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VOL. 25

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NO. 25*

UNITED STATES DEPARTMENT OF JUSTICE

*There was no issue No. 24.

VOL. 25 DECEMBER 9, 1977 NO. 25

TABLE OF CONTENTS

VOL. 25 DECEMBER 9, 1977 NO. 25

COMMENDATIONS

United States Attorney Andrew W. Danielson and Assistant United States Attorney Thorwald H. Anderson, District of Minnesota, have been commended by John E. Otto, Special Agent in Charge, Federal Bureau of Investigation, for their successful prosecution of a difficult kidnapping case which concluded one of the most extensive and costly kidnapping investigations ever conducted by the FBI.

Assistant United States Attorney Eugene Welch, Western District of New York, has been commended by Peter B. Bensinger, Administrator, Drug Enforcement Administration, for his outstanding effort in United States v. Pennwalt Corporation, Pharmaceutical Division, which resulted in the payment of the largest civil award ever recovered by DEA under the Controlled Substances Act. Mr. Bensinger presented DEA's highest commendation, the Award of Honor, to Assistant United States Attorney Welch for his effort in the case.

Assistant United States Attorney Gordon Nash, Northern District of Illinois, has been commended by Richard F. Sprague, Administrative Law Judge, Social Security Administration, Department of Health, Education and Welfare, for his excellent performance in presenting the rebuttal closing argument in a complex fraud and bribery case.

Assistant United States Attorneys John R. Hailman and Albert Moreton, III, Northern District of Mississippi, have been commended by Richard M. Cooper, Chief Counsel, Food and Drug Administration, for their successful prosecution of the case United States v. Barnett.

Assistant United States Attorney Max Wheeler, District of Utah, has been commended by Benjamin R. Civiletti, Assistant Attorney General, Criminal Division, for his successful prosecution of United States v. Jackson, a complicated case brought under the Continuing Criminal Enterprise statute, 21 U.S.C. §848.

Assistant United States Attorney Dennis Dutterer, District of Columbia, has been commended by James M. Powell, Chief of Police, U.S. Capitol Police, for his fine job in successfully representing the Capitol Police in a civil suit, Davis v. United States.

Assistant United States Attorney Robert M. Werdig, Jr., District of Columbia, has been commended by Togo D. West, Jr., General Counsel, Department of the Navy, for successfully representing the government in a suit brought by an advertising agency to enjoin the Navy's award of a $40 million recruitment advertising services contract.

Assistant United States Attorney Lawrence Iason, Southern District of New York, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for his successful prosecution of an armed bank robbery case, United States v. Tartt.

Assistant United States Attorneys F. William Soisson and Gordon S. Gold, Eastern District of Michigan, have been commended by William L. Hart, Chief of Police, Detroit, Michigan, for their work and assistance in connection with a joint undercover operation of local police and the FBI to detect and apprehend "fences" in the Detroit Metropolitan area. The operation concluded in the arrest of 139 persons and the recovery of over $6 million in contraband and stolen property.

Assistant United States Attorneys Lawrence B. Pedowitz and Betty Santangelo, Southern District of New York, have been commended by Peter B. Bensinger, Administrator, Drug Enforcement Administration, for their successful prosecution of a case involving a multi-count indictment charging income tax evasion and conspiracy to smuggle heroine.

VOL. 25 DECEMBER 9, 1977 NO. 25

POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorneys have entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

DISTRICT	UNITED STATES ATTORNEY	ENTERED ON DUTY
California, N.	G. William Hunter	11/11/77
Utah	Ronald L. Rencher	11/21/77
Guam	David T. Wood	11/22/77
New Jersey	Robert L. Del Tufo	12/05/77
Illinois, S.	Gerald D. Fines	12/05/77

(Executive Office)

* * *

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following Bluesheets have been sent to press in accordance with USAM 1-1.550 since the last issue of the Bulletin.

DATE	AFFECTS USAM	SUBJECT
10/18/77	8-2.220	Suits Against the Secretary of Commerce Challenging the 10% Minority Business Set-Aside of the Public Works Employment Act of 1977, P.L. 95-28 (May 13, 1977)
11/11/77	9-2.070	Federal-State Law Enforcement Committees

(Executive Office)

* * *

LAND COMMISSION DOCUMENTATION

The Financial Management Staff, Office of Management and Finance, has received several inquiries concerning the preparation, processing, submission and payment of various Land Commission Documentation involving services rendered after September 30, 1977. Pursuant to an August 8, 1977, telegram from the Office of Management and Finance, effective October 1, 1977, the above responsibilities have been transferred to the Administrative Office of the U.S. Courts (P.L. 95-86, 8/22/77).

Land Commissioner vouchers will be processed and paid by the Administrative Office of the U.S. Courts, Payroll Section, Supreme Court Building #1, 1st Street, N.E., Washington, D.C. 20544.

Written instructions for the Clerks of the U.S. Courts concerning the preparation, processing and submission of Land Commission Documentation have been developed by the Administrative Office of the U.S. Courts.

(Executive Office)

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DISCOVERY--CRIMINAL CASES

In disclosing certain criminal file material (principally Federal Bureau of Investigation 302 investigative reports, but other items as well) some United States Attorneys make such disclosure pursuant to a stipulation and order. This procedure offers the advantage of (1) formalizing the agreement for the record, thus reducing future disputes over past action, (2) reducing the risks of criminal investigative material (which may have originated from a grand jury inquiry) from being put to improper uses, and (3) placing defense counsel specifically under the jurisdiction of the court's contempt procedures relative to the material disclosed. A current example of one such stipulation and order is enclosed. Also enclosed for your information is a reprint of a Points to Remember item on Security of Jencks and **Brady** Material which was published in 25 USAB 79 (No. 6).

(Executive Office)

* * *

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF _____

E X A M P L E

United States of America, CR

Plaintiff **STIPULATION**

vs.

Defendant

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the above named defendant and counsel for the United States of America, that the Court may enter the following Order concerning the handling and disposition of discovery materials turned over to the defense.

_____

_____
Attorney for the Defendant

O R D E R

Upon the foregoing Stipulation and for good cause having been shown, it is hereby

ORDERED that any discovery materials, including but not limited to, statements and summaries of interviews of witnesses furnished by the prosecution to the defense shall not be used by the defendant or his attorney for any other purpose other than in direct relationship to this case and no further disclosure should be made of these items.

IT IS FURTHER ORDERED that said documents shall be immediately returned to attorneys for the United States of America upon disposition of the case.

Dated this_____day of _____, 1977.

BY THE COURT:

_____

ATTEST:

_____ Clerk

By_____Deputy (SEAL OF COURT)

SECURITY OF JENCKS AND BRADY MATERIAL

In obedience to a court order a United States Attorney recently turned over to a dozen defense counsel, four days in advance of trial, the statements of 87 anticipated witnesses. Only 47 witnesses were actually called at trial. Statements of two of those not called, containing derogatory allegations concerning a local sheriff, were subsequently disseminated in an election campaign.

This misuse of the material could not have occurred had the letter of the Jencks Act, 18 U.S.C. 3500, been adhered to, because the two documents in question would never have been subject to production.

To prevent future mishaps of this kind, premature turnover should regularly be opposed, and in those instances where the United States Attorney is unable to oppose such disclosure successfully, or where the documents will be in defense possession outside the courtroom for an appreciable amount of time, a protective order should be sought. A protective order binding counsel and defendants against further disclosure and requiring the prompt return of the documents and any copies on pain of contempt, should reduce if not eliminate the risk of abuse.

Trial counsel should be mindful of the need to retrieve such material, and request its return at the earliest appropriate moment.

(Criminal Division)

* * *

(Reprint from 25 USAB 79 (No. 6).)

UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500. This monthly listing may be removed from the Bulletin and used as a check list to assure that your Manual is up to date.

Transmittal Affecting Title	Transmittal No. / Date Mo/Day/Yr		Date of Text	Contents
1	1	8/20/76	8/31/76	Ch. 1,2&3
	2	9/3/76	9/15/76	Ch.5
	3	9/14/76	9/24/76	Ch.8
	4	9/16/76	10/1/76	Ch.4
	5	2/4/77	1/10/77	Ch.6,10&12
	6	3/10/77	1/14/77	Ch.11
	7	6/24/77	6/15/77	Ch.13
2	1	6/25/76	7/4/76	Ch. 1 to 4
	2	8/11/76	7/4/76	Index
3	1	7/23/76	7/30/76	Ch.1 to 7
	2	11/19/76	7/30/76	Index
4	1	1/3/77	1/3/77	Ch.3 to 15
	2	1/21/77	1/3/77	Ch.1 & 2
	3	3/15/77	1/3/77	Index
	*4	11/28/77	11/1/77	Revisions to Ch. 1-6, 11-15, Index
5	1	2/4/77	1/11/77	Ch.1 to 9
	2	3/17/77	1/11/77	Ch.10 to 12
	3	6/22/77	4/5/77	Revisions to Ch. 1 - 8

6	1	3/31/77	1/19/77	Ch.1 to 6
	2	4/26/77	1/19/77	Index
7	1	11/18/76	11/22/76	Ch.1 to 6
	2	3/16/77	11/22/76	Index
8	1	1/4/77	1/7/77	Ch.4 & 5
	2	1/21/77	9/30/77	Ch.1 to 3
	3	5/13/77	1/7/77	Index
	4	6/21/77	9/30/76	Ch.3 (pp 3-6)
9	1	1/12/77	1/10/77	Ch.4,11,17,18, 34,37,38
	2	1/15/77	1/10/77	Ch.7,100,122
	3	1/18/77	1/17/77	Ch.12,14,16, 40,41,42,43
	4	1/31/77	1/17/77	Ch. 130 to 139
	5	2/2/77	1/10/77	Ch.1,2,8,10,15, 101,102,104, 120,121
	6	3/16/77	1/17/77	Ch.20,60,61,63, 64,65,66,69,70, 71,72,73,75,77, 78,85,90,110
	7	9/8/77	8/1/77	Ch. 4 (pp 81-129) Ch. 9, 39
	*8	10/17/77	10/1/77	Revisions to Ch. 1

*Transmittals to be distributed to Manual Holders soon.

(Executive Office)

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VOL. 25 DECEMBER 9, 1977 NO. 25

CIVIL DIVISION

Assistant Attorney General Barbara Allen Babcock

Califano v. Jobst, ____ U.S. ____, 46 U.S.L.W. 4004 (Sup. Ct. No. 76-860, November 11, 1977), DJ 137-43-169.

Social Security Act; Constitutionality of Dependent Children Provisions.

This case involved a challenge to the Social Security Act provision that secondary insurance benefits paid to disabled dependent children of wage earners shall be permanently terminated when the children marry. This provision is based on the legislative assumption that matrimony signals an end of the child's dependent financial status. The statute also provides, however, that disabled children who marry other Social Security beneficiaries shall continue to receive dependency benefits. The district court held the Act unconstitutionally "underinclusive" because it excludes dependent children who marry disabled nonbeneficiaries. In reversing the district court and upholding the statute, the Supreme Court unanimously held that the special hardship which will in most cases result from a simultaneous termination of dependents' benefits, combined with a need for an administrative program which can be run with a "modicum of efficiency", justifies the special rule which preserves benefits only for the dependent child who marries another benefit recipient.

Attorney: Frederic Cohen (Civil Division)
FTS 739-2786

Association for Women in Science v. Mathews, ____ F.2d ____, No. 75-2136 (D.C. Cir. October 21, 1977) DJ 145-16-671

Executive Order Creates Lawful Privilege.

Plaintiff association sued the National Institutes of Health, alleging, inter alia, that the conflict of interest standards of Executive Order 11222 had been violated in the award of training grants. As part of discovery, plaintiff requested copies of conflict of interest forms filed by members of the training grants committees (who are outside consultants). The government refused the request, and the district court, citing FOIA exemptions (4) and (6), upheld the government. On appeal, we abandoned reliance on the FOIA exemptions as a defense to discovery. We argued instead that the Executive Order and the case law create a privilege which could only be waived by the consultants themselves. The D.C. Circuit has affirmed, accepting this alternative argument.

Attorney: Judith S. Feigin (Civil Division)
FTS 739-3170

Caidin v. United States, ____ F.2d ____, No. 75-1826 (9th Cir. November 11, 1977) DJ 157-12C-768

Federal Tort Claims Act; Administrative Class Actions.

The Ninth Circuit has affirmed the dismissal of a putative class action suit under the Federal Tort Claims Act, on the grounds that no proper administrative claim had been filed. Plaintiff had filed an administrative claim on behalf of himself and a group of shareholders, in which he sought $100 million in damages for the class as a whole. The Ninth Circuit accepted our arguments that insofar as the administrative claim was filed on behalf of a class of shareholders, it was invalid because plaintiff presented no evidence of his authority to file such a claim on behalf of the class members, and that insofar as the claim was filed on behalf of plaintiff himself, it was invalid because it did not claim a specific dollar amount of damages for plaintiff individually. The Ninth Circuit stressed that the purpose of the jurisdictional administrative claim requirement was to facilitate settlement, and that the claim filed by plaintiff frustrated this purpose. However, the Court pointedly did not decide the broader question of whether, assuming proper administrative claims have been filed by class members, a class action is permissible under the Tort Claims Act.

Attorney: Neil H. Koslowe (Civil Division)
FTS 739-5325

Dr. John T. MacDonald Foundation v. Mathews, ____ F.2d ____, No. 75-2966 (5th Cir. order entered October 26, 1977) DJ 145-16-724

Social Security Act; Jurisdiction to Review Medicare Reimbursement Disputes.

In this Medicare reimbursement case against the Government, the Fifth Circuit first held that jurisdiction was supplied by the APA. We petitioned for rehearing. The panel denied the petition, holding that although jurisdiction could no longer be predicated on the APA after the Supreme Court's recent decision in Califano v. Sanders, jurisdiction could be based upon 28 U.S.C. §1331. We then again petitioned for rehearing noting that this decision conflicts with an earlier decision of the Fifth Circuit holding that §1331 does not supply jurisdiction to review reimbursement disputes. The Fifth Circuit has just granted our petition, and will consider the case en banc.

Attorneys: Robert E. Kopp (Civil Division)
FTS 739-3389; and
Richard A. Olderman (Civil Division)
FTS 739-5325

International Paper Company v. Whitson, ___ F.2d ___, No. 76-1429 (10th Cir. October 7, 1977) DJ 101-60-343

National Housing Act; Materialmen's Liens.

The owner-sponsor of a multifamily housing project insured by HUD under the National Housing Act defaulted on its loan before completing the project. After the mortgagee assigned its interests in the project to HUD under 12 U.S.C. §1713(g), HUD paid the mortgagee's insurance claim and acquired all assets established under the loan-insurance contract, including a Completion Assurance Fund which had been advanced by the contractor at the outset of the project. An unpaid materialman claimed in this suit that it was entitled to the fund under a third-party beneficiary theory. The district court rejected this claim but the Tenth Circuit has just reversed. Applying state rather than federal common law, the court of appeals examined the various contract documents and concluded that the Assurance Fund had been established for the benefit of subcontractors and materialmen.

Attorney: John E. Green (U.S. Attorney, W.D. Okla.)
FTS 736-5281

M and M Leasing Corp. v. Seattle First National Bank, ___ F.2d ___, Nos. 75-2576 & 75-2577 (9th Cir. November 4, 1977) DJ 145-3-1330

National Banking Act; Activities Incident to Banking.

Automobile leasing companies brought this action challenging competing leasing activities which two national banks conducted pursuant to a regulation of the Comptroller of the Currency. The district court held that leasing was authorized as an incidental power of "the business of banking" (12 U.S.C. §24 (Seventh)) only if the banks did not bear any of the economic risk of selling the leased vehicle after the lease had expired. (In most automobile leases, the customer guarantees the residual value of the automobile and must pay any deficiency if the car is sold for less than the guaranteed amount.) The Ninth Circuit affirmed the district court's holding that leases with guaranteed residual values are permissible. Moreover, the court of appeals accepted our argument that banks could also engage in additional leasing activities. It held that banks are prohibited by statute from engaging in leases only "when the lessor assumes material burdens other than those of a lender of

money [or] is subject to significant risks not ordinarily incident to a secured loan." This flexible standard allows the Comptroller considerable discretion in regulating leasing by banks.

Attorney: Anthony J. Steinmeyer (Civil Division)
FTS 739-3442

Overman v. United States, ____ F.2d ____, No. 76-1997 (8th Cir. October 25, 1977) DJ 145-151-381

Federal Employee Garnishment; Federal Court Jurisdiction.

Plaintiff, a federal employee, was advised by the Government that a writ of garnishment had been levied, pursuant to 42 U.S.C.§659, to attach his wages in satisfaction of a divorce and child support decree obtained by his wife in the Tennessee state court. Plaintiff then filed suit in the Missouri state court naming as defendants both his former wife and the United States. He sought to contest the support decree as fraudulently obtained, and to enjoin the United States from honoring the Tennessee garnishment. The Government then removed the action to the Missouri federal district court and successfully moved to dismiss the federal defendant. On plaintiff's appeal, the Eighth Circuit adopted the Government's assertion that the suit was subject to removal under 28 U.S.C. §1441(a)(1), and further upheld the dismissal of the United States as defendant on the theory that the garnishment statute provided no basis for a suit for injunctive relief against the United States.

Attorney: Joseph B. Moore (Assistant U.S. Attorney, E.D. Mo.)
FTS 279-4209

Farmers and Merchants Bank v. Board of Governors of the Federal Reserve, ____ F.2d ____, No. 76-1367 (D.C. Cir. November 7, 1977) DJ 145-105-156

Federal Reserve Board Decisions; Standard of Review.

In a suit challenging the Federal Reserve Board's hearing procedures under the Bank Holding Company Act, the D.C. Circuit has just held that "[i]n the absence of a showing that substantial unanswered questions of a material nature remained at the conclusion of the informal process, the decision of the Board not to have a hearing should not be disturbed." The Court also found that the Board's findings in favor of approval of the

application at issue to acquire a newly organized national bank were supported by substantial evidence, and accordingly affirmed the Board's decision.

Attorney: Ronald R. Glancz (Civil Division)
FTS 739-3424

Merrill v. The Federal Open Market Committee of the Federal Reserve System, ____ F.2d ____, No. 76-1379 (D.C. Cir. November 10, 1977) DJ 145-105-126

FOIA; Exemption 5.

At a monthly meeting the Federal Open Market Committee of the Federal Reserve Board adopts a policy directive and additional criteria which govern the FOMC's purchase of government securities on the open market. In this action under the Freedom of Information Act, the FOMC resisted disclosure of the directives and guidelines on the ground that if they were required to be disclosed prior to their being acted upon, it would seriously impair the FOMC's ability to control the nation's money supply. The court of appeals, however, ruled after reviewing the legislative history that the guidelines are final policy decisions which are not exempt from disclosure under the Act.

Attorney: Thomas G. Wilson (Civil Division)
FTS 739-3395

Sneaker Circus v. Carter, ____ F.2d ____, No. 77-6092 (2d Cir. November 10, 1977 DJ 145-1-586

Court of Claims Jurisdiction; Import Quotas.

Plaintiff, an importer of footwear, sued in district court to invalidate trade agreements limiting shoe imports. The district court held that it lacked jurisdiction because 28 U.S.C. § 1582(a) conferred exclusive jurisdiction upon the Customs Court. The Second Circuit reversed and reasoned that because the facts of the case would never meet the statutory requirements for Customs Court jurisdiction, jurisdiction would lie in the district court. The court also rejected our argument that the case presented a nonjusticiable political question. We are considering seeking rehearing en banc.

Attorney: Joan Dolan (Assistant U.S. Attorney, E.D. N.Y.)
FTS 656-7955

United States v. Federal Deposit Insurance Corp., ____ F.2d ____, No. 16940 (Tex. Ct. Civ. App., November 3, 1977) DJ 77-74-531

Bankruptcy; Federal Lien Priority.

A Texas state bank, in which the Bureau of Indian Affairs had deposited $8 million in Indian trust funds, filed for bankruptcy. Proceeds from the sale of collateral and F.D.I.C. insurance were insufficient to cover the full amount of the funds and the B.I.A. sought priority status for the part of its claim which had not been recompensed, plus interest to the date of bankruptcy. The lower Texas state court denied B.I.A. priority for its claim, ruling that 31 U.S.C. §191, the Federal priority statute, was repealed by implication when Congress amended the F.D.I.C. Act in 1974. The Texas Court of Civil Appeals reversed on our appeal, holding that B.I.A.'s claim was entitled to priority status and the B.I.A. was also entitled to interest until the date of bankruptcy.

Attorney: Richard A. Olderman (Civil Division)
FTS 739-5325

Russell v. Reed, _____ F.Supp. _____, CA No. 77-53-MAC (M.D. Georgia October 28, 1977)

Age Discrimination Class Action.

Two procurement agents at Robins Air Force Base, Georgia, brought a complaint against the Secretary of the Air Force alleging a nationwide, class action age discrimination suit under 29 U.S.C. §633(a). Defendant moved for dismissal of the class action under 12(b)(6) of the Federal Rules of Civil Procedure, contending that a prerequisite to maintenance of a class action under Section 633(a) is a written consent filed by each and every plaintiff and that age discrimination class actions were an "opt-in" procedured followed in Rule 23 class actions. The District Court granted defendant's motion to dismiss, holding that plaintiffs in an age discrimination class action must file written consent from each class member on the basis of 29 U.S.C. §216(b), a provision of the Fair Labor Standards Act incorporated into 29 U.S.C. §626(b) of the Age Discrimination Employment Act. The District Court distinguished the case of Christie v. Marston, 551 F.2d 1080 (7th Cir. 1977), under which case plaintiffs contended that Federal employees receive different treatment under the ADEA than private sector employees. The Court recognized that Christie, supra, dealt with a narrow factual situation creating statutory conflict for Federal employees between 65 and 70 years of age. The Court found no such conflict in this case and, following natural statutory construction, dismissed plaintiffs' class action.

Attorney: John D. Carey (Assisant U.S. Attorney, M.D. Georgia)
FTS 238-0454

CRIMINAL DIVISION
Assistant Attorney General Benjamin R. Civiletti

Edwards v. United States, ____ F.2d ____, No. 77-2048 (2d Cir. October 25, 1977)

Interstate Agreement on Detainers.

Violation of Article IV(e) of the Interstate Agreement on Detainers, by retransfer to the sending state prior to completion of proceedings, is not grounds for setting aside a conviction under 28 U.S.C. §2255. Violation of the Agreement does not amount to either a constitutional error, a defect of jurisdiction, or a fundamental defect resulting in a complete miscarriage of justice, or otherwise present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." See Hill v. United States, 368 U.S. 424, 428 (1962); Davis v. United States, 417 U.S. 333, 346 (1974).

Attorneys: Robert B. Fiske, Jr. (U.S. Attorney, S.D.N.Y.)
Richard A. Mescon
Frederick T. Davis (Assistant U.S. Attorneys, S.D.N.Y.)
FTS 662-1057

United States v. Barker, ____ F.2d ____, No. 77-1497 (4th Cir. October 6, 1977)

Grand Jury; Multiple Representation.

The court of appeals found that the district court properly exercised its discretion in granting the government's motion to disqualify two counsel from representing multiple witnesses in a grand jury investigation, where each witness invoked the Fifth Amendment, and where three witnesses and one counsel were identified as targets of the investigation.

The government's initial argument, that an order of disqualification of the attorneys is not an appealable matter, was dismissed by the court. In applying the "collateral order" rule of Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), the court determined that the motion's denial could be appealed because the order is final as to the representation of the witnesses by these particular counsel, and important rights are at stake which might be irretrievably lost if review were denied at that point in the proceeding.

In purposefully refraining from the question of whether a witness is entitled to the assistance of counsel in grand jury proceedings, see United States v. Mandujano, 425 U.S. 564, 581

(1976), the court held that even if such a right of the grand jury to pursue its important investigative functions, see United States v. Dionisio, 410 U.S. 1, 16-18 (1972), which includes the right of the public to every man's testimony, United States v. Calandra 414 U.S. 338, 345 (1973). The court also found professional jury witnesses based upon their inability to give "entire devotion to the interest" of each client. Canon 15, ABA Canons of Professional Ethics. Serious and actual conflicts of interest exist when some of the attorneys' clients may testify against other clients who have been identified as targets, and especially when the clients' testimony might implicate one of the attorneys, who was himself a known target of the investigation. The court ruled that written statements by the witnesses purporting to waive any conflict of interest defects were ineffective as the witnesses had not been advised by counsel of all the facts and legal consequences of such waivers.

Attorney: Robert Bruce Amidon (Assistant U.S. Attorney, W.D. Virginia)
FTS 937-6253

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NO. 25

DECEMBER 9, 1977

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General James R. Moorman

Environmental Defense Fund v. Hoffman, ___ F.2d ___,
Nos. 76-1366 and 17-1431 (8th Cir. October 25, 1977)
DJ 90-1-4-386

National Environmental Policy Act of 1969.

The Eighth Circuit affirmed the district court's ruling that the Corps' final revised EIS for the Cache River-Bayou DeView Channelization Project in Arkansas complied with the NEPA and the Eighth Circuit's 1972 mandate. The principal question was the EIS's adequacy concerning (1) consideration of the project's secondary impact on groundwater levels, (2) state and federal water quality requirements and compliance with the FWPCA Amendments, and (3) evaluation of conflicting scientific opinion on the project's impact on migratory waterfowl. Congress was regarded as having determined the adequacy of the plan to mitigate fish and wildlife losses by appropriating project funds after an exhaustive review process and despite a presidential recommendation. The State's alternative to a leveed floodway with bypass features was not required to be discussed in the final EIS because it came too late (the EIS was then substantially in printed form); nor did the alternative warrant a supplemental EIS and recirculation, especially since the decisionmaker was apprised of the alternative. The Corps was held to have given sufficient weight to environmental factors in striking a balance of costs and benefits. The court repeatedly declared the impropriety of judicial substitution of judgment, emphasizing the history of the project and the EIS and congressional and presidential action.

Attorney: Glen R. Goodsell (Land and Natural Resources Division) FTS 739-5034

Elaine Stickelman v. United States, ___ F.2d ___,
No. 75-3476 (9th Cir. October 21, 1977) DJ 90-1-4-778

Desert Land Act.

This case involved a request under the Desert Land Act for an extension of time to make final proof that 320 acres had been reclaimed and cultivated by the entryperson as the Act requires. BLM denied the extension relying in part on field reports. The Ninth Circuit held that, prior to a ruling on such an application the entryperson should be given an opportunity to read and reply in writing to any adverse field reports, to confront the authors, and to present

contrary evidence. The matter, the court said, was not one committed to unreviewable agency discretion. An extension decision under 43 U.S.C.§334 has two stages: the first stage requires a finding of fact (which is reviewable under the APA, based on federal question jurisdiction); the second stage involves the exercise of discretion (and is unreviewable judicially). The case was remanded to the district court for a determination of the extent to which the entryperson's procedural rights may have been denied in this case.

Attorney: Eva R. Datz (Land and Natural Resources Division) FTS 739-2827

State of Minnesota v. C. John Forge, ___ Minn. ___, ___ N.W.2d ____, Nos. 46473, 46473, 46478 and 76479 (S.Ct., Minn. October 14, 1977) DJ 90-6-0-32

Indians.

The Minnesota Supreme Court agreed generally with the Government's brief as amicus curiae and upheld a state statute requiring a special fishing license for non-Indians to fish on the Minnesota Chippewa's Leech Lake Reservation, the proceeds to go to the reservation's Indians. The court found that the reservation has not been disestablished and that the statute is reasonable in light of the Indians' unextinguished fishing rights on the reservation. The court based its holding on the reservation's continuing existence, but the opinion indicates that the statute could be justified on fishing rights which may be independent of the reservation's existence. Convictions for fishing on the reservation without a special fishing license were therefore affirmed.

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS 739-4497

Mercantile National Bank v. Morton, ___ F.2d ___, No. 76-1983 (7th Cir. October 19, 1977) DJ 33-15-322-1704

Quiet Title Actions.

Individuals brought a quiet title action to land which had been previously condemned by the United States. The district court, accordingly, dismissed the quiet title action. On appeal, the court affirmed, holding that under

the condemnation action the title was now vested in the United States, and also that the quiet title action was barred by collateral estoppel.

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS 739-4497

State of Minnesota v. Zay Zah, ___ Minn. ___, ___ N.W.2d ___, No. 46834 (S.Ct. Minn. October 21, 1977) DJ 90-6-0-48

Indians.

The Minnesota Supreme Court affirmed the order of the trial court substantially on the basis advocated in the Government's brief as amicus curiae. Pursuant to an 1889 statute, Minnesota Indians became entitled to allotments of land which would be tax-free for 25 years. In 1906 Congress passed a statute purporting to abolish that trust status, including the tax exemption, for part-blood Indians on the White Earth Reservation. Subsequent case law declared that such statutes were unconstitutional insofar as they deprived Indians of vested rights, including tax exemptions. In 1934 the Indian Reorganization Act declared that all trust periods on allotments were extended indefinitely. Zay Zah was a part-blood Indian who received his trust patent in 1927. (He was born in 1887 and came within the terms of the 1889 statute.) The State acknowledged that he was entitled to hold the land tax free for 25 years, but after 25 years it taxed the land and purported to sell it at a tax sale. In this action to quiet the title obtained at the tax sale, the court held that the tax exemption was extended indefinitely by the Indian Reorganization Act as part of the continuing trust status of the land and therefore the tax sale was void. (Justice Yetka's specially concurring opinion complains of shifting federal policies towards Indian tribes, and of uncertainty regarding taxation, status of Indian tribes and land holdings.)

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Asphalt Roofing Manufacturers Association v. Interstate Commerce Commission and United States, ___ F.2d ___, No. 75-1641 (D.C. Cir. October 17, 1977) DJ 90-1-4-1149

National Environmental Policy Act of 1969.

The District of Columbia Circuit reaffirmed the authority of agencies to make their own threshold determination of whether a particular action will "significantly

affect the quality of the human environment" within the meaning of Section 102 of NEPA. Here, it found that the ICC had adequately explained its conclusion that such an impact would not result from two general railroad freight rate increases. The utilization of a private consultant in the preparation of an EIS for a related rate increase was also upheld. Increases in two other ICC proceedings were invalidated for failure to comply with NEPA.

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D.C.R.L.A. v. Four Parcels of Land in Squares 619 and 625 in the District of Columbia, George F. and Pauline T. Fouche, ___ F.2d ___, No. 76-1868 (D.C. Cir. October 5, 1977) DJ 33-4-647-2

Condemnation.

The landowner asserted that the district court, in violation of Rule 408, F.R. Evid., had erroneously barred testimony as to a sale of property to the condemning authority within the scope of the project. See Nash v. DCRLA, 395 F.2d 571 (D.C. Cir. 1968). The court of appeals, however, avoided this question by accepting the Government's arguments that the district court had rejected the offered evidence because (1) the landowner's witness was not qualified as an appraiser and he was not shown to have had personal knowledge of the sale, and (2) the comparability of the two properties was not established.

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United States v. 3,727.91 Acres in the County of Pike, Missouri, Elsberry Drainage District (Clarence Cannon National Wildlife Refuge, ___ F.2d ___, No. 76-1722 (8th Cir. September 2, 1977) DJ 33-26-482-413

Condemnation.

The Eighth Circuit ruled that, although the substitute facilities doctrine to the fee taking of a drainage district's land (here, 214 acres of levees and ditches), does not apply, because the district had no duty to replace the facilities, this does not necessarily mean that only nominal compensation is due. The court, therefore, held that the district court erred in awarding only nominal compensation ($1.00). The court further determined that the district court erred in applying the reproduction-less-depreciation method as an alternative basis for awarding only nominal

compensation, since there was sufficient basis for an award of fair market value, namely, the testimony of the Government's own appraisers. On these grounds, the court reversed and remanded for reconsideration of the amount of the award.

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