

mc

United States Attorneys Bulletin



*Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.*

Volume 24

August 6, 1976

No. 16

UNITED STATES DEPARTMENT OF JUSTICE

TABLE OF CONTENTS

	<u>Page</u>
POINTS TO REMEMBER	
Social Security Violations: SSA & FBI Investigators	781
Official Immunity	782
NOTICES	782
CASENOTES	
Civil Division	
Official Immunity	
<u>Expeditions Unlimited Aquatic Enterprise,</u> <u>Inc., v. Smithsonian Institution,</u>	783
<u>Economou v. Department of Agriculture,</u>	783
<u>Raphaela Martinez v. Lawrence Schrock,</u>	784
Veterans Reemployment Act	
<u>Davis v. Alabama Power Co.</u>	784
False Claims Act	
<u>U.S. v. Lewis Kates,</u>	785
APPENDIX: FEDERAL RULES OF EVIDENCE	
Relevancy & Materiality	787
Cases on Relevancy	789
Admissibility of Administrative Record, Rule 803(6)	
<u>Hackley v. Roudebush</u>	790
Police Report and Broadcast Transcript as Business Records, Rule 803(6)	
<u>U.S. v. Smith</u>	791
Statement Against Penal Interest, Rule 804(b)(3)	
<u>U.S. v. Brandenfels</u>	791
APPENDIX: FEDERAL RULES OF CRIMINAL PROCEDURE	793

POINTS TO REMEMBER

SOCIAL SECURITY VIOLATIONS: SSA & FBI INVESTIGATORS

Thirty-five convictions have been obtained in the last year or so, as a result of guilty pleas obtained, in cases involving violations of the penal provisions of title XVI of the Social Security Act (42 U.S.C. 1381 et. seq).

Title XVI of the Social Security Act, known as the Supplemental Security Income (SSI) program, provides payments of general revenue funds for the needy, aged, blind and disabled. Over \$5.9 billion in Federal funds will be paid in fiscal 1976 under this program. The Social Security Administration believes that criminal prosecutions of violations of the SSI program are vital, as deterrents to fraud.

Attempts to defraud occur in connection with applications (claims) submitted for aid and documents submitted in support thereof. Most violations under the SSI program involve false statements about--or concealment of--an individual's financial conditions. There are misdemeanor statutes specifically covering these violations (42 U.S.C. 1383a(1), (2) and (3)). Of course, felony statutes such as 18 U.S.C. 287, 371 and 1001 also are applicable, and have been successfully used in prosecuting SSI cases.

United States Attorneys will continue to receive completely documented requests for prosecution of title XVI violations, directly from SSA investigators. The investigators will seek criminal action only in cases where the suspects' age, health and general circumstances do not argue persuasively against prosecution. You are invited to contact the SSA investigator familiar with the facts of the case for discussion, or additional investigation of matters referred to you for action. Upon request, the investigators will be available to appear before Grand Juries and U.S. Magistrates, and otherwise assist in prosecution of the cases. Requests for FBI assistance in these fraud prosecutions should be forwarded to the Criminal Division, Fraud Section for review. The Bureau will supply investigative resources in appropriate matters but only on request of the Department. Requests for Bureau assistance should not be directed to FBI field offices.

(Criminal Division)

OFFICIAL IMMUNITY

The three cases noted below, pp. 783 - 784 of this issue, indicate the varying approaches taken by the Circuits to the doctrine of official immunity. We believe that the correct approach is the balancing test adopted by the Third Circuit in Martinez. The central question is "whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." Doe v. McMillan, 412 U.S. 306, 320 (1973). For more information on this approach, contact Barbara Herwig, FTS 739-3427, or Robert E. Kopp, FTS 739-3389, Appellate Section.

(Civil Division)

NOTICE

We inaugurate with this issue a new section for the Bulletin entitled "Appendix: Federal Rules of Evidence." Much of this material will be prepared by James McGuirl, Attorney, Main Library, Justice Department. We do not hope to cover these Rules as extensively as the Criminal Division covers the Federal Rules of Criminal Procedure for the Bulletin. Nevertheless, we believe the materials chosen for publication will be of assistance to you.

NOTICE

Melvin S. Kracov who had for one year been Director of the Attorney General's Advocacy Institute has recently returned to his duties as an Assistant United States Attorney in New Jersey. Mr. Kracov wishes to thank the many U.S. Attorneys' Offices whose assistance and cooperation have made possible the Advocacy Institute's success.

The new AGAI Director is David J. Yeres who previously served as its Assistant Director. Any questions of suggestions regarding professional training may be directed to him. Room 4410, Main Building Phone (FTS) 739-4104.

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

Expeditions Unlimited Aquatic Enterprises, Inc., et al. v. Smithsonian Institution, et al. (C.A.D.C., No. 74-1899, decided June 28, 1976). DJ 78-16-240.

Official Immunity.

The C.A.D.C. held the Smithsonian Institution immune from a libel action under the Federal Tort Claims Act, but remanded the libel claim against a Smithsonian official to the district court for further consideration of the scope of official immunity in light of a "totality of the circumstances" balancing test derived from Supreme Court decisions from Barr v. Matteo, 360 U.S. 564 (1959) through Imbler v. Pachtman, 44 U.S.L.W. 4245 (1976). Three factors were deemed relevant to determine whether an absolute or a qualified immunity should apply: (1) the nature of the plaintiff's interest; (2) the need for absolute immunity or how the threat of suit would affect the defendant's performance of his duties; and (3) the governmental character of the duties of the official involved.

Judge Leventhal's dissent argued for absolute immunity if the defendant was acting within the scope of his discretion, and forcefully attacked the sub silentio overruling of Barr by the majority here and by the Second Circuit in Economou v. Department of Agriculture, 44 U.S.L.W. 2516 (April 23, 1976).

Attorneys: Earl J. Silbert (U.S. Attorney, D.C.),
FTS 426-7511; Jeffrey T. Demerath,
(Assistant U.S. Attorney, D.C.),
FTS 426-7636.

Economou v. Department of Agriculture, et al. (C.A. 2, No. 75-6060, decided April 23, 1976, 44 U.S.L.W. 2516). DJ 106-51-281.

Official Immunity.

Department of Agriculture officials were sued for alleged violation of plaintiff's constitutional rights and for common law torts including libel arising out of administrative license revocation proceedings. The Second Circuit held that all defendants--administrative judges and an administrative prosecutor--are entitled to only a qualified immunity. Absolute judicial immunity was rejected on the ground that unlike the absolute federal judicial immunity, no separation of powers problems occur if the executive branch defends an administrative judge; absolute prosecutorial immunity was distinguished on the

ground that administrative prosecutors' greater reliance on documentary evidence obviates quick decisions regarding the veracity of witness and differentiates them from the criminal prosecutor in Imbler v. Pachtman, 44 U.S.L.W. 4245 (1976). A petition for rehearing has been filed.

Attorneys: Paul J. Curran (Formerly United States Attorney S.D.N.Y.), FTS 791-0055;
Mel P. Barkan (Formerly Assistant U.S. Attorney, S.D.N.Y.), FTS 791-0055.

Raphaella Martinez, etc. v. Lawrence Schrock, M.D., et al. (C.A. 3, No. 74-1282, decided June 25, 1976). DJ 137-48-1038.

Official Immunity.

In a suit arising out of the allegedly wrongful death of a retired Army sergeant, the Third Circuit, *en banc*, has ruled, 7-2, that Army doctors are entitled to absolute immunity in malpractice actions. In balancing the need to protect the citizen from harm by actions of government officials against the need to protect the public interest by shielding public officials from damage actions, the court considered the following factors relevant: (1) defendants were on active duty and could not select their patients; (2) plaintiff had an alternate remedy under the Federal Tort Claims Act; and (3) imposing liability would impair the government's ability to recruit doctors and harm the public interest. The court concluded that the harm to the public interest outweighed the harm to individuals and held that absolute immunity applied.

Attorneys: Jonathan L. Goldstein (U.S. Attorney, D. New Jersey), FTS 341-2289;
Ronald L. Reisner (Assistant U.S. Attorney), FTS 341-2479.

Davis v. Alabama Power Co. (C.A. 5, No. 74-4149, decided July 1, 1976). DJ 151-1-1005.

Veterans Reemployment Act.

In a 2-1 decision the Fifth Circuit has affirmed the favorable decision of a district court which held that pension

benefits constitute seniority rights under the Veterans Reemployment Act, 38 U.S.C. 2022, and returning veterans are therefore entitled to credit for their time in military service in the computation of their private pension benefits. The decision places the Fifth Circuit in conflict with the Third and Tenth Circuits, which had previously rejected our arguments on behalf of returning veterans.

Attorneys: Robert E. Kopp (Civil Division),
FTS 739-3389; John K. Villa (Civil
Division), FTS 739-3381.

United States v. Lewis Kates, et al. (E.D. Pa., Civil Action
No. 75-151, decided June 30, 1976). DJ 46-62-828.

False Claims Act.

The district court granted the Government's motion for summary judgment in this False Claims Act case, holding that defendants' prior criminal conviction for the same conspiracy collaterally estopped defendants from contesting liability in this civil action. As to a second set of defendants that had been granted immunity from criminal prosecution, the court granted the Government's motion for summary judgment based upon admissions they made in the criminal proceedings and held that a grant of immunity under 18 U.S.C. §6001, et seq., does not preclude False Claims Act civil liability. The court further ruled that because an Assistant United States Attorney lacked authority to grant civil immunity, his promise to that effect was not binding on the Government.

Attorney: Mark Cymrot (Civil Division),
FTS 739-3527