assignment of territories by Yale. Relying on a Second Circuit decision in Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F. 2d. 398, 406 (1968), cert. den. 393 U.S. 938 (1968), the Court distinguished Yale's actions from the Schwinn case by stating that Schwinn had been "firm and resolute" in carrying out its assignment of territories while such enforcement was lacking in the Yale case. Since there was no evidence showing that Yale was "firm and resolute" in carrying out its assignment of territories, the Court held that a per se violation was not established regarding this charge.

The Court did find that the Government's evidence established that Yale had allocated customers among its distributors of master key systems primarily by "protecting" the distributor who sold an original master key

system from competition from other Yale distributors on all extensions to that system. The Court further found that other means were used by Yale to allocate customers. The Court found specifically that Yale "violated the prohibition of the Sherman Act against a manufacturers' restricting the customers of a distributor to whom he sells goods."

Defendant argued that the case was moot since the Government's evidence showed no action taken by Yale since 1966. Yale's actions ceased after the company had knowledge of our investigation. The Court dismissed defendant's mootness argument citing U.S. v. Parke, Davis & Co., 362 U.S. 29, 48 (1960):

> The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial Court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.

The Court, holding that injunctive relief was warranted against Yale, stated that even where the prohibited activity has been clearly discontinued, the future protection of the public warrants injunctive relief, citing U.S. v. Glaxo Group Ltd., 302 F. Supp. 1 (D.C.D.C. 1969).

Defendant was enjoined from imposing or attempting to impose any restrictions upon its distributors of master key systems with respect to the customers to whom those distributors may sell.

Staff: Arthur A. Feiveson and William A. Cerillo
(Antitrust Division)

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## CIVIL DIVISION
Assistant AttorneyGeneral L. Patrick Gray, III

## COURTS OF APPEALS

### COURTS - JURISDICTION

TENTH CIRCUIT VACATES INJUNCTION AGAINST UNITED STATES ENTERED IN SUIT TO WHICH GOVERNMENT WAS NOT A PARTY.

Commercial Security Bank v. Walker Bank & Trust Co. (C.A. 10, No. 71-1447, decided March 9, 1972; D.J. 105-77-91)

This interpleader action was brought by a bank to determine the ownership of shares of stock in a coal company. The United States, which had brought suit in a state court to foreclose against the property of the coal company, was not made a party. The district court (Ritter, J.), after determining ownership of the stock, enjoined the United States from proceeding with the foreclosure action. The Court of Appeals vacated the injunction, holding that the district court had no jurisdiction to enjoin a non-party. "It is axiomatic that before a court may enter a valid decree adjudicating the rights of an individual, that individual must in some form submit himself to the jurisdiction of the court or be subjected to the jurisdiction of the court by service of process." The Court noted that 28 U.S.C. 1651, upon which the district court had relied, did "not operate to confer jurisdiction"; rather, it merely provided ancillary jurisdiction "where jurisdiction is otherwise already lodged in the court".

Staff: Robert E. Kopp (Civil Division)

### REMEDY - SCOPE OF RELIEF IN HOUSING DISCRIMINATION CASES

SEVENTH CIRCUIT HOLDS DISTRICT COURT ABUSED ITS DISCRETION BY ENJOINING RELEASE OF FEDERAL MODEL CITIES FUNDS TO REMEDY CIVIL RIGHTS VIOLATIONS IN THE LOW-RENT PUBLIC HOUSING PROGRAM.

Dorothy Gautreaux, et al. v. George W. Romney, et al. (C.A. 7, No. 71-1807, decided March 7, 1972; D.J. 145-179-3)

In 1969, the tenant assignment and site selection procedures of the Chicago Housing Authority were found to be racially discriminatory in a class action brought on behalf of Negro tenants of, and applicants for, low-rent public housing in Chicago. Gautreaux v. Chicago Housing Authority,

296 F. Supp. 907 (N.D. Ill., 1969). In a companion suit, HUD was also held responsible for having funded and otherwise participated in the Chicago public housing program. Gautreaux v. Romney, 448 F. 2d 731 (C.A. 7, 1971). On remand from that decision, HUD was enjoined from releasing $26,000,000 in Model Cities funds to the City of Chicago, a non-party, until the City approved 700 new sites for public housing units in areas of Cook County located at least one mile away from any census tract having a Negro population of thirty percent or more.

On appeals taken by the Government, the City, and an organization elected by Chicago Model Cities beneficiaries, the Seventh Circuit reversed. The Court held that it was improper "to threaten the termination of a program which was not tainted with discriminatory action /i.e., the Model Cities Program/ in order to bring about a cure of a separate program which was found to have been so tainted", i.e., the public housing program. Further, the Court held that the district court failed "to balance the individual and collective interests involved" in that it ignored the interest of the intended beneficiaries of the educational, health, social, and economic activities included in the Model Cities Program. Approximately 36,000 of these Model Cities beneficiaries are also members of the plaintiffs' class.

Staff: Anthony J. Steinmeyer (Civil Division)

## TORT - IMMUNITY; FERES DOCTRINE

SECOND CIRCUIT STRICTLY ADHERES TO FERES DOCTRINE AND ALSO HOLDS INDIVIDUAL SOLDIERS IMMUNE FROM TORT LIABILITY.

Rotko v. Abrams, et al. (C.A. 2, No. 71-1893, decided February 24, 1972; D.J. 157-14-471)

Plaintiffs sought to recover money damages from the United States under the Tort Claims Act and also from individual officers in the Armed Forces for the death of their son, a United States Marine, who was killed in combat while on active duty in Vietnam. Plaintiffs sought to avoid Feres v. United States, 340 U.S. 135, by alleging that the orders given to their son were illegal and ultra vires and that the defendants' actions were wanton and intentional. The district court dismissed the complaint as to the United States on the basis of Feres, holding that "it is the status of the claimant as a serviceman rather than the legal theory of his claim which governs in such cases". The court also held that a negligence action could not be maintained against individual members of the military for an injury resulting from acts performed in line of duty and therefore dismissed the complaint against the individual defendants.

The Court of Appeals affirmed on the district court's opinion and thus refused to limit the Feres doctrine to cases involving mere negligence.

Staff: Morton Hollander and Robert M. Feinson
(Civil Division)

## TORT - IMMUNITY

SECOND CIRCUIT HOLDS FEDERAL POLICE OFFICERS HAVE NO IMMUNITY FROM DAMAGE SUITS CHARGING VIOLATIONS OF CONSTITUTIONAL RIGHTS.

Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (C. A. 2, No. 32537, decided March 8, 1972; D. J. 145-3-891)

This is an action for damages for mental suffering and humiliation in which plaintiff Bivens alleged that Federal Narcotics Agents used unreasonable force concurrent with a warrantless search in effecting his arrest for alleged narcotics violations. Specifically, Bivens alleged that Federal Narcotics Agents, acting under claim of Federal authority, manacled him in front of his wife and family, threatened the arrest of the entire family, and then took him to the Federal courthouse in Brooklyn where he was subjected to interrogation, booking, and a visual strip search.

The district court dismissed the complaint on the grounds that (1) there was no right of action under the Fourth Amendment; and (2) even if there was such a right, the defendants, being Federal agents, were immune from suit (276 F. Supp. 12 (E. D. N. Y.)). The Second Circuit affirmed on the first ground without reaching the immunity question (409 F. 2d 718). The Supreme Court reversed, holding that a valid claim had been stated, and remanded the case to the Court of Appeals for a determination on the immunity question (403 U. S. 388).

The Court of Appeals, on remand, rejected the Government's argument that the Federal Narcotics Agents were entitled to immunity from suit under Barr v. Matteo, 360 U. S. 564, holding that their arrest activities were not "discretionary" in the sense required by Barr. The Court noted that, "* * * a long line of cases /citations omitted/ indicates a woeful laxity on the part of some police officers, state and federal, in complying with constitutional standards, and this laxity would only be encouraged by a grant of immunity". The Court of Appeals therefore remanded the case to

the district court for a trial on the merits. The Court specifically added, however, that good faith and reasonable belief in the validity of and necessity for the arrest and search would be a proper defense.

Staff: Walter H. Fleischer and Thomas J. Press
(Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEALS

FALSE STATEMENT

FALSE STATEMENT OF IDENTITY GIVEN TO FBI INVESTIGATING AGENT HELD OUTSIDE SCOPE OF 18 U.S.C. 1001.

United States v. Robert G. Bedore (C.A. 9, 71-2292, February 9, 1972; D.J. 46-82-744)

Defendant was convicted under 18 U.S.C. 1001 for denying his true identity to the F.B.I. Special Agent Henry had gone to the home of Bedore for whom a subpoena was outstanding directing him to appear at the trial of one Milford Cook. The subpoena was in the possession of a deputy marshal who had called earlier when Bedore was not at home. When Bedore answered the door, Special Agent Henry identified himself to Bedore, said he was looking for Robert G. Bedore for service of a subpoena, and asked him his name. Bedore said he was one Tom Halstead, who was, in fact, Bedore's roommate. Henry then asked that he tell Bedore to call the United States Attorney when Bedore contacted "Halstead."

The Court, in reversing the conviction, held Congress did not intend 18 U.S.C. 1001 to apply in this situation, the response not being within the class of statements the statute proscribes.

Citing 18 U.S.C. 1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (Emphasis added)

It was concluded extension of the statute to its literal breadth "would swallow up perjury statutes and a plethora of other federal statutes proscribing the making of false representations in respect of specific agencies and activities of Government," and such extension was not supported by the legislative history. The Court noted that, under revisions of the Criminal Code proposed by The National Commission on Reform of

Federal Criminal Laws, Bedore's false statement would be specifically excluded.

The statutory history, in the Court's view, justified a finding that only those false statements were included "that might support fraudulent claims against the Government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made" and typical of such statements would be "false reports of crime made to federal law enforcement agencies that may engender groundless federal investigations." United States v. Adler, 380 F. 2d 917, cert. den. 389 U.S. 1006. It found the statute did not embrace oral, unsworn statements unrelated to the declarant's claim to a privilege from the United States or to a claim against the United States given in response to federal agency inquiries except, perhaps, "where such a statement will substantially impair the basic functions entrusted by law to that agency."

The opinion, by implication, raises the distinction drawn between "volunteered" and "elicited" responses and the concept of the Bureau's "jurisdiction" to investigate rather than to decide matters.

The opinion reemphasizes the Department's concern over our heretofore expressed policy to avoid further adverse case precedent in the area. Pursuant to Title II, pages 117-118, of the U.S. Attorney's Manual, U.S. Attorneys should be alert to secure advance authorization whenever consideration is being given to prosecuting persons who give false statements to investigative personnel engaged primarily in criminal inquiries.

Staff: United States Attorney Stan Pitkin (W.D. Washington)

## INDICTMENT AMENDMENT

AMENDING BY STRIKING PORTIONS OF INDICTMENT IS PROPER IF INDICTMENT IS NOT THEREBY BROADENED AND TRIAL PROCEEDS ON MAIN CHARGE.

United States v. Colasurdo, et al. (C.A. 2, December 6, 1971; 453 F. 2d 585; D.J. 113-51-202)

The defendants were convicted of making false filings with the Securities and Exchange Commission and conspiracy arising from a complicated takeover of control of Crescent Corporation with its own funds. Relying on Ex Parte Bain, 121 U.S. 1 (1887), and Russell v. United States,

369 U.S. 749 (1962), 1/ they contended that the conspiracy count was improperly amended when the trial court struck references to fraud on stockholders and creditors and thereby left only references to false filings with the Securities and Exchange Commission. Alternatively, they argued that the trial court's removal of certain allegations of fraud at the close of the Government's case entitled the defendants to a new trial under United States v. Wolfson, 437 F. 2d 862 (C.A. 2, 1970), because evidence of such fraud had been admitted.

The Court of Appeals distinguished Bain and Russell, reasoning that striking a portion of the indictment narrowed rather than broadened the conspiracy count.

The Court stated:

> Here, however, . . . the trial was on the main charge preferred (here a scheme to commit fraud on the SEC) and the portion of the manifold scheme ordered stricken was unnecessary to the commission of the basic fraud charged.

The Court also refused to apply the Wolfson holding to these facts. Here, unlike Wolfson, the Government's reliance on the stockholders' and creditors' aspects of the fraud was much less pronounced and the trial court, when it limited the indictment at the close of the Government's case, "promptly instructed the jury that it would not have to consider the counts of mail fraud, and spelled out that the conspiracy charge was one to defraud the United States and SEC by concealment, filing false statements, committing and suborning perjury, and so forth."

An alternative argument was that the evidence did not support a conviction under the conspiracy count because there was no direct evidence of an agreement to conspire to conceal the fraud by filing false statements

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1/ In Ex Parte Bain, the Supreme Court found that a physical amendment to the indictment, without resubmission to the Grand Jury, worked a fundamental change in the charge as set forth in the indictment. In Russell v. United States an indictment for perjury was held insufficient because it failed to allege what was the subject of the inquiry vitally necessary to the issue of materiality.

with the Securities and Exchange Commission. See Grunewald v. United States, 353 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1944); and United States v. Bufalino, 285 F. 2d 408 (C.A. 2, 1960). 2/

This position was also rejected. The opinion stated:

> . . . [H]ere the concealment was the essence of the object of the conspiracy . . . Filing false statements with, and submitting false testimony to, the SEC were means of furthering that aim.

Cf. Grunewald v. United States, 353 U.S. 391 (1957).

Staff: United States Attorney Whitney North Seymour, Jr. Assistant United States Attorneys H. Thomas Coghill, Jack Kaplan, John A. Lowe, Barbara A. Rowan, James P. Tierney, and Peter F. Rient (S.D. New York)

## WHITE SLAVE TRAFFIC ACT

18 U.S.C. 2423, "COERCION OR ENTICEMENT OF MINOR FEMALE," DOES NOT REQUIRE KNOWLEDGE OF VICTIM'S AGE.

United States v. James Hamilton, (C.A. 3, No. 71-1401, February 14, 1972; D.J. 31-017-64)

Defendant was convicted under 18 U.S.C. 2423 for knowingly inducing a minor female to travel in interstate commerce by common carrier for the purpose of engaging in prostitution. On appeal, defendant's main contention was that the Government did not prove that he knew the minor female was under the age of eighteen at the time he induced her to cross state lines and engage in prostitution, and, therefore, the offense described in Section 2423 had not been proven. The Third Circuit rejected the contention, holding that the statute neither states nor requires that knowledge of the victim's minority be shown to sustain a conviction. The Court added that, in addition to the fact that the statute did not require knowledge of the victim's age, the appellant did not request the trial court

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2/ These cases stand for the propositions that "acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement . . ." (Grunewald, at 402) and ". . . the life of a conspiracy cannot be extended by evidence of concealment after the conspiracy's criminal objectives have been fully accomplished." Ingram v. United States, 360 U.S. 672 (1959).

to charge the jury on this issue of knowledge, nor did he take exception to the failure to so charge.

Staff: United States Attorney Richard L. Thornburgh
Assistant United States Attorney Samuel J. Orr, III
(W. D. Pa.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURT OF APPEALS

ADMINISTRATIVE LAW; INDIANS

FEDERAL POWER COMMISSION AFFIRMED ON REDETERMINATION OF RENTAL FOR USE OF INDIAN LANDS IN HYDROELECTRIC PROJECT; FPC AUTHORITY TO READJUST RENTAL; RETROACTIVE APPLICATION OF READJUSTED RENTAL; APPROVAL OF "PROFITABILITY," AS OPPOSED TO "NET BENEFITS," THEORY; ACCEPTANCE OF AGENCY'S REASONABLE INTERPRETATION OF ITS STATUTE: SECRETARY OF THE INTERIOR'S AUTHORITY TO NEGOTIATE AND APPROVE RENTALS FOR USE OF INDIAN LANDS; INTEREST RATE ON READJUSTED RENTAL.

The Montana Power Co. v. Federal Power Commission (Confederated Salish and Kootenai Tribes of the Flathead Reservation and Secretary of the Interior, Intervenors), and The Confederated Salish and Kootenai Tribes, Etc. v. Federal Power Commission (Montana Power Co., Intervenor) C.A.D.C., Nos. 21904 and 21767, Feb. 17, 1972; DJ 90-2-2-639).

The Tribes petitioned the Commission to readjust the annual rental charge paid by the Company for Indian lands used in the Company's Kerr Hydroelectric Development on the Flathead River. Such readjustment 20 years after operation of the project was commenced, was provided for in the license issued by the Commission authorizing the project. The final decision of the Commission granted the Indians a rental increase from $238,375 to $950,000 annually, effective May 20, 1959, with interest at 6% on the deficiency. Both the Company and the Indians petitioned the Court of Appeals to review the Commission's determinations. The Secretary of the Interior, who had intervened on behalf of the Indians in the proceedings before the Commission, intervened to defend the Commission's decision against the appeal by the Company. The Court of Appeals initially held that the Commission had no jurisdiction over the readjustment proceeding because of provisions in the original license and the then applicable Federal Water Power Act of 1920. The Indians, the Commission and the Secretary petitioned for rehearing which was granted and resulted in a decision en banc that the Commission had jurisdiction under the amendatory Federal Power Act of 1935. Montana Power Company v. Federal Power Commission, 445 F. 2d 739 (C.A. D.C. 1970), cert. den., 400 U.S. 1013 (1971). The case was then returned to a three-judge panel to rehear the case on the merits, which resulted in the present decision affirming the Commission except to reduce

the interest rate on the deficiency from 6% to 4%. Judge Fahy wrote the majority opinion with partial dissents from both Judge Tamm and Judge Leventhal.

Reaching the merits, the Court held with respect to the appeal by the Company:

1. Section 10(e) of the Federal Power Act allows the Commission to redetermine the reasonable rental de novo based on the commercial value of the lands. The Commission is not bound by the license provisions as to the prior rental. The Court held it would accept this interpretation by the Commission of the statute it administers.

2. The Commission was authorized to readjust rental covering the entire project, including both the two generating units which had been initially included in the project at its start in 1939, and the third unit placed in operation in 1954.

3. The increased rental is to be retroactive to 1959, the date on which the Commission was authorized under the license to readjust the rental. To allow increased rentals to take effect only after the conclusion of the litigation would encourage dilatory tactics and protraction of the litigation.

4. The Court upheld the Commission's adoption of the expert witnesses' use of the "profitability" theory rather than the "net benefits" theory. The "profitability" theory determines the share of the Company's total electric revenues attributable to Kerr, and bases rental on the profit after payment of the expenses. The "net benefits" theory bases rental on the net savings from using the Kerr project compared with generating the same amount of electricity from the next most favorable power source. The Court ruled the Commission's use of the "profitability" theory was a reasonable one. Nor was the Commission unreasonable in taking into account the total generating capacity as a factor in making the allocations to Kerr.

5. The Commission's allocation of 42.13% of the total Kerr value to Indian land rentals was upheld as reasonable and with its competence.

6. The Court rejected the Company's argument that the Kerr site was given credit for waters released from an upstream dam (headwater benefits) for which the Company had to pay, while money the Company received from headwater benefits downstream were counted in its revenues in determining profitability. The Court held there was nothing in the record to support this argument.

7. In summary, the Court agreed that the rental determined by the Commission was supported by substantial evidence, except on the matter of interest. The Commission's hearing examiner had initially determined that 4% was proper on the deficiency, the rate fixed by the Commission and affirmed by the Court in the Third Unit case completed in 1962. The Commission reversed its hearing examiner on the ground that the prevailing commercial rate at the time was more nearly 6%. The Court reversed the Commission because 4% had been the rate fixed in the earlier case, and because any award from the rentals of Indian lands placed in the Treasury was allowed interest at 4% by statute.

8. The Court rejected the Company's argument that the Court was without jurisdiction because the annual rental must be approved by the Secretary. The Court noted that the Secretary had approved the amount of rentals which the Commission determined should be paid to the Indians. Moreover, the Court held the Secretary could not insist on withholding approval unless the rental were unreasonable. The Court continued:

> Considering the applicable statues together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination.

The Court upheld the Commission on the Tribes' appeal, which had not been seriously pursued. Judge Tamm dissented on the ground that the Commission had no jurisdiction to determine rental rates de novo and that the 42.13% of total Kerr value attributed to the Indians' lands was wrong. Judge Leventhal dissented because he felt the increased rental should have been made retroactive only to 1965, the date of FPC's notice of hearing.

Staff: A. Donald Mileur (Land and Natural Resources Division); Newton Frishberg (Department of the Interior)

## DISTRICT COURT

### URBAN RENEWAL; ENVIRONMENT; STANDING

CONDEMNEE LACKS STANDING TO ENJOIN CONDEMNATION ON GROUND NEPA ENVIRONMENTAL IMPACT STATEMENT NOT FILED.

Signey S. Zlotnick, et al. v. District of Columbia Redevelopment Land Agency, et al. (D. D.C., Civil No. 1700-71, Mar. 3, 1972; D.J. 90-1-4-372)

This action involves an attempt to enjoin the condemnation of a vacant lot located in downtown Washington, D.C., designated for acquisition as part of the Second Action Year of the Downtown Urban Renewal Plan of the Neighborhood Development Program. The plaintiffs attacked various procedures followed in developing the urban renewal plan subsequently added a claim that an environmental impact statement failed to meet the requirements of NEPA. In accordance with its regulations, HUD had prepared a "negative" environmental impact statement.

The court, never meetings the issue as to whether the "negative" statement was adequate, but observing that no environmental group or quasi-public body had imposed any environmental objections in the case and that the plaintiffs had nothing but their own financial interest to protect, concluded that the NEPA was not designed to assist individual property owners seeking to enhance payment from the government when condemnation threatened. Stating that to have standing plaintiffs must assert an interest "arguably within the zone of interests to be protected or regulated by the statute," the court found that "plaintiffs can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment," and ruled plaintiffs had not established standing. A notice of appeal has been filed.

Staff: Assistant United States Attorney Nathan Dodell (D. D.C.); John E. Lindskold (Land and Natural Resources Division)

## PUBLIC LANDS

SURVEYS; OMITTED LANDS; DETERMINATION OF GROSS ERROR IN ORIGINAL SURVEY OF MEANDER LAND.

United States v. Harold Zager, et al. (E.D. Wis., No. 67-C-384, Feb. 29, 1972; D.J. 90-1-10-799)

The United States sought to quiet title to 112.11 acres adjacent to a lake in Wisconsin as part of a national forest. Title was asserted on the ground that the original survey of 1859 contained a gross error in the configuration of the meander line of the lake which was tantamount to a fraud on the government. This gross error was alleged to prevent the omitted land from being conveyed by the United States under the general rule that the actual water line rather than the meander line controls. Under the gross error exception the meander line is treated as a boundary line and the omitted land remains property of the United States.

The court stated that, at the time of the original survey, errors of this type were to be expected because of limitations on personnel and pressure for development, especially timber resources. The ratio of omitted land (112.11 acres) to originally surveyed land (207.05 acres) was found to be within the expectable margin of error. Considering the minimal value of land in this part of Wisconsin in 1859, the court concluded that the omission of 112.11 acres did not constitute a gross error to be considered a fraud on the government. The court relied particularly on the cases of Internal Improvement Fund of the State of Florida v. Nowak, 401 F. 2d 708 (C.A. 5, 1968); and Schultz v. Winther, 10 Wis. 2d 1 (1960).

Staff: Assistant United States Attorney Joseph P. Stadtmueller (E.D. Wis.)

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## INTERNAL SECURITY DIVISION

Assistant Attorney General Robert C. Mardian

## FOREIGN AGENTS REGISTRATION ACT

## OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 USC 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

### MARCH 1972

During the first half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

The Curacao Tourist Board of Coral Gables, Florida registered as agent of the Curacao Government Tourist Bureau & Commissioner of Tourism, Island Government of Curaco. Registrant is an official branch of the foreign principal and as such will promote tourism to Curacao.

The Curacao Tourist Board of New York City registered as agent of the Curacao Government Tourist Bureau & Commissioner of Tourism, Island Government of Curacao. Registrant is an official branch of the foreign principal and as such will promote tourism to Curacao.

Ivins, Phillips & Barker of Washington, D.C. registered as agent of the Saudi Arabian Government. Registrant will render legal services to the foreign principal.

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