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POINTS TO REMEMBER

SUBPOENA DUCES TECUM: ISSUANCE BY U.S. ATTORNEY PRIOR TO INDICTMENT.

A panel in the Fifth Circuit has recently held that a subpoena duces tecum seeking a potential defendant's bank records prior to indictment was invalid where it was issued by the U.S. Attorney's office for a date when no grand jury was in session. United States v. Mitchell Miller, No. 73-2405 (Sept. 13, 1974). The Department has petitioned for a rehearing en banc in Miller asserting that Miller lacked standing under the Fourth Amendment to seek the suppression of records in the hands of a third party (the bank), and that even if he had standing, the subpoena duces tecum was a valid "legal process" within the meaning of California Bankers Association v. Shultz, 416 U.S. 21 (1974).

Nevertheless, the problems encountered in Miller can be avoided, or at least substantially alleviated, by taking the following precautions in issuing subpoenas duces tecum prior to indictment:

(1) The U.S. Attorney or an Assistant U.S. Attorney should personally authorize every such subpoena duces tecum;

(2) The subpoena should be returnable only on a date when a grand jury is scheduled to be in session; and,

(3) Where the custodian of the records is willing to turn them over or make them available to the Government prior to the return date of the subpoena, a report should be made to the grand jury as to the nature and contents of the documents obtained.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General Carla A. Hills

COURT OF APPEALS

EMPLOYEE DISCHARGE

DISTRICT OF COLUMBIA CIRCUIT AFFIRMS DISMISSAL OF COMPLAINT OF LIBRARY OF CONGRESS EMPLOYEES DISCHARGED FOR STRIKING

Haywood J. Bullock, et al. v. L. Quincy Mumford, et al., (C.A.D.C., No. 71-2058, October 21, 1974; D.J. 145-0-488)

Eleven Library of Congress employees were discharged following their participation in disruptive sit-in demonstrations in the Library of Congress reading rooms during working hours. In this action for reinstatement and back pay against the Librarian of Congress and his subordinates, the employees claimed their conduct was a means of protesting alleged racial discrimination and was protected by the First and Fifth Amendments.

The district court dismissed the complaint and the Court of Appeals for the District of Columbia affirmed. The court of appeals rejected the employees' First Amendment claims on the ground that their actions constituted a strike validly prohibited by 5 U.S.C. 7311 and the First Amendment "does not protect behavior made unlawful by legitimate legislation or regulation, enacted for purposes unrelated to the suppression of free expression". In addition, relying on Arnett v. Kennedy, 42 U.S.L.W. 4513, the court held that the employees were not entitled under the Fifth Amendment to hearings prior to their discharges.

Staff: Anthony J. Steinmeyer (Civil Division)

HOUSING

DISTRICT OF COLUMBIA CIRCUIT REJECTS CLAIMS OF BUYERS OF FHA-INSURED HOMES NOT IN COMPLIANCE WITH D.C. CODE

Dorothy W. Jackson, et al. v. James T. Lynn, et al., (C.A.D.C., No. 73-1510, October 17, 1974; D.J. 145-17-241)

Plaintiffs, inexperienced home buyers who purchased homes in the District of Columbia upon which mortgages were approved by the Federal Housing Administration, brought this class action against the United States and three federal administrators of the FHA program. Seeking to represent the class of all persons in the District of Columbia who have purchased, are purchasing, or will purchase homes with FHA-insured mortgages, plaintiffs alleged that various real estate brokers had led them to believe that the houses they purchased were in FHA approved condition and that the Government would stand by the houses and would require repair of defective conditions. They sought a declaration that the Federal Housing Act allows the Secretary of HUD to insure mortgages only if the houses comply with local housing regulations (The houses purchased by the plaintiffs violated the Housing Regulations of the District of Columbia.) and an injunction to restrain defendant officials from insuring mortgages on homes which do not so comply. They also sought damages equal to the value of their homes when purchased and the value the homes would have had when purchased had they then conformed to the housing code, or in the alternative, an order requiring the FHA to finance purchases, without down payment, of other homes in proper repair by insuring mortgages for the entire purchase price.

The district court dismissed the complaint and, on appeal, the Court of Appeals for the District of Columbia affirmed. Although the court reaffirmed its earlier holding in Pickus v. United States Board of Parole, __ F.2d __ (C.A.D.C., No. 73-1987, October 11, 1974) that the Administrative Procedure Act constitutes an independent grant of jurisdiction to the district courts of all claims that challenge "agency action", the dismissal was upheld on the merits. In the first place, the court did not consider the appeal as a class action since the record contained "neither a certificate or any showing that the district court agreed to hear this case as a class action, nor any judicial pronouncement to define the scope of the class". As to the damages of named plaintiffs, the court held that in order to recover, plaintiffs must have demonstrated that the National Housing Act either confers a right of redress against the United States for HUD's violation of a statutory duty or

that a private right to recover from the United States is implied. Finding neither of those rights, the court rejected the claim for damages for failing to state a cause of action upon which relief could be granted. The court also rejected plaintiffs' claim for corrective administrative action to permit them to acquire homes other than their present defective ones on the ground that plaintiffs had not asked the agency for relief. Finally, in light of a change in HUD's policy to require that a dwelling comply with the local housing code to qualify for mortgage insurance, the court dismissed the remainder of the complaint as moot.

Staff: John A. Terry, Thomas G. Corcoran, Jr., Michael G. Scheininger (Assistant United States Attorneys)

SOCIAL SECURITY

TENTH CIRCUIT UPHOLDS CONSTITUTIONALITY OF 20/40 REQUIREMENTS FOR DISABILITY FREEZE AND BENEFITS ELIGIBILITY

Edgar C. Tuttle v. Secretary of Health, Education and Welfare, (C.A. 10, October 16, 1974; D.J. no. 137-77-36)

Claimant in this Social Security case challenged the constitutionality of the provisions of the Social Security Act requiring that a disability applicant have not less than 20 quarters of covered employment in the 40-quarter period preceding his disability in order to qualify for benefits. Claimant had only 19 quarters in the 40-quarter period preceding his disability. The district court upheld the requirements and the Tenth Circuit affirmed, pointing out that the requirements were rationally related to two legitimate governmental objectives -- first, maintaining the self-supporting nature of the disability insurance program; and second, screening out those applicants who have not established a substantial attachment to the labor force and a consequent probable dependence on their earnings.

Staff: Michael Kimmel (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

IMMIGRATION - ENTRY

ALIEN'S INTENT UPON DEPARTURE FROM THIS COUNTRY NOT DISPOSITIVE OF THE QUESTION OF WHETHER OR NOT SUCH DEPARTURE IS A "MEANINGFUL INTERRUPTION" OF HIS RESIDENT STATUS.

Edmond K. Palatian v. Immigration and Naturalization Service, (C.A. 9th Cir., No. 73-2846, August 30, 1974, D.J. No. 39-12c-408).

A three-judge panel of the Ninth Circuit, one judge dissenting, reversed the decision of a California district court which granted the petitioner a writ of habeas corpus. The writ was sought following a determination of the Immigration and Naturalization Service that he was excludable under 8 U.S.C. §1182(a)(23), following a conviction of smuggling marijuana into this country.

The petitioner was awarded "permanent resident" status on February 23, 1970. On December 11, 1970, he traveled to Tijuana, Mexico, where he stayed for two and one-half days. Upon his return to the point of entry, he was found to be in the possession of twenty-eight bricks of marijuana, weighing approximately fifty-five pounds. He was arrested and convicted of failing to register and pay the tax on the narcotic under 26 U.S.C. §4755(a)(1). He was thereafter sentenced to two years imprisonment. The petitioner never appealed this conviction. On May 22, 1972, as a result of the conviction the Immigration and Naturalization Service found him excludable under 8 U.S.C. §1182(a)(23). Thereafter the petitioner sought a habeas corpus writ in district court.

In granting the writ, the district court found that following his visit to Mexico, the petitioner did not make an "entry" into this country as that term is defined in 8 U.S.C. §1101(a)(13), and therefore was not excludable under 8 U.S.C. §1182(a)(23). In supporting their interpretation of "entry" as it pertained to this case, the district court relied on Rosenberg v. Fleuti, 374 U.S. 449 (1963). The district court stated that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure, meaningfully interruptive of his resident alien status, therefore not subjecting him to the consequences of an 'entry' into the country on his return." One of the factors

that the district court determined to be relevant to the inquiry as to whether a departure was a meaningful interruption was the purpose of the visit; for if the purpose of leaving the country was to accomplish some object which is itself contrary to some policy reflected in the immigration laws, the interruption of residence thereby occurring would properly be regarded as meaningful. The absence of demonstrable intent to "accomplish some object ...", at the time of departure, left the district court short of concluding that his departure was meaningful.

The Ninth Circuit did not accept the district court's interpretation of Rosenberg v. Fleuti, supra, and, in reversing, held that the interruption of Palatian's residence was "meaningful." The majority pointed out that what Palatian did when he attempted to come back to this country from Mexico was an "attempt to accomplish some object which is itself contrary to some policy reflected in our immigration laws." Those laws expressly provide for the exclusion or deportation of an alien who has been convicted of smuggling marijuana. [8 U.S.C. §1182(a)(23)] Palatian's acts, according to the Court, were contrary to both the letter of the immigration laws and to a policy expressed in those laws, and therefore he was excludable under 8 U.S.C. §1182(a)(23).

The Ninth Circuit could not agree that the fact that Palatian did not decide to smuggle the marijuana until after he was in Mexico was controlling. The purpose of the visit may have been innocent when it began, but according to the Court, was not innocent when he sought to re-enter this country. Therefore, they did not accept, as did the district court, that the language in Fleuti, supra, referring to an "intent to depart" should be controlling. The Court reasoned that they "... cannot see any good reason why the time when the 'intent' to accomplish some purpose which is itself contrary to some policy reflected in our immigration laws was first formed, should be controlling." "The purpose, to smuggle marijuana into this country is just as 'meaningful' if formed first in Mexico as it would be if first formed before going to Mexico."

Staff: United States Attorney William Keller
Assistant United States Attorney James R. Dooley

NARCOTICS

CUSTOMS OFFICIALS HELD TO HAVE ACTED PROPERLY IN OPENING AND EXAMINING FIRST CLASS ENVELOPE CONTAINING COCAINE.

United States v. David J. Odland, (7th Cir., August 21, 1974).

David J. Odland was convicted of unlawfully importing 8.8 grams of cocaine in violation of 21 U.S.C. 952(a). Customs officials detected the cocaine when they opened a first class envelope from Colombia during a routine search of mail emanating from abroad. On appeal, Odland, relying on the provisions of 19 U.S.C. 482, contended that the Customs officials had acted improperly in opening the envelope since the officials did not have "reasonable cause to suspect" that the envelope contained cocaine. The Seventh Circuit Court of Appeals rejected this contention, holding that Customs officials are empowered to search all classes of international mail by virtue of the provisions of 19 U.S.C. 1582 and, more importantly, under the provisions of a Postal regulation, to wit, 39 C.F.R. 61.1. The Court observed, "The envelope was subject to search at the border merely because it was entering the United States from abroad; no other fact, and no suspicion particular to this envelope, is necessary under the regulation." The Court had no difficulty in finding the broad search power granted by 39 C.F.R. 61.1 constitutional.

Staff: United States Attorney William J. Mulligan

21 U.S.C. 841 IS GENERAL INTENT OFFENSE AND DEFENDANT NEED NOT KNOW EXACT NATURE OF CONTROLLED SUBSTANCE.

United States v. Donald Ray Davis, (C.A. 9, No. 73-3203, July 17, 1974; D.J. 12-82-415).

On September 12, 1973, Donald Ray Davis was convicted of knowingly distributing and possessing with the intent to distribute mushroom pieces containing lysergic acid diethylamide (LSD) in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(B), and 18 U.S.C. §2.

One of the assignments of error was that the trial court erred in instructing the jury as to the word "knowingly" and in refusing to give the defendant's requested instructions which were in part "the word knowingly as used in the indictment means that the act was done with full

knowledge on the part of each defendant and the substance delivered and possessed was lysergic acid diethylamide (LSD)." The Court of Appeals in ruling on this particular assignment of error stated that Title 21 U.S.C. §841 described "A general intent offense." The court further reflected that the government under this statute is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing and so holding relied upon the United States v. Balint, 258 U.S. 250, and United States v. Hillman, 461 F.2d 1081 (9th Cir. 1972).

Staff: United States Attorney Stan Pitkins
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LAND AND NATURAL RESOURCES DIVISION
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COURTS OF APPEALS

MARINE RESOURCES

SECTION 5(a)(1) OF THE OUTER CONTINENTAL SHELF LANDS ACT AND NEPA JUSTIFIED THE SECRETARY OF THE INTERIOR IN SUSPENDING DRILLING FOR OIL IN SANTA BARBARA CHANNEL AFTER THE OIL SPILL HAD REVEALED THE DANGER TO ALL THE RESOURCES OF THAT AREA.

Gulf Oil Corp. v. Morton, 493 F.2d 141 (C.A. 9, 1973; D.J. 90-1-13-932).

After the oil spill in Santa Barbara Channel, the Secretary of the Interior determined to suspend operations on lease operations pending consideration of his bill to protect environmental values in the Channel by creating a national energy reserve there. Four oil companies holding 11 leases issued under the Outer Continental Shelf Lands Act, 43 U.S.C. secs. 1331 et seq., for which they had paid $152 million, filed suit challenging the legality of the Secretary's order. The companies sought to vacate the Secretary's suspension order, to extend their leases for a period commensurate to the period during which they were prevented from exploiting their leases, and to compel the Secretary to act forthwith on their pending applications for drilling permits.

The oil companies argued that, while the Secretary has discretion whether or not to lease, once he has leased offshore lands he has fully exhausted his discretionary power over the leased lands. After leasing, they contended, the Secretary lacks authority to take any measures for a purpose diametrically opposed to the overriding purpose of the OCS Act, namely oil and gas production, and that NEPA does not apply because it cannot repeal or amend the true purpose of the OCS Act.

The district court agreed, holding that the OCS Act did not authorize the Secretary to suspend operations on leases in order to permit the Congress to consider pending legislation which the Secretary had

recommended and that the Secretary's suspension order did not come within the meaning of "conservation" in Section 5(a)(1) of that Act. Accordingly, the district court entered judgment: (1) setting aside the Secretary's suspension order, (2) directing him to forthwith grant all applications for drilling permits, and (3) extending the initial term of the leases for 32 months to enable the lessees to exercise their rights under these leases. 345 F.Supp. 685.

The Ninth Circuit reversed. With respect to the standard of judicial review, it held that under the Administrative Procedure Act, 5 U.S.C. sec. 706, "informal" agency action (which may be taken without formal hearings) by the Secretary could be set aside only if it were unauthorized by law under subsection (2)(C), or arbitrary and capricious under subsection (2)(A).

Next, the court held, suspension in the interest of conservation is authorized by statute. Section 5(a)(1) authorized the Secretary to suspend operations under existing leases in the interest of conservation whenever he determines that the risk to marine environment outweighs the immediate national interest in exploring and drilling for oil and gas. The phrase "conservation of the natural resources of the Outer Continental Shelf" should be used as defined in Section 2(e) of the Submerged Lands Act, to encompass all such resources, not just oil and gas, sulphur and other minerals. This broad construction is reinforced by NEPA which directs agencies to consider environmental matters in addition to matters within their special jurisdiction in making their determinations. Together, the OCS Act and NEPA give the Secretary a continuing duty to guard all the resources of the Outer Continental Shelf. The dangers revealed by the oil spill properly caused the Secretary to reconsider the dangers to the natural resources of the area if drilling were to proceed under the leases. The Secretary's order, therefore, was within the range of choices available to him. On the petition for rehearing the court reaffirmed its opinion that the Secretary's order was valid when made, but when on October 18, 1972, Congress adjourned its fourth session, without having taken any action on the proposed legislation, the raison d'etre of the Secretary's order vanished, and on that day it became invalid.

Moreover, the Secretary himself abandoned the sole basis upon which his suspension orders purported to rest when on November 13, 1973, an Assistant Secretary advised Congress not to enact the Secretary's proposed legislation at that time, because of the energy crisis, shows that on that date the Secretary's authority to suspend was fully spent. Finally, equity required that the original term of the leases be extended by the entire time the suspension orders were purported to be effective.

Staff: Jacques B. Gelin and Myles E. Flint (Land and Natural Resources Division).

JURISDICTION

TERMINATION OF FEDERAL JURISDICTION; FEDERAL OWNERSHIP AND USAGE OF LAND.

United States v. Franklin Dale Goings, et al. (C.A. 8, 1974, No. 74-1164, Oct. 16, 1974; D.J. 90-2-0-755).

This action involved criminal proceedings against two defendants who allegedly assulted a person upon land owned by a private corporation, which land some five months previously was owned by the United States as part of the Fort Lincoln Military Reservation in North Dakota and within the "special territorial jurisdiction" of the United States as defined in 18 U.S.C. secs. 7(3) and 113(c). The subject land was conveyed by quitclaim deed from the United States to a private corporation. The State of North Dakota was never notified of the conveyance, nor did the United States advise that State that it intended to relinquish its jurisdiction of that land to the State.

The district court held that the United States lost jurisdiction of the subject land on the date of the conveyance since the United States no longer held an interest in the land and since it was no longer used for federal purposes, and therefore dismissed the criminal complaints. The court of appeals affirmed, holding that the federal sovereignty over land acquired under Article I, section 8, Clause 17 of the Constitution ends when the reasons for existence of that sovereignty and ownership terminates, and that the covenant retained in the deed reserving the right of federal use in the event of emergency was a

declaration of procedure to facilitate the Government's power of eminent domain. (The court of appeals did not reach the issue of the State's acceptance of jurisdiction.)

Staff: Glen R. Goodsell (Land and Natural Resources Division); United States Attorney Harold O. Bullis (D. N.D.).

DISTRICT COURT

CONDEMNATION

JUST COMPENSATION; ESTOPPEL; LANDOWNERS MAY INCLUDE ENHANCEMENT IN VALUE ATTRIBUTABLE TO PROJECT, WHERE THE GOVERNMENT REPRESENTED THAT VALUE OF LANDOWNERS' REMAINING LANDS WOULD BE ENHANCED BY THE PROJECT.

United States v. 31.45 Acres, Whitman County, Wash., and Evans, et al., 376 F.Supp. 1277 (E.D. Wash., May 28, 1974; D.J. 33-49-777-305).

The Government sought to prohibit the landowners' evidence at trial as to just compensation from including as an element of value any increment in value attributable to the project for which the lands were taken. Under United States v. Miller, 317 U.S. 369 (1943), the landowners would not be entitled to any increased value attributable to the project, since the court found that the lands taken were within the scope of the original project. In this case, however, the court held that the Government was estopped from asserting that there had been no change in the project since the land agent and Assistant United States Attorney represented that the landowners' remaining lands would have enhanced value by reason of the project. The landowners rightfully relied on these representations to their detriment. Thus, the court denied the Government's motion to preclude the landowners from including, as an element of damages, any increment in value attributable to the project itself.

Staff: Assistant United States Attorney Terrence Flannery (E.D. Wash.).

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TAX DIVISION
Assistant Attorney General Scott P. Crampton

DISTRICT COURT

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

FEDERAL LAW PROHIBITS A HOST STATE FROM TAXING A NONRESIDENT SERVICEMAN'S MOBILE HOME AS AN IMPROVEMENT TO REAL PROPERTY

UNITED STATES DISTRICT COURT HOLDS THAT FEDERAL LAW, RATHER THAN STATE LAW, DETERMINES WHAT CONSTITUTES PERSONAL PROPERTY FOR PURPOSES OF THE EXEMPTION PROVIDED NONRESIDENT SERVICEMEN FROM ALL TAXES "IN RESPECT OF * * * PERSONAL PROPERTY" BY THE PROVISIONS OF SECTION 514 OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (50 U.S.C., App., § 574).

United States v. Shelby County, Tennessee, et al. (W.D. Tenn., No. C-74-123, October 10, 1974; D.J. # 236517-44-39).

The United States brought this suit on behalf of nonresident servicemen residing in mobile homes located in Shelby County and the City of Millington, Tennessee, which impose an annual tax upon mobile homes as improvements to real property pursuant to authority granted by Article II, Section 28 of the Tennessee Constitution and Sections 67-601, 67-602, and 67-612 Tennessee Code Annotated (Supp. 1973). Congress freed nonresident servicemen from the obligation of paying personal property and income taxes to state or local governments where they are present in compliance with military orders when it enacted Section 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (Title 50, U.S.C., App. § 574) and saved the sole right of taxation to the jurisdiction of original residence. The act does not exempt nonresident servicemen from taxes on real property.

In a Memorandum Opinion granting the United States summary judgment on October 10, 1974, Judge Harry W. Welford held that mobile homes belonging to nonresident servicemen which are not permanently affixed to realty are determined to be personal property within the meaning of Section 514 of the Soldiers' and Sailors' Civil Relief Act. The Court reasoned that federal law, rather than state law which classifies mobile homes as real property, determines the scope of the exemption provided nonresident servicemen in Section 514 of the Soldiers' and Sailors' Civil Relief Act

from all taxes "in respect of * * * personal property". The importance of the decision is that it prevents a state from circumventing Section 514 by enacting a statute which arbitrarily and artificially defines real property so as to include exempt personal property and provides another example where a federal court has ruled recently that the protection Section 514 affords to nonresident servicemen is not limited to ad valorem personal property taxes, but extends to all taxes "in respect of * * * personal property". See United States v. Hawaii, et al., (D.C. Hawaii, No. 74-131 Civil, July 8, 1974; D.J. # 236517-12-6; United States Attorneys Bulletin, Vol. 22, No. 17, August 23, 1974).

Staff: Charles E. Stratton and George F. Lynch (Tax Division)

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