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COMMENDATIONS

United States Attorneys Richard L. Thornburgh, Otis L. Packwood, and William S. Sessions, and their staffs, of the Western District of Pennsylvania, the District of Montana, and the Western District of Texas, respectively, were commended by Assistant Attorney General Henry E. Petersen for their exemplary efforts in furtherance of the aviation security policies set forth in the Attorney General's telegrams of March 16 and July 14, 1972.

Mr. Thornburgh was instrumental in the development of a plan providing complete local law enforcement coverage of Greater Pittsburgh International Airport. Mr. Packwood secured local law enforcement coverage at all 14 airports in his district. Mr. Sessions secured commitments from the city governments of El Paso, Waco, San Antonio and Austin to provide police support for the Civil Aviation Security Program. It is noteworthy that all of these accomplishments were prior to the Federal Aviation Agency's regulatory action of December 5, 1972, requiring airport operators to provide such a law enforcement presence.

POINTS TO REMEMBER

Military Selective Service Act;
Dismissal of Indictments

The Department's policy regarding the dismissal of selective service indictments was set out in a circular letter to all United States Attorneys dated May 10, 1972. It was pointed out that "In requesting authorization to dismiss an indictment, the circumstances surrounding the reason for dismissal should be stated with particularity on Form No. USA 900, "Authorization for Dismissal of Indictment and Information."

In order to allow for proper review of the facts and evaluation of the basis for dismissal, Form No. USA 900 together with any pertinent documents should be submitted well in advance of any court proceedings. Oral authorization to dismiss will be given only in those instances where the circumstances are unanticipated and compelling.

(Internal Security Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

SUPREME COURT

CLAYTON ACT

SUPREME COURT UPHOLDS THE EXPEDITING ACT.

Tidewater Oil Co. v. United States
(Supreme Court No. 71-366; December 6, 1972; DJ 60-0-37-905)

By lodging exclusive appellate jurisdiction over the "final judgment of the district court" in the Supreme Court, the Expediting Act, 15 U.S.C. 29, necessarily eliminated court of appeals jurisdiction over appeals from interlocutory as well as final decrees in government civil antitrust cases, according to a ruling of the Supreme Court entered December 6, 1972.

In July 1966, the United States filed a civil antitrust suit alleging that Phillips Petroleum Company's acquisition of certain assets and operations of Tidewater Oil Company violated Section 7 of the Clayton Act, 15 U.S.C. Section 18. The district court denied the United States' motions aimed at preventing consummation of the acquisition. During five years of pretrial discovery, Tidewater continued as a party to the suit but when the Government, in 1971, announced that it was ready for trial, Tidewater moved to be dismissed as a party. Tidewater contended that Section 7 is directed only against the acquiring corporation and not against the seller. Therefore, since the sale of assets had already taken place, Tidewater argued, no relief is obtainable against it and, therefore, its presence in the suit was no longer necessary or appropriate. The district court denied the motion, but concluded that the issue raised a "controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from [the] order may materially advance the ultimate termination of this litigation." Therefore the district court certified "its order denying defendant's motion to dismiss for interlocutory appeal under 1292(b) of Title 28 of the United States Code."

Tidewater then applied to the Court of Appeals for the Ninth Circuit for leave to prosecute the appeal. The court, however, declined the application in the belief that Section 2 of the Expediting Act precludes court of appeals jurisdiction in civil antitrust actions initiated by the government.

In affirming the Ninth Circuit, the Supreme Court, in an opinion written by Mr. Justice Marshall, points out that Congress' aim in enacting the Expediting Act in 1903 was twofold: (A) avoidance of the delay inherent in piecemeal appeal by conditioning appeal upon the presence of a "final judgment"; and (B) facilitating uniform interpretation of the antitrust law "which was still in its infancy in 1903." In 1944, the Supreme Court reiterated "that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this Court, and [the Expediting Act] limited the right of appeal to final decrees." Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 142

The Court, after examining the history and evolution of 28 U.S.C. Section 1292(a)(1), "the direct descendant of the original interlocutory appeals provision contained in the Evarts Act", concludes that at least up to the passage of 1292(b) in 1958, Congress did not impair the original exclusivity of its jurisdiction under Section 2 of the Expediting Act. 1292(b) provides in pertinent part that "When a district judge, is making in a civil action an order not otherwise appealable under this section shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order. . . ." [Emphasis added]

Tidewater contended that "civil action" is an "all-inclusive" phrase, covering government civil antitrust cases. However, Mr. Justice Marshall, in rejecting this contention, maintains that "Section 2 [of the Expediting Act] does not merely apply solely to a 'final judgment' but also limits the right of appeal to a 'final judgment'." In light of the legislative history, the Court concludes that 1292(b) "was intended to establish jurisdiction in the courts of appeals to review interlocutory orders other than those specified in Section 1292(a) in civil cases in which they [courts of appeals] would have jurisdiction were the judgment final." relates only to appeals from final judgments in a limited category of cases, while Section 1292(b) applies to appeals from certain interlocutory orders in all civil actions. The Expediting Act does not prohibit court of appeals jurisdiction under Section 1292(b) for the former applies only to final judgments while the latter applies only to interlocutory orders." Thus they perceive no inconsistency between the statutes.

In a separate dissenting opinion, Mr. Justice Douglas agrees that the appeal to the Court of Appeals in this case was not barred by the Expediting Act. However, he takes issue with

"intimations" in the majority and minority opinions "that because of our overwork the antitrust cases should first be routed to the courts of appeals and then only brought here." In a word the case for Supreme Court overwork is a "myth" according to Mr. Justice Douglas. He contends that if anything the Court is "underworked" especially in light of the heavy burdens carried by the Court of Appeals. Furthermore, the Expediting Act does not "materially contribute to our caseload."

Staff: Carl D. Lawson, Gregory B. Hovendon and Stephen Rubin (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

ADMINISTRATIVE LAW

SECOND CIRCUIT HOLDS THAT FTC REFUSAL TO DISMISS AGENCY PROCEEDING FOR NON-JOINDER OF PARTIES MAY CONSTITUTE REVIEWABLE "FINAL AGENCY ACTION." COURT LIMITS REQUIREMENTS OF JOINDER OF PARTIES IN ADMINISTRATIVE PROCEEDING.

Pepsi Co., Inc. v. F.T.C. (C.A. 2, Nos. 72-1911, 72-1912; November 20, 1972; D.J. 102-16-09)

The F.T.C. filed a complaint against Pepsi Co., Inc. alleging that the company had violated Section 5 of the F.T.C. Act by granting bottlers exclusive licenses to use the Pepsi trademark in specific territories. Three of the 513 bottlers and Pepsi-Cola Bottlers Association moved to intervene. Their motion was granted and Pepsi Co. moved to dismiss the complaint for non-joinder of each of the 513 bottlers as indispensable parties. The Hearing Examiner denied this motion, finding that joinder of all the bottlers "would create a completely unmanageable situation for trial purposes" and the F.T.C. upheld the Examiner's decision. Pepsi Co. then instituted action to enjoin the F.T.C. from continuing the proceeding unless it joined all the bottlers. The district court held that the F.T.C. denial of the motion to dismiss was not a final order and therefore not reviewable. Accordingly, the court denied the plaintiff's application for an injunction and granted the Government's motion to dismiss the complaint.

In affirming, the Court of Appeals went into an extensive analysis of whether the courts have jurisdiction. The F.T.C. Act limits review by a court of appeals to "any person, partnership, or corporation required by order of the Commission to cease and desist," 15 U.S.C. 45(c). The court held that this merely limited review by petition to the court of appeals; however, whether the F.T.C. action was reviewable in the district court depends on 19(c) of the APA which provides, inter alia, for judicial review where there has been "final agency action for which there is no other adequate remedy in a court." The court of appeals gave this phrase a broad interpretation, holding that in some circumstances review would be permissible to test the issue of whether the proceeding as presently structured could not result in a valid cease and desist order, because the proceeding was plainly beyond the agency's jurisdiction or was conducted in a manner which could not result in a valid order. The court, however, held that such circumstances were not present in the instant case; particularly since any bottler who feared

the consequences of the F.T.C. proceeding could move to intervene.

The Court added that the non-joinder of the bottlers was not a defect in the F.T.C. proceeding. Since the F.T.C. was enforcing a public right, the bottlers were not indispensable parties to the administrative procedure, though they had a clear right to to intervene therein.

Staff: United States Whitney North Seymour, Jr.
Assistant U.S. Attorney Frank H. Wohl
(S.D.N.Y)

SOCIAL SECURITY

FIFTH CIRCUIT REFUSES TO ALLOW ENTRY OF DEFAULT JUDGMENT AGAINST UNITED STATES IN THE ABSENCE OF SATISFACTORY EVIDENCE SUPPORTING JUDGMENT.

Carroll v. Richardson, (C.A. 5, No. 72-2296, December 13, 1972, D.J. 137-17-54)

In this Social Security disability case, the Secretary failed to file a transcript of the administrative proceedings within the time specified by the district court, and the court thereupon awarded claimant disability benefits. On our appeal, the Fifth Circuit reversed, noting that such an award was in effect a default judgment against the United States. F.R.Civ.P 55(e) forbids the entry of such a judgment against the United States, in the absence of evidence satisfactory to the court establishing plaintiff's claim. Since the district court had already determined that such evidence was lacking, the default judgment was improperly entered.

Staff: Michael Stein (Civil Division)

DISTRICT COURT

HOUSING FRAUDS: FALSE CLAIMS ACT

MORTGAGE COMPANY HELD ACCOUNTABLE FOR TRUTHFULNESS OF DOCUMENTS SUBMITTED TO FHA AND VA.

United States v. Ekelman and Associates, Inc., et al., (Civil Action No. 30932, E.D. Mich., November 1, 1972, D.J. 151-37-1770)

The United States brought suit for double damages and forfeitures under the False Claims Act, 31 U.S.C. Section 231 et seq., against six defendants for conspiring to fraudulently induce FHA and Va to insure mortgages on low-income residential

properties in Detroit. The Government alleged that in each of 32 transactions the defendants -- two salesmen, three realtors and one mortgage company -- made, or caused to be made, false statements on applications and supporting documents which overstated the applicants' income and assets, understated their debts and miscertified to their payment of closing costs. It was also alleged that defendants submitted false and counterfeit credit reports in support of the applications. The Government relied on the misrepresentation, approved the applications and incurred over $275,000 in losses after each of the mortgagors defaulted.

After eight weeks of trial in which the Government put in its case on liability, defendants moved for directed verdicts. The Court denied defendants' motions as to all counts on which they were based. In so holding, the Court rejected the mortgage company defendant's familiar contention that it had no duty to verify the credit information on the applicants which it obtained from the realtor defendants, and thereafter certified the VA and FHA. Rather, the Court concluded "from the entire statutory scheme of loan guarantees for veterans that it was the intent of Congress to place a duty on the lender to exercise credit judgment with respect to loans submitted to the Veterans Administration [and Federal Housing Administration]." Moreover, the Court held that this duty was "non-delegable." Thus, although there was no direct evidence of the mortgage company's knowledge of the fraud, it was "charged with the knowledge" of the falsity of the documents on the part of the realtor defendants to whom it attempted to delegate this duty. Hence liability could be imposed upon the mortgage company under either the False Claims Act or common law theories of deceit. The trial will resume for presentation of the Government's damage evidence and whatever defense may be presented.

Staff: United States Attorney Ralph B. Guy, Jr.; Assistant U.S. Attorney Fred M. Mester (E.D. Mich.); Alexander Younger (Civil Division).

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

NARCOTICS AND CONTROLLED SUBSTANCES

SINGLE VERSUS MULTIPLE CONSPIRACY.

United States v. Louis Cirillo (C.A. 2, No. 298, November 6, 1972)

Louis Cirillo was convicted on two counts charging violations of the Controlled Substances Act. The first count alleged that Cirillo conspired to import, possess with intent to distribute and distribute narcotics; the second, that he committed the substantive offense of possessing heroin.

The government relied principally on the testimony of a Frenchman who was an unindicted co-conspirator. The witness testified that he and three other Frenchmen planned to smuggle a large quantity of herion from France into the United States. One of the Frenchmen volunteered to contact his own American buyer, one Louis Cirillo, on behalf of the new ring. The witness accompanied the Frenchman to the United States to meet with Cirillo and negotiate on the price for the heroin shipment. After the transaction was completed, Cirillo indicated that he would like to purchase future shipments from the French ring and gave instructions on how he could be reached when subsequent shipments were available.

The French ring prepared to make another smuggling attempt approximately a month after the initial transaction with Cirillo. The ring members decided that the witness should make arrangements for Cirillo to purchase the second shipment. The heroin shipment was prepared for departure as the witness left France for New York to contact Cirillo. Before the witness had the opportunity to contact Cirillo and inform him of the new shipment, both were arrested in New York.

On appeal, Cirillo contended that while the indictment alleged the existence of one ongoing conspiracy involving two transactions, the proof at trial actually showed the existence of two separate conspiracies. Hence, the introduction of evidence relating to the second transaction so prejudice his right to a fair trial that the variance between indictment and proof must be considered material.

The Second Circuit Court of Appeals affirmed Cirillo's conviction and held tht the evidence proved the "existence of a single, ongoing continuous conspiracy" and, therefore, the claim of variance between indictment and proof was unfounded. The

Court maintained that it was rational to infer from the evidence that the conspirators anticipated transactions beyond the initial shipment.

The Court recognized the well-established rule that a conspirator may be held responsible for the actions of a co-conspirator even though the co-conspirator's identity or activities remain unknown to the complaining conspirator. Hence, the fact that Cirillo was not informed of the second transaction prior to his arrest does not relieve him from culpability. The evidence did not indicate that the conspirators were to notify Cirillo before each shipment of heroin was placed in transit.

Finally, the Court maintained that the participation of a conspirator may extend beyond his own overt acts if the conspiracy continues in existence and there is no proof that the conspirator withdrew from the conspiracy. The evidence at trial failed to show that Cirillo attempted to withdraw from the conspiracy prior to his arrest. Hence, although Cirillo did not actively participate in the second transaction, he remained a member of the conspiracy and is responsible for the actions of the co-conspirators taken in furtherance of their previous agreement for smuggling heroin.

Staff: United States Attorney Whitney N. Seymour, Jr.
Assistant United States Attorney Arthur J. Viviani (S.D. New York)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

ENVIRONMENT

THE NATIONAL EVIRONMENTAL POLICY ACT: ADEQUACY OF IMPACT STATEMENT: SCOPE OF JUDICIAL REVIEW.

Environmental Defense Fund, Inc., et al. v. Froehlke, et al. (Cache River) (C.A. 8, No. 72-1427, Dec. 14, 1972; D.J. 90-1-4-386)

This action was filed in October 1971, by environmentalists seeking to enjoin construction of the Cache River-Bayou DeView Channelization Project, authorized by Congress in 1950, for failure of federal officials to comply with the National Environmental Policy Act of 1969 (NEPA). In December 1970, the Corps of Engineers filed a final impact statement (EIS) with respect to the project, consisting of approximately 12 pages. In September 1971, the Corps filed a draft EIS respecting a mitigation plan with respect to the project to mitigate wildlife losses. The district court found the final EIS minimally adequate and denied an injunction. The environmentalists appealed, asserting that the final EIS was not adequate, and that the administrative determination to channelize the river was reviewable on the merits by the court under Section 101 of NEPA.

The Court of Appeals reversed and remanded the case, holding: (1) that the final EIS was not adequate; (2) that the Corps must file a revised EIS in accordance with the decision of Judge Eisele in the Gillham Dam case; (3) that the district court should review the agency decision as to whether it was arbitrary and capricious; and (4) that the district court may grant such injunctive relief as it feels appropriate.

Staff: Glen R. Goodsell (Land and Natural Resources Division); United States Attorney W. H. Dillahunty and Assistant United States Attorney Walter G. Riddick (E.D. Ark.)

CONDEMNATION

AWARD SUSTAINED DESPITE FAILURE TO ESTABLISH LEGAL RIGHT TO CLAIMED DIMINISHED HIGHEST AND BEST USE; FAILURE TO OBJECT TO RULE 71A(h) COMMISSION'S DETERMINATION OF LEGAL QUESTION AMOUNTS TO WAIVER.

United States v. Six Access Rights in York County, Va., Ferguson Corp. (C.A. 4, No. 72-1643, Dec. 6, 1972; D.J. 33-48-155-76)

The United States filed a declaration of taking and complaint in condemnation to acquire six 30-foot rights of way to the Colonial Parkway in York County, Virginia, belonging to Ferguson Corporation, the owner of an adjacent, vacant 300-acre tract. Although when these access rights were granted, in 1931, they were legally sufficient to support a residential subdivision, on the date of taking, however, county regulations required a 40-foot minimum. Accordingly, the United States argued that the landowner was entitled only to a nominal $100 for each access right. The Rule 71A(h) commission, however, accepted the landowner's argument that the loss of these access rights had diminished its tracts' highest and best use from residential subdivision to farming, and gave an award of over $52,000, and the district court confirmed the award.

On appeal, the United States argued that the commission's award was based on the erroneous legal premise that on the date of taking the landowner had sufficient legal access to support a residential subdivision. The Court of Appeals issued a per curiam opinion affirming "on the opinion of the district court." In addition, the court stated that it was of no consequence that the commission had decided questions of law, since its conclusions had been adopted by the district court and the error, if any, had been waived by the Government's failure to object at trial.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Roger Williams (E.D. Va.)

INDIANS

PRIOR DECISION RELATING TO INDIAN ENTRY ON PUBLIC LANDS BETWEEN SAME PARTIES HELD BINDING IN SUBSEQUENT SUIT.

A. A. Hopkins-Dukes v. United States (C.A. 9, No. 72-1797, Dec. 11, 1972; D.J. 90-2-10-489, 90-2-10-490, and 90-2-11-6960)

Hopkins-Dukes, a Kiowa Indian, along with other Indians, occupied public lands lands in Maricopa County, Arizona, claiming the land by virtue of certificates of entitlement issued by the BIA. Officials of the B.L.M. sought to remove

the Indians because the lands were not available for Indian entry.

Hopkins-Dukes brought two suits seeking to establish the validity of his entry on the lands and alleging invasion of privacy and defamation against the B.L.M. officials. The United States brought a third suit to eject the Indians. Summary judgment was granted in favor of the United States on its claim and the actions by Hopkins-Dukes were dismissed.

On appeal, based on the identity of issues in Hopkins v. United States, 414 F.2d 464 (C.A. 9, 1969), the Ninth Circuit summarily affirmed the district court's decision relating to public lands. The privacy and defamation causes were remanded to give Hopkins-Dukes opportunity to plead independent federal jurisdiction.

Staff: Dennis M. O'Connell (formerly of Land and Natural Resources Division)

DISTRICT COURT

ENVIRONMENT

NATIONAL ENVIRONMENTAL POLICY ACT; ONGOING HIGHWAY PROJECTS; SUFFICIENCY OF 4(F) STATEMENTS: PUBLIC HEARING REQUIREMENTS.

Live in a Favorable Environment, Inc. v. John Volpe, et al. (E.D. Va., Civil No. 137-72-A, Nov. 30, 1972; D.J. 90-1-4-464)

The Federal Highway Administration, in conjunction with the State of Virginia and the City of Alexandria, proposed the replacement of a single four-lane bridge over a railroad yard with twin three-lane spans. The alteration would also replace signalized intersections with grade-separated ramp structures. Design approval was given in 1967. Approximately one and a half acres of a little league ball field were required for the ramp structures. A4(F) statement on the ball field was prepared in 1971, but an environmental impact statement was not prepared. Public hearing had been held by the Highway Department in 1967 and by the City on several occasions thereafter.

Considering itself bound by the benefit/cost test stated by the Fourth Circuit in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, on the requirement of an environmental impact statement for ongoing projects, the court received a day and a half of testimony on the Government's view of the respective costs and benefits to be derived from a delay in the project to prepare an impact statement. The court began by stating that "any doubt about whether NEPA is applicable to this

ongoing project must be resolved in favor of its applicability." The certain and ascertainable costs of delay shown by the Government must, in the court's view, "be weighed against the benefits or the possible benefits which might accrue." (Emphasis added.)

The court was not persuaded that the structural deterioration and resulting shutdown of the bridge outweighed the possible benefits from preparation of an impact statement. A similar balancing process indicated to the court that additional public hearings should be required.

On the sufficiency of the 4(f) statement, the court noted that the Secretary did not have before him any alternatives which did not require the use of parklands. In addition, the court found a change in circumstances limiting the available alternatives which was not brought to the Secretary's attention.

Staff: Irwin L. Schroeder (Land and Natural Resources Division)

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