United States Attorneys

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Quarterly Index to Points to Remember

Volume 24 April 2, 1976 Number 7

UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney C. Wesley Currier, Southern District of Florida, has been commended by E. L. Eastmoore, Chief Judge, Seventh Judicial Circuit, State of Florida, and by K.C. Bullard, Major General, Adjutant General, State of Florida, for his successful handling of the defense in Lieut. Col. John Walker v. Secretary of the Army and Adjutant General of Florida.

Assistant United States Attorney Rebeckah J. Poston, Southern District of Florida, has been commended by Julius L. Mattson, Special Agent in Charge, Miami, Federal Bureau of Investigation, for the exemplary diligence and professionalism she displayed in the successful prosecution of Carmen Michael Cartenuto for interstate transportation of stolen property; fraud by wire, conspiracy and obstruction of justice.

Assistant United States Attorney James Stotter, II, Central District of California, has been awarded a "Certificate of Appreciation" by Peter B. Bensinger, Administrator, Drug Enforcement Administration, for his successful defense of DEA in a FOIA suit which sought information provided to DEA by local, state and foreign police agencies.

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POINTS TO REMEMBER

Deferred Prosecution of Cases Involving Labor Union Officials or Persons Associated with Employee Benefit Funds

It has come to our attention recently that some United States Attorneys have authorized the disposition of cases involving present or former labor union officials or persons holding positions of trust in relation to employee benefit funds, by way of deferred prosecution. In each instance, prosecution was deferred without consideration of the provisions of 29 U.S.C. 504 and 1111.

In the future, whenever your office is seriously contemplating the proffer of a deferred prosecution disposition to such an individual, please check the provisions of 29 U.S.C. 504 and 1111 and contact the Government Regulations and Labor Section before the proffer is made. This will serve to more adequately effectuate the policies and goals underlying these statutory provisions.

(Criminal Division)

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Draft Document Entitled Standard Office Procedure For United States Attorneys Offices (January 1972)

A recent TWX from the Executive Office to all U.S. Attorneys read:

"In 1972, the now extinct office of judicial examinations published a draft of a procedural manual entitled, Standard Office Procedure For United States Attorneys' Offices. This Manual was assigned number 1000., indicated its status as a draft, and was distributed to many United States Attorneys' offices for comment.

Since its distribution, questions have surfaced from time to time concerning conflicts between the information in this manual and the policy of the Department of Justice as expressed by the Executive Office for United States Attorneys and the Divisions. Standard Office Procedure For United States Attorneys' Offices is not an official Department of Justice order in that it never received approval. Therefore, it should not be referred to or relied upon by the United States Attorneys as a source of authoritative policy or procedure. For example, it was recently discovered that one United States Attorney was declining to accept agency referrals of claims under $400.00 in accordance with language in paragraph 402(A)(B),

Page 76, of the 'Manual,'" which does not accurately state the authoritative source which is 4 CFR 105.6 (1975).

(Executive Office)

* * * * *

Effect of the Privacy Act of 1974 in the Extrajudicial Solicitation of Financial Information from Opposing Parties

The Legal Divisions and United States Attorneys handling Collection cases often require financial information of opposing parties in order that litigation and collection costs and risks can be assessed and so that compromise offers can be evaluated. One usual practice in obtaining such information is for the Department to informally solicit the necessary data directly from the opposing parties outside of the judicial process. This is accomplished by requesting that they voluntarily fill out and submit a financial statement form (DJ-35, OBD-132, CIV-OT-8, or equivalent) setting forth their financial ability to satisfy the Government's criminal fine, claim or judgment (or, where applicable, to make a compromise offer).

The enactment of the Privacy Act of 1974, Public Law 93-579, 5 U.S.C. 552a, et seq., which went into effect September 27, 1975, among other things, regulates the extrajudicial solicitation and gathering of financial information from opposing parties. (See Sections 3(e) and 7(b) of the Act.)

In order to bring our procedures into compliance with the Act, the Department is in the process of amending and reissuing the financial statement forms. However, in the interim and until the new form is approved and distributed to your offices, it is requested that you attach to the present financial statement form that you are using, the statement on the following page.

An initial supply of these forms (Form PAS-1) is being sent to each U.S. Attorney's office. Additional copies may be requisitioned in the usual manner.

(Executive Office)

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DEPARTMENT OF JUSTICE
PRIVACY ACT OF 1974 COMPLIANCE INFORMATION

The following Department of Justice "Financial Status/ Financial Statement of Debtor" forms MUST be accompanied by this Privacy Act Statement: OBD-132; OBD-133; CIV-190 (formerly DJ-35 & CIV-OT-8).

Authority for the solicitation of the requested information is one or more of the following: 5 U.S.C. 301, 901 (see Note, Executive Order 6166, June 10, 1933); 28 U.S.C. 501, et seq.; 31 U.S.C. 951, et seq.; 44 U.S.C. 3101; 4 C.F.R. 101, et seq.; 28 C.F.R. 0.160, 0.171 and Appendix to Subpart Y.

Disclosure of the information is voluntary. The principal purpose of the information is to evaluate your capacity to pay the Government's claim or judgment against you. Routine uses of the information are established in the following Department of Justice Case File Systems published in Vol. 40 of the Federal Register: Justice/CIV-001 at pages 38725-38726; Justice, TAX-001 at pages 38773-38774; Justice/USA-005 at page 38784; Justice/USA-007 at pages 38786-38787. If the requested information is not furnished, the Department of Justice has the right to seek disclosure of the information by legal methods.

Your Social Security account number is helpful for identification, but you are not required to indicate it if you do not desire to do so.

FORM PAS-1
3-15-76

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CITATIONS FOR CRIMINAL CASES

Citations for criminal cases (concerning statutes under the supervisory jurisdiction of the Criminal Division) which were decided later than the Modern Federal Practice Digest pocket parts (i.e., the most recent bound volumes and advance sheets of F. Supp. and F. 2d) are always available by calling:

FTS 739-3754
Office of Miss Gormley, Legislation and Special Projects Section, Criminal Division.

(Executive Office)

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ORDER TO COMPEL BANK ROBBERY SUSPECT TO WEAR DISGUISE AND REPEAT PHRASES FOR LINE-UP UPHELD

Donald B. Mackay, United States Attorney, Southern District of Illinois, has forwarded to the Executive Office the opinion of United States v. Elmer Schuer, (7th Cir., No. 75-2034). In this not to be published opinion, the Court of Appeals for the Seventh Circuit affirmed the district court's order which directed bank robbery suspect to participate in a line-up, wear certain clothing and speak certain words in common with other participants. Suspect was to have his choice of mustaches, beard and clothing. Upon suspect's refusal to so participate he was held in contempt of court under 18 U.S.C 401(3). It was further ordered that any additional refusal would be met with "the requisite force required to dress [suspect] and have his picture taken with that disguise . . . in as nearly natural circumstances as any recalcitrance on his part permits." (It is the photograph derived from the procedure just described which, as part of a photo display, produced an identification witness and the conviction.) In affirming the order, the Court of Appeals relied on U.S. v. Turner, 472 F. 2d 958 (4th Cir. 1973) and U.S. v. Hammond, 419 F. 2d 166 (4th Cir. 1969).

(Executive Office)

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FIRST QUARTER, 1976, OF BULLETIN POINTS TO REMEMBER (Nos. 1-6)

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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

JURY FINDS STEEL COMPANY OFFICIALS GUILTY OF VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

United States v. Bethlehem Steel Corporation, et al., (74-148-CR-T-K; February 14, 1976, DJ 60-138-172)

On February 14, 1976, after a 10 day trial, a 10 woman - 2 man jury in Tampa, Florida, returned guilty verdicts against each of four steel company executive and management officials for allocating contracts for the sale of reinforced steel bar materials, in violation of §1 of the Sherman Act.

The indictment, filed on August 5, 1974, charged Bethlehem Steel Corp., Laclede Steel Co., Florida Steel Corp., Owen Steel Co. of Florida, Edward L. Flom, President of Florida Steel, Frank W. Hunsberger, Director and Vice President of Florida Steel, Richard E. Volland, Product Supervisor of Bethlehem Steel and David L. Hoffman, District Manager of Tampa-Laclede with allocating construction projects involving the sale of fabricated reinforced steel bar material; agreeing that participants who were not designated low bidders would either not bid or submit sham bids; and that the defendants telephoned each other to exchange price information.

The corporate defendants entered pleas of nolo contendere prior to trial and were each fined $50,000 by Judge Ben Krentzman.

Prior to trial the defendants filed motions to disqualify the judge, dismiss the indictment, and to suppress the grand jury testimony of a senior Florida Steel executive on the ground that the government had abused the grand jury process by instructing the witness not to discuss his testimony with his attorney during a luncheon

recess, which allegedly resulted in obtaining the indictment in violation of the defendants' constitutional rights. The Court denied the motions for failure to show a particularized need to justify intrusion into the secrecy of the grand jury and because the defendants had no standing to assert alleged violations of the witness' constitutional rights. The Court further held that even if the witness' testimony was partially incompetent, it was insufficient to dismiss the indictment where other competent evidence was presented to the grand jury and the indictment was proper on its face. U.S. v. Howard, 433 F. 2d. 1 (5th Cir. 1970); U.S. v. Dunham, 475 F. 2d 1241 (5th Cir. 1973).

Repeated efforts were made by the defendants to enter a plea agreement with the government pursuant to Rule 11 F.R.Cr.P., including an arrangement whereby the defendants would proffer conditional pleas subject to a pre-trial probation report and review by the Judge who was to indicate if he considered jail time appropriate, and if so, the defendants could withdraw their pleas. The government rejected this and other ex parte type arrangements and successfully opposed three unconditional efforts to plead nolo contendere the morning trial was to begin.

Major issues at trial included whether there was a continuous uninterrupted stream of interstate commerce; to what extent the government was bound by its bill of particulars; how evidence prior to the statute of limitations but within the indictment period was to be considered by the jury; and whether hostile witnesses were or should be called as court witnesses.

The indictment charged that the defendant companies acted as conduits for the shipment of steel re-bar materials from out-of-state sources, that the steel was received and fabricated in Florida and shipped to job sites also in Florida in an uninterrupted stream of interstate commerce. The defendants contended that the material went into inventory at the plants in Florida and thereby lost its interstate characteristics insofar as subsequent anticompetitive activity was concerned. Thus they concluded that the indictment conceded an interruption for fabrication at the plants in Florida, that the goods had

"come to rest", that there was no impact on interstate commerce thereafter, and that the court had no jurisdiction.

The government argued that the defendants had deliberately misrepresented and distorted a legal term of art- "continuous uninterrupted stream of interstate commerce"- which included as a principle of law, goods which were temporarily stored, co-mingled or altered in part, but remained in the stream of interstate commerce. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); Standard Oil v. FTC, 173 F. 2d 210 (7th Cir. 1949); U.S. v. Chrysler Corp., 180 F. 2d 557 (9th Cir. 1950); U.S. v. So. Florida Asphalt Co., 329 F. 2d 860 (5th Cir. 1964). The government objected to efforts to argue factual interruptions under the guise of representing an acceptable and accurate legal premise which would have had the effect of conveying to the jury that the government had conceded by its own admission not only an interruption in the flow of commerce, but the Court's lack of jurisdiction. The Court did not limit the defendants' scope of cross-examination or closing argument on this subject, but did instruct the jury that such interruptions did not necessarily cause the goods to lose their interstate character. The actual factual determination was left to the jury.

One of the government's key witnesses was a former steel executive of one of the defendants who had participated in the allocation scheme for 10 years and had kept records of the meetings and allocations. When the government tried to introduce these records, a major defense effort was made to block their admissibility because the government had failed to include this data in its voluntary bill of particulars filed one year previously when such information was not known to the government. The government had obtained this evidence two weeks prior to trial and immediately made it available to the defendants. The defendants did not attempt to quash its use, request a delay, or request an amended bill. Defense opening statements categorically asserted the government would be unable to prove specific contract allocation. When the government sought to introduce this evidence, the defendants claimed undue surprise, unfair trial, denial of due

process, and that the government was bound by its original bill which reserved the right to amend. After a lengthy hearing, the government was cleared of all allegations of misconduct since the witness had concealed the records from the government until the last minute, and of denial of due process. The records were admitted.

The government called two hostile witnesses, but prior to trial had moved the Court to call one as a Court's witness because he had refused to talk to the government prior to trial, had equivocated before the grand jury, was a 30 year senior executive for a defendant company and his testimony was likely to be less than candid because of his identity of interest with an adverse party. The Court declined to rule on the motion and directed the government to call the witness as on direct examination. When the witness became evasive, the Court called a bench conference and granted a motion under Rule 611 F.R.Ev. to direct leading questions to the witness. Thus, the tactical move of filing the Court witness motion in anticipation of this hostility proved successful.

A significant effort was made to confuse evidence received as background evidence and outside the statute of limitation period, but within the indictment period. The indictment period was 1960-1972. The five year statute of limitations was from 1969-1974. Some evidence had been received as background evidence prior to the indictment period with a limiting instruction that it could be considered only as evidence of motive and intent. The defendants, however, contended that the five year statute of limitations within which the conspiracy must have existed prior to the indictment meant that not only did the conspiracy have to have existed but that each defendant must have participated during that time; that all evidence relating to the period prior to the five year period (1960-1968) even though within the indictment period (1960-1972) was background evidence and thus excludable from consideration by the jury to convict any defendant. Defendants further alleged that during 1960-1972 there was no continuing agreement to allocate as to these defendants because any alleged conspiracy had involved different companies and different people (successors) at different times, and the agreements, if any,

took different forms, e.g. allocation of customers, contracts, territories, contractors. The Court denied these contentions in determining how it would instruct the jury. Judge Krentzman ruled that even if this scheme evolved by utilizing different mechanics and different people, the statute of limitations minimum requirement was that the conspiracy has existed within the five years preceding the indictment and that it was a jury question as to who participated during the indictment period and whether any agreement existed or was continuous. The Court also ruled that all competent evidence adduced during the indictment period could be considered as substantive evidence notwithstanding the statute of limitations and only background evidence prior to the indictment period was to be given limited effect. U.S. v. Dunham, supra; U.S. v. Dennis, 183 F. 2d 201 (2d Cir. 1950); American Tobacco v. U.S., 147 F. 2d 93 (6th Cir. 1944); AMA v. U.S. 130 F. 2d 233 (D.C. Cir. 1942). To have ruled otherwise would, by definition, restrict every indictment to five years preceding its filing date and nullify all other evidence outside that period as "background" and thus incompetent to be considered by a jury to convict, a purpose never intended by the drafters of the statute.

The defendants' motions for acquittal were all denied, but were based on insufficiency of proof to establish: (1) interstate commerce; (2) construction contracts would be or were allocated because the contracts in a technical sense had not been formed at the time when the allocation agreement as to bids had been made; (3) specific construction contracts would be or were allocated successfully to the defendants; (4) a continuous agreement to meet or to allocate; (5) the defendants had the power and intent to allocate; and (6) the effects alleged.

Staff: Wilford L. Whitley, Jr., Thomas P. Ruane, Robert E. Bloch and Ernest T. Hays (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Rex E. Lee

COURT OF APPEALS

STANDING

C.A.D.C. HOLDS INTEREST OF THE FEDERAL GOVERNMENT IN THE EXCLUSIVITY OF ITS PARENS PATRIAE POWER BARS GRANT OR STANDING TO STATE OF PENNSYLVANIA IN SUIT AGAINST FEDERAL AGENCY.

Commonwealth of Pennsylvania, et al. v. Thomas S. Kleppee, As Administrator of the Small Business Administration, et al. (C.A.D.C. No. 74-1960, decided March 4, 1976; D.J. 105-16-93).

The State of Pennsylvania brought suit against the Small Business Administration asserting that the means by which the SBA administered disaster relief after the ravages of hurricane Agnes was illegal. Pennsylvania claimed standing on its own behalf and as parens patriae for its injured citizens. The complaint was dismissed by the district court for lack of standing. The court of appeals affirmed.

The court of appeals determined that the suit could not be brought by Pennsylvania on its own behalf because the alleged injuries to the state's economy and the health, safety and welfare of its people involved no harm to the state beyond the individualized harm to its citizens. Turning to parens patriae as a basis for standing, the court observed that where a state is not suing another state, but rather an agency of the federal government, there exist important arguments for denying the state standing. Relying on Massachusetts v. Mellon, 262 U.S. 447 (1923) for the proposition that the supremacy of federal law requires that "the federal parens patriae power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens," the court held that, in light of the "ambiguous" state interests alleged by Pennsylvania, the state could not be permitted "to insert itself between the national government and the legitimate objects of its administrative authority."

Staff: Earl J. Silbert, United States Attorney
John A. Terry, Thomas G. Corcoran, Jr.,
Assistant United States Attorneys
(District of District of Columbia)

TORT CLAIMS ACT, 28 U.S.C. 1346

THIRD CIRCUIT HOLDS THAT FAILURE TO FILE ADMINISTRATIVE CLAIM BARS TORT CLAIMS ACT SUIT BY PLAINTIFF WHERE THE UNITED STATES HAD BEEN BROUGHT INTO THE LAWSUIT AS A THIRD PARTY DEFENDANT IN A JONES ACT CLAIM AND SUBSEQUENTLY WAS SUED DIRECTLY UNDER THE TORT CLAIMS ACT

Rosario v. United States, (C.A. 3 No. 75-1741, decided March 8, 1976; D.J. 157-62-970).

In this medical malpractice case, the district court awarded plaintiff judgment of $250,000, rejecting our argument that the suit was barred by plaintiff's failure to file an administrative claim. Plaintiff seaman had sued his shipowner under the Jones Act, and the shipowner had brought the United States in as a third party defendant on the ground that the malpractice of the Public Health Service had aggravated plaintiff's injuries. Plaintiff then amended his complaint to assert a cause of action against the United States under the Tort Claims Act, and settled his lawsuit with the shipowner.

The Third Circuit accepted our argument that the suit was barred by 28 U.S.C. 2675(a) of the Tort Claims Act. According to the Court, the exception in that section to the administrative claim requirement for third party actions does not cover a direct action by a plaintiff against a third party defendant.

Staff: Michael H. Stein (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

COURT OF APPEALS

AUTHENTICATION OF FOREIGN BUSINESS RECORDS

TIME NECESSARY TO AUTHENTICATE FOREIGN BUSINESS RECORDS HELD NOT TO DENY RIGHT TO SPEEDY TRIAL.

United States v. John Robert Hay, (10th Cir. No. 75-1044, December 31, 1975, D.J. Nos. 46-1038, 182-9).

Defendant Hay, an engineer employed by a United States consulting firm monitoring the expenditure of USAID funds under a contract for the construction of a water system for Saigon, was paid $125,000 by a French contracting company for his approval of cost overruns on the project. The payment was made by a deposit on a numbered account in a Swiss bank. The records of the account were obtained through letters ragatory from the United States District Court for the District of Colorado, requesting the Swiss judiciary to obtain the records for use in Hay's prosecution. The Swiss were successful in persuading the bank to give up the documents (there being no compulsory process, under the Swiss Cantonal laws, in the absence of a proceeding in the Cantonal courts), but could not persuade the bank to send the custodian of the records to testify to their authenticity.

On June 29, 1973, the government filed a motion under 18 U.S.C. 3491 et seq. for the issuance of a commission to the U.S. Consul in Switzerland for the taking of a deposition to authenticate the records. Because of the extreme difficulty of conducting this unprecedented proceeding in Switzerland, whose criminal code outlaws the performance of the official acts of a foreign government on Swiss soil, and whose laws have no equivalent of the Sixth Amendment right to confrontation or the hearsay rule, the deposition was not completed until the end of January, 1974. Proceedings on pretrial motions challenging the admissibility of the documents were concluded with an order of April 30, 1974, wherein Judge Winner ruled the bank records admissible. See 376 F.Supp. 264. Trial was set for June 10, 1974, but was continued until September 16, 1974, at the instance of the government because of the unavailability of a necessary witness.

The Court of Appeals, in balancing the detriment to Hay against the complexity of completing the authentication procedure under 18 U.S.C. 1391 et seq., held that the period of one year consumed by the procedures did not infringe his rights to a speedy trial.

The Court of Appeals affirmed District Judge Winner's order of April 30, 1974, on the issue of the sufficiency of the authentication of the bank documents. It ruled that any conceivable defect in the authentication would be a harmless error in light of Hay's testimony at trial, wherein he admitted that he had been paid the $125,000 via a deposit in his Swiss bank account.

Staff: James L. Treece
United States Attorney (Colorado)
Richard J. Spelts
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(Criminal Division)

ELECTRONIC SURVEILLANCE- GOVERNMENT'S DUTY TO AFFIRM OR DENY ILLEGALITY

FRIVOLOUS ASSERTIONS OF ILLEGAL WIRETAPPING NOT "CLAIM" UNDER 18 U.S.C. §3504 SUFFICIENT TO TRIGGER GOVERNMENT'S OBLIGATION TO SEARCH RECORDS AND AFFIRM OR DENY ILLEGALITY.

In re Francis Joseph Millow, (2d Cir., No. 75-1381 January 13, 1976).

Millow appealed from an order under 28 U.S.C. §1826(a) confining him for failure to testify before a grand jury investigating violations of federal gambling and conspiracy statutes. Millow had moved to quash his subpoena, requesting a hearing to determine if the questions to be asked before the grand jury were the product of illegal surveillance. The Government produced a court order issued by a Westchester County Court judge authorizing a wiretap of Millow's telephone. Upon review of the order, the supporting affidavits, and applications, the district judge found them sufficient and denied Millow's motion. Millow then claimed his right against self-incrimination, refused to testify, and was granted immunity. Upon Millow's continued refusal to testify (appellant claimed he was appealing the denial of his motion to quash, which denial was unappealable), the Government requested the district court to find him in contempt and confine him without bail under 28 U.S.C. §1926(a). Millow then asserted that the Special Attorney for the Government conducting the investigation had conceded in a statement to him that the electronic surveillance lasted two years and as such was beyond the sixty-day period authorized in the court order. Millow also contended he should not be held in contempt or ordered to testify since the Government had not denied pursuant to

18 U.S.C. §3504 that it had engaged in illegal wiretapping. The district court judge rejected Millow's arguments and ordered him confined.

The Court of Appeals repeated its holding in In re Persico, 491 F.2d 1196, cert. denied 419 U.S. 924, that refusal to testify in a grand jury proceeding under 18 U.S.C. §2515 was permissible only where the Government failed to produce a court order authorizing the surveillance or admitted illegal conduct. The Court stated the Government's submission of the court order and the district judge's determination of the validity of the surveillance in a contempt proceeding. The Court rejected as without merit Millow's interpretation of the Special Attorney's statement that his questions were based in part upon "physical surveillance of your movements in the past two years" as a concession of illegality of the electronic surveillance.

The Court of Appeals went on to hold that Millow's assertions of misconduct were so obviously frivolous and lacking in even a colorable basis that they did not constitute a "claim" under 18 U.S.C. §3504 sufficient to trigger the Government's obligation to disrupt grand jury proceedings, check thoroughly the applicable agency records, and affirm or deny the occurence of illegal surveillance. The statute was not intended to "transform an investigation by the government into an investigation of the government where claims of illegality lack substantial support."

Although the Court's holding made it unnecessary for the Government to submit affidavits responding to the charge of illegal surveillance, the Government had submitted affidavits which complied fully with its obligation under the strictest reading of 18 U.S.C. §3504. The Court believed this made frivolous any petition for certiorari which Millow could file and accordingly denied his request for bail pending application for such writ.

Staff: Thomas J. Cahill
United States Attorney (New York, Southern)
John D. Gordon, III
Assistant United States Attorney (New York, Southern)
Michael D. Abzug
Criminal Division

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Peter R. Taft

COURTS OF APPEALS

ENVIRONMENT

NEPA CLAIMS NOT RAISED BELOW WILL NOT BE CONSIDERED ON APPEAL; UNIFORM RELOCATION ASSISTANCE ACT DOES NOT GUARANTEE IDENTICAL SUBSTITUTE HOUSING.

Katsev v. Coleman, et al. (C.A. 8, No. 75-1350, Feb. 9, 1976; D.J. 90-1-4-1057).

Alleging violations of the National Environmental Policy Act and the Uniform Relocation Assistance Act, plaintiffs brought suit to enjoin the construction of a federally aided highway in St. Louis, Missouri. The court of appeals affirmed the district court's grant of summary judgment for the Government. The court first held that plaintiffs' two NEPA claims were not properly raised on appeal because they had been raised below only in an amendment to the complaint which the district court refused to allow because of its tardiness, and plaintiffs did not appeal the denial of leave to amend. The court further held that the NEPA claims were in any event without merit: (1) plaintiffs' claim that an EIS should have been prepared before the grant-of-location approval for the highway, whether or not correct, was rendered moot by the subsequent filing of an EIS, and (2) plaintiffs' claim that the EIS failed to discuss an alternative location was without foundation. On the only issue properly raised on appeal, the court held that the state defendants had conducted the relocation studies required by the URA, 42 U.S.C. sec. 4601, and that the federal defendants' acceptance of the State's studies was not arbitrary and capricious. The court also rejected plaintiffs' argument that relocatees living in mobile homes must be relocated to mobile home sites in the same county, noting that the Act does not guarantee identical substitute housing.

Staff: Kathryn A. Oberly (Land and Natural Resources Division); Assistant United States Attorney Joseph B. Moore (E.D. Mo.).

CONDEMNATION

ADMISSIBILITY OF LANDOWNER'S TESTIMONY BASED ON INCOMPETENT GROUNDS; LANDOWNER GIVEN MORE LEEWAY IN FIXING VALUES THAN AN EXPERT.

District of Columbia Redevelopment Land Agency v. Thirteen Parcels of Land in Squares 859, 912, 934 and 4068 (Lewis), et al. (C.A. D.C. No. 74-1644, Feb. 23, 1976; D.J. 33-9-733-5).

This case involved a condemnation trial before a jury in which the only evidence proffered by the landowner was his own testimony as to value which was based in part on another parcel of land he owned and ruled by the district court as not comparable to the subject tract for valuation purposes. Therefore, the trial court refused to permit the landowner to testify, and directed a verdict in the amount of $64,600 based on the highest valuation figure submitted in evidence by the Government. The landowner appealed, contending that the district court erred in that an owner is always qualified to testify as to value and that it was for the jury to determine the weight to be given his testimony.

The court of appeals, in a majority decision, reversed the judgment of the district court and remanded the case for a new trial, holding: (1) that the landowner should have been permitted to testify as to the value of his property even though his opinion was based in part upon his experience with his incomparable property; (2) that the differences between the two properties go to the weight of the owner's testimony, not to its admissibility; (3) that the testimony of an expert based on incompetent grounds should not be admitted; (4) that since the owner is draped with no cloak of expertise and the jury is aware of the owner's interests, the jury is free to evaluate his testimony in weighing the evidence; (5) that were this the testimony of an expert, the district court might well have been justified in excluding it; (6) that owners are entitled to more leeway than experts in expressing opinions of value; and (7) that the trial court could have instructed the jury to disregard the sale price of the incomparable property, while allowing the jury the benefit of the owner's testimony of value. Judge MacKinnon dissented.

Staff: Glen R. Goodsell; Thomas Carolan (Land and Natural Resources Division).

PUBLIC LANDS

43 U.S.C. SEC. 164 REQUIRES HOMESTEADER TO HAVE HABITABLE HOUSE ON ENTRY AT TIME OF FINAL PROOF.

Nelson v. Kleppe (C.A. 9, No. 74-1842, Jan. 14, 1976; D.J. 90-1-23-1801).

Nelson appealed from a summary judgment holding that the Secretary of the Interior, through the Interior Board of Land Appeals, had properly cancelled Nelson's homestead entry in Alaska because he failed to have a habitable house on the property at the time of final proof.

The 160 acres involved are about eight miles east of Anchorage in the Chugach Mountains. The land lies adjacent to a resort club in a developing area called Stuckagain Heights which commands a magnificent view of Cook Inlet. Believing that Nelson's objective was to obtain 160 acres of public land with a fine view--at a bargain price and for a minimum effort--not for any bona fide homesteading purposes, Interior decided to file a contest.

Interior's contest complaint charged that Nelson failed to meet the cultivation requirements of the homestead laws and regulations; that he failed to establish timely residence on the entry; that he did not maintain a residence for seven months of any one year after making his entry; and finally, that he failed to have a habitable house on his homestead at the time of final proof. The hearing examiner found in favor of Nelson on all issues, except the habitable house issue, on which he made no finding. The hearing examiner did note that at the time of final proof Nelson's house was in a deteriorated condition. The United States appealed to the IBLA which reversed solely on the habitable house issue.

Nelson filed suit in district court seeking an order directing the Secretary of the Interior to issue him a patent. On cross-motions for summary judgment the court granted the Government's motion. On appeal, the Ninth Circuit held that, while Interior had correctly interpreted

43 U.S.C. 164 as requiring a habitable house on the homestead at the time of final proof, Interior's finding that Nelson did not have a habitable house at that time was not supported by substantial evidence. Accordingly, it reversed and remanded.

Staff: Jacques B. Gelin; Edward J. Shawaker (Land and Natural Resources Division).

CONDEMNATION

UNITED STATES NOT OBLIGATED TO COMPENSATE HOLDERS OF AN INTEREST IN PROPERTY FOR INCONSISTENT USES.

United States v. 145.30 Acres of Land, Situated in Quachita Parish, State of Louisiana, et al., and Bentz and Elmore, Inc., intervenor-appellant (C.A. 5, No. 75-1107, D.J. 33-19-343-6).

The district court held that intervenor sand and gravel company had a compensable mineral interest in land taken by the United States, but had failed to prove the actual value of the interest taken. While the Government contended it had to make only one payment for all interests taken (it had already paid the fee owner) the distribution of which is a matter for the parties to argue, the district court did not reach the Government's contention.

The Fifth Circuit affirmed per curiam in an unreported opinion.

Staff: Neil T. Proto (Land and Natural Resources Division).

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