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COMMENDATIONS

Assistant United States Attorney MICHAEL CAVANAUGH, Eastern District of New York, has been commended by Captain R. J. McHugh, Jr., CEC, Department of the Navy, Naval Facilities Engineering Command in Philadelphia, Pennsylvania, for representing the interests of the Navy in a dispute between Consolidated Edison, Inc. (Con Ed) and Commerce Labor Industry Corporation of Kings (CLICK) as to the failure of CLICK to pay Con Ed for steam services provided to the former Brooklyn Naval Shipyard.

Assistant United States Attorneys BARBARA EDELMAN and ROBERT F. TREVEY, Eastern District of Kentucky, have been commended by W. Douglas Cow, Special Agent In Charge, Federal Bureau of Investigation in Knoxville, Tennessee, for the successful prosecution of Tommy Heatwole and Jimmy Riley Shumake in the case of United States v. Tommy Heatwole which charged the defendants with obstruction of criminal investigations, 18 U.S.C. § 1510, by severely beating an FBI informant.

Assistant United States Attorney ROBERT E. RAWLINS, Eastern District of Kentucky, has been commended by Mr. Ron Johnson, Commonwealth Attorney for the 26th Judicial District of Kentucky, for the successful prosecution of Kenneth Crawford, and his three sons: Jeffrey Lee Crawford, Kenneth Ray Crawford, and Timothy Wayne Crawford in the case of United States v. Kenneth Crawford which dealt with violations brought against individuals conducting illegal mining operations, 30 U.S.C.

Assistant United States Attorney LAURENCE URGENSON, Eastern District of New York, has been commended by J. F. Williamson, Postal Inspector in Charge, New York, New York, for the successful prosecution of United States v. Joseph McAndrew which involved an attempt to defraud the Federal Crime Insurance Program.

The letters of commendation on the following pages have been reprinted in this issue of the United States Attorneys' Bulletin in order to insure recognition by all U. S. Attorneys.

Office of the Attorney General
Washington, D. C. 20530

March 8, 1982

Edward C. Prado, Esq.
United States Attorney
for the Western District
of Texas
John H. Wood, Jr. Federal
Building
655 East Durango Boulevard
San Antonio, Texas 78206

Dear Ed:

Assistant Attorney General Paul McGrath and his Deputy, Robert Ford, brought to my attention the favorable publicity you received recently when you filed 146 suits to collect defaulted student loans in your district. I understand that the publicity surrounding the filings not only let your community know that we meant it when we said we are serious about collecting the debts owed the government, but that it also brought some real dollars into the till.

I commend you for your innovative and enthusiastic debt collection efforts, and I intend to cite your actions to your fellow U.S. Attorneys as an example of what can be done to get the public's attention and collect some money too. Please keep up the good work.

Sincerely,

William French Smith
Attorney General

Office of the Attorney General
Washington, D. C. 20530

March 11, 1982

Francis A. Keating, II
United States Attorney
for the Northern District
of Oklahoma
Room 460, U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103

Dear Frank:

Assistant Attorney General Paul McGrath and his Deputy, Bob Ford, brought to my attention the favorable publicity you received recently with regard to the "hard-line" your office took in collecting debts owed the United States. I was also most favorably impressed with the chart showing the dramatic increase in the amounts of money your office has been collecting since your new collections system became active last October. The remarkable progress you have shown is a testimonial to your personal dedication to these efforts and the inspiration you have provided to your able staff.

I commend you for your innovative and enthusiastic debt collection efforts, and I intend to cite your actions to your fellow U.S. Attorneys as an example of what can be done to get the public's attention and collect some money too. Please keep up the good work.

Sincerely,

William French Smith
Attorney General

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EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Casenotes, Collections

Beginning with this issue, significant holdings affecting collections will be published in the United States Attorneys' Bulletin under CASENOTES, COLLECTIONS. All personnel with responsibilities for collections should be made aware of this resource.

You are invited to submit casenotes on holdings which may have a significant impact on collection cases. Submissions in this category should be in the format currently used in the CASENOTES section of the Bulletin.

You should send your submissions to Edward H. Funston, Assistant Director, Suite 803, One Skyline Place, Falls Church, VA 22041.

(Executive Office)

Operation Spectre

A number of United States Attorneys have experienced problems in obtaining evidence from the Department of Health and Human Services and the Department of the Treasury in cases where people reported dead were still receiving Social Security checks. In an effort to alleviate any such problems, Mr. Dave Snipe, Deputy Assistant Inspector General of Investigations, Department of Health and Human Services, is coordinating the project on Social Security Death Terminations (Spectre). On February 8th through the 11th, coordination meetings were held with components of the Treasury, Secret Service, and Social Security to work out the problems with the processing of these cases.

As a result of the coordination meetings, a new system utilizing computers was developed to retrieve information from the Treasury and Social Security agencies, that would circumvent much of the paper work, and save time.

Mr. Snipe has forwarded to our office a packet of information containing; 1) an outline of the HHS procedures for obtaining checks from Treasury; 2) a memo justifying the decision to limit request for checks to 6 originals or 18 copies per case; and 3) a list of the program coordinators at each agency.

To have this information forwarded to your office, write or call Elizabeth Walker in Legal Services (633-4024).

(Executive Office)

The Department of Justice approach to the coordination of the criminal investigative jurisdiction of the FBI and the Inspectors General:

The following comments are designed to implement the Policy statement of the Department of Justice on its relationship and the coordination with the statutory Inspectors General of the various departments and agencies of the United States issued on June 3, 1981. (USAM 9-42.401 and 9-42.502).

- Inspectors General will in all instances notify the FBI of criminal investigative matters that concern:

  1. Bribery matters,

  2. Significant allegations of fraud which culpably involve U.S. Government employees, and

  3. Organized crime related matters, including both traditional (La Cosa Nostra) and non-traditional organizations such as other ethnic groups and outlaw motorcycle gangs.

  The FBI will have the primary investigative role in these three areas and, as part of the notification, the IG will transfer the investigative file and consequently investigative responsibility to the FBI. The Inspector General simultaneously will notify the prosecutor of the above described matters.

- The Inspectors General normally will have the responsibility for conducting investigations of fraudulent misconduct involving their respective departments and agencies by non-Government personnel. However, the FBI will treat fraud against the government matters as a top priority and, if asked by the prosecutor, will investigate every criminal violation that the prosecutor advises will be prosecuted, if proved. The FBI maintains the right to investigate any criminal allegations which the FBI receives independently and which involve any agency's programs or functions wherein the alleged violations are within the FBI's jurisdiction.

- The FBI will, given adequate manpower conditions, consider undertaking joint investigations with Inspector General personnel, and encourage joint undercover operations targeted against identified major crime problems.

- The FBI will accept responsibility for other significant criminal investigative matters, consistent with the availability of investigative resources within the applicable FBI field office. As a general rule, the FBI will not initiate investigations concerning recipient/participant-type frauds, absent indications of a pattern of widespread criminal activity.

The Fraud and Corruption Tracking System is being developed to complement the Policy Statement and will be used to insure all appropriate offices are informed of ongoing investigations.

(Executive Office)

Revised Representation Regulations

The following is a copy of the recent revisions to regulations governing the representation of Federal officials who are sued or subpoenaed in their individual capacities, as published in 47 F.R. No. 38, pps 8172-8174 (Feb. 25, 1982).

(Civil Division)

DEPARTMENT OF JUSTICE

28 CFR Part 50

[Order No. 970-82]

Statements of Policy; Representation of Federal Officials and Employees

AGENCY: Department of Justice

ACTION: Statement of policy.

SUMMARY: This statement amends the policy of the Department on representation of Federal officials, employees and former Federal officials or employees when they are sued individually for actions performed within the scope of their employment. This amendment is necessary to clarify and expand existing procedures.

EFFECTIVE DATE: February 17, 1982.

FOR FURTHER INFORMATION CONTACT:
J. Paul McGrath, Assistant Attorney General, Civil Division, Department of Justice, Washington, DC 20530 (202 633-3301).

PART 50—STATEMENTS OF POLICY

By virtue of the authority vested in me by 28 U.S.C. 509, Part 50 of Chapter I of Title 28 of the Code of Federal Regulations is hereby amended by revising §§ 50.15 and 50.16 to read as follows:

§ 50.15 Representation of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil and Congressional proceedings, and in state criminal proceedings in which Federal employees are sued or subpoenaed in their individual capacities.

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be submitted promptly thereafter.

(2) Upon receipt of an individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In

circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is the subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the United States Government is obligated to pay or indemnify the defendant employee for any judgment for money damages which may be rendered against such employee;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraphs (a)(8), (a)(9) and (a)(10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental

representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10) (ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.15.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

§ 50.16 Representation of Federal Employees by Private Counsel at Federal Expense.

(a) Representation by private counsel at federal expense is subject to the availability of funds and may be provided to a federal employee only in the instances described in § 50.15(a)(6), (9) and (10), and in appropriate circumstances, for the purposes set forth in § 50.15(a)(2).

(b) To ensure uniformity in retention procedures among the litigating divisions, the Civil Division shall be responsible for establishing procedures for the retention of private counsel including the setting of fee schedules. In all instances where a litigating division decides to retain private counsel under § 50.16, the Civil Division shall be consulted before the retention is undertaken.

(c) Where private counsel is provided, the following procedures shall apply:

(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee client for any reason.

Dated: February 17, 1982.

William French Smith,

Attorney General.

[FR Doc. 82-5049 Filed 2-24-82; 8:45 am]

BILLING CODE 4410-01-M

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Hugh L. Carey v. Malcom Baldrige No. 80-752, Supreme Court (March 8, 1982). D.J. #145-9-527.

CENSUS ACT: SUPREME COURT DENIES CERTIORARI IN SUIT BROUGHT BY NEW YORK CHALLENGING THE 1980 DECENNIAL CENSUS AND THEREBY LEAVES STANDING THE SECOND CIRCUIT'S REMAND OF THE CASE TO THE DISTRICT COURT FOR A NEW TRIAL.

This case involved a challenge to the 1980 Decennial Census brought by the Governor of New York, the Mayor of New York City, the State and City of New York, and several New York residents. The New York petitioners had successfully obtained preliminary injunctive relief against the Census Bureau, which was sustained by the Second Circuit on appeal. Meanwhile, the Bureau, on grounds of statutory protection of the confidentiality of certain census records, refused to produce some of the documents requested by New York in civil discovery, and the Second Circuit declined to entertain the government's appeal from the district court's order to produce the census documents. Accordingly, the district court issued a broad preclusion order under Rule 37(b)(2), F.R.Civ.P., preventing the government from presenting evidence on a number of matters litigated at trial. On December 22, 1980, the district court entered its final judgment on the merits against the Census Bureau, ordering the Bureau to make a statistical adjustment of the 1980 census figures for New York to correct for a disproportionate racial undercount and enjoining the Bureau from certifying its official statewide population totals to the President by December 31, 1980, as required by statute. The government promptly appealed; and the Supreme Court, on December 30, 1980, granted a stay of the district court's order, thereby permitting the reporting of statewide population totals to go forward as planned.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

The government raised a broad range of issues in the court of appeals to challenge the district court's judgment. The court of appeals, however, reached only the question of the propriety of the district court's preclusion order and found its resolution of that issue to be dispositive for present purposes, although the opinion also included some helpful dicta concerning the substantial difficulties that may be encountered in challenging the decennial census. The court of appeals ruled that the broad preclusion order was erroneous as a matter of law, since the requested census documents were statutorily privileged under the Census Act and were not subject to disclosure in civil discovery. Accordingly, the Second Circuit reversed the judgment below and remanded the case to the district court for a new trial unencumbered by the preclusion order. Both New York and the government sought rehearing of this decision, with New York seeking rehearing en banc on all of the issues and the government seeking only a rehearing before the panel to address the standard of review at the new trial. The court of appeals denied the cross-petitions for rehearing.

The New York petitioners then sought Supreme Court review, urging the Court to address all of the important issues raised by this census litigation. The government opposed and asked the Court to hold New York's petition for disposition in light of McNichols v. Baldrige, No. 80-1781, which presented the same census confidentiality issue decided by the Second Circuit and was then already awaiting decision by the Court. On February 24, 1982, the Supreme Court decided in McNichols that the census documents were statutorily privileged and were therefore not subject to disclosure in civil discovery. On March 8, 1982, the Supreme Court denied New York's petition for a writ of certiorari.

The Court's denial of certiorari in the New York case does not necessarily signal an end to the 1980 census litigation, since this case may yet return following a new trial on the remand and since other census cases -- notably the multidistrict

litigation -- remain in the courts. Nevertheless, this denial of review, together with the recent denial of certiorari in the Detroit Census case (Young v. Baldrige, No. 81-867) and the unanimous decision in McNichols (and in its companion Freedom of Information Act case, Baldrige v. Shapiro, No. 80-1436), augers well for a favorable outcome in all of the census litigation.

Attorney: Michael Jay Singer (Civil Division)
(FTS) 633-3159

Attorney: William Kanter (Civil Division)
(FTS) 633-1597

Government Land Bank v. GSA, No. 81-1550, 1st Circuit (February 24, 1982). D.J. #145-171-343.

FOIA EXEMPTION FOR COMMERICAL INFORMATION: FIRST CIRCUIT HOLDS THAT FOIA EXEMPTION 5 QUALIFIED PRIVILEGE AGAINST PREMATURE DISCLOSURE OF CONFIDENTIAL COMMERCIAL INFORMATION COVERS A REAL ESTATE APPRAISAL GENERATED BY A GOVERNMENT AGENCY DURING THE PROPERTY DISPOSAL PROCEDURES.

Government Land Bank, a land acquisition agency of the Commonwealth of Massachusetts, sought access under the Freedom of Information Act to an appraisal report and related internal memoranda generated by GSA in preparation for selling certain surplus real property on a former Air Force base in Massachusetts. GSA refused disclosure on the grounds that disclosure of the documents during the property disposal process would harm the government's commerical bargaining position, and therefore the documents were protected by the Exemption 5 privilege against premature disclosure of government-generated confidential commercial information, recognized in Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979).

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

The First Circuit agreed, reversed the district court's disclosure order, and upheld our claim of exemption. The court pointed out that "the FOIA should not be used to allow the government's customers to pick the taxpayers' pockets," and concluded that such appraisals as the one at issue here are "prime candidates for exemption under Merrill." The court further held that the Land Bank's status as a state property acquisition agency has no bearing on its right to access to the information under the FOIA. The court held that not only are state agencies not, as the Land Bank contended, preferred buyers of federal surplus property under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 484(e), but even if they were, that factor could have no relevance under the FOIA where disclosure turns on the nature of the document, not the requestor. The court did not reach our additional argument that the appraisal and memoranda were protected under Exemption 5 executive privilege.

Attorney: Wendy Keats (Civil Division)
(FTS) 633-3355

Baker v. Barber, No. 80-5493, 6th Circuit (March 9, 1982). D.J. #157-31-307.

FECA: SIXTH CIRCUIT HOLDS THAT FECA IS SOLE REMEDY FOR FEDERAL EMPLOYEE SEEKING REMEDY FOR INJURY RESULTING FROM TREATMENT BY MILITARY PHYSICIANS.

Baker, a civilian employee of the Department of the Army, brought a common law tort action against his two treating military physicians in their individual capacities. The district court granted the government's motion to dismiss holding that Baker's exclusive remedy for injuries resulting from the alleged malpractice lay against the United States under FECA.

On appeal, plaintiff argued that 10 U.S.C. §1089, which immunizes individual military physicians and provides that the sole remedy for damages resulting from their negligence shall be against the United States in a FTCA action, did not immunize the

physicians in this case because federal employees are barred from pursuing a FTCA action by the exclusivity provisions of FECA. The court of appeals has just affirmed the decision of the district court, noting that Congress felt a special need to immunize military doctors and plaintiff's argument would undermine the clear intent of the statute.

Attorney: Marleigh D. Dover (Civil Division)
(FTS) 633-4820

Attorney: Susan Herdina (Civil Division)
(FTS) 633-5713

Rank v. Nimmo, No. 79-3128, 9th Circuit (February 23, 1982). D.J. #151-12C-318.

VA MORTGAGE FORECLOSURE: NINTH CIRCUIT REVERSES DISTRICT COURT ORDER INVALIDATING MORTGAGE FORECLOSURE, AND HOLDS THAT VA NEED NOT ENGAGE IN FORMALIZED FORECLOSURE AVOIDANCE EFFORTS.

Plaintiffs ceased making payments on their VA-guaranteed home loan in 1974. After some sixteen months of negotiations among the VA, the mortgage company, and the plaintiffs had failed to produce a work-out agreement, the mortgage company foreclosed plaintiffs' mortgage. Plaintiffs sued the mortgage company and the VA in federal court, however, and obtained a court order invalidating the mortgage foreclosure on the grounds that the VA had not made adequate efforts to avoid the foreclosure and that the VA had not implemented a program for the refunding of defaulted mortgages. On our appeal, the Ninth Circuit has just reversed. The court of appeals ruled that the VA's manuals and circulars, where the district court had found the VA's foreclosure avoidance duty were mere agency policy statements and not judicially enforceable. In addition, the court of appeals found no constitutional due process difficulty with the VA's foreclosure procedures. Finally, the court ruled that, even though Congress gave the VA the authority to refund defaulted mortgages, the decision whether to exercise that authority is committed to unreviewable agency discretion and beyond judicial scrutiny. Judge Reinhardt dissented from the majority view on this last

CIVIL DIVISION
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point, believing that the VA must at least consider its refunding option. This case is one of a series of cases throughout the nation challenging foreclosures of VA-guaranteed mortgages. The Ninth Circuit decision should be quite useful in defending the other cases.

Attorney: John F. Cordes (Civil Division)
(FTS) 633-4214

United States Postal Service v. Athena Products, Ltd., 654 F.2d 362 (5th Cir. 1981).

FIFTH CIRCUIT GRANTS POSTAL SERVICE AN INJUNCTION TO DETAIN MAIL OF COMPANY USING FALSE REPRESENTATIONS IN THEIR ADVERTISING

The Postal Service brought suit against a mail order company in the business of selling "health products" seeking injunctive relief pursuant to 39 U.S.C. §3007. Upon proof of probable cause to believe Athena was using false representations in their advertising, the district court granted an injunction which detained Athena's incoming mail for 120 days.

Athena appealed challenging the constitutionality of the statute on First Amendment grounds. The Fifth Circuit upheld the government's ability to regulate false commercial speech, up to and including the power to impose prior restraints on the speech. The court also found the probable cause standard of proof created by §3007 did not violate due process because the district court's thorough consideration of the case minimized the risk of erroneous deprivation to Athena.

Attorney: Kathie G. McClure
Assistant United States Attorney
Northern District of Georgia
FTS 242-6954

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COLLECTIONS

Executive Office for United States Attorneys
William P. Tyson, Director

United States v. Levenson, 524 F. Supp. 781 (S.D.N.Y. 1981)

Aggressive Collection of Stand-Committed Fines

Three defendants, who had been convicted of tax evasion stemming from skimming $2.3 million while operating Plato's Retreat, received 8 year sentences and stand-committed fines totaling $160,000, plus the costs of prosecution. They appealed their convictions. Although defendants were free on bail, the Government moved to have the committed fines paid immediately. (See USAM 9-121.600). Defendants claimed they were unable to pay the fines and offered to take the pauper's oath under 18 U.S.C. 3569.

In his Memorandum and Order, Judge Edmund L. Palmieri cited evidence indicating that the defendants were not without assets to pay the fine:

(1) they had been represented by experienced privately retained counsel;

(2) they had each posted a $100,000 indemnity bond to secure $150,000 personal recognizance bonds;

(3) they had other business interests and investments with friends and relatives and made scant use of bank accounts and normal business records;

(4) they had expensive homes and automobiles; and

(5) they had successfully laundered a very large amount of money.

Stating that "[t]he court is aware that imprisonment of an indigent person solely for nonpayment of a fine would violate rights of due process and equal protection," Judge Palmieri went on to point out that "[t]he government should

not be put to the inconvenience and expense of attempting to ferret out the assets of nonindigent persons in seeking to collect committed fines." The court found defendants' claims of inability to pay "patently unbelievable."

The defendants were then directed to pay their fines forthwith, or post a surety bond guaranteeing payment on the filing of the mandate of the Court of Appeals in the event the convictions are affirmed, or to stand committed until the fines are paid.

The fines of the defendants were then paid to the court.

PETER D. SUDLER, Special Assistant U.S. Attorney
ROBERT M. JUPITER, Assistant U.S. Attorney (FTS 662-0031)
Southern District of New York

(Criminal Division)

COLLECTIONS

Executive Office for United States Attorneys,
William P. Tyson, Director

United States v. Thornton, No. 81-1304 (D.C. Cir. February 16, 1982)

CRIMINAL COLLECTIONS: D.C. CIRCUIT UPHOLDS THE GOVERNMENT'S RIGHT TO COLLECT FINES FROM RECALCITRANT CRIMINAL FINE DEBTOR WHOSE ASSETS HAD BEEN SEIZED UPON HIS ARREST AND HELD BY STATE AUTHORITIES.

In 1971, Thornton was convicted in U.S. District Court in Washington, D.C. of gambling offenses, sentenced to jail, and fined $10,000. Upon his parole, demand was made for payment of the fine, but he refused to pay. In July 1980, following leads developed by the FBI during their search for evidence of Thornton's ability to pay, Thornton was arrested at his home in Prince George's County Maryland by County Police and, $15,439 and gambling paraphenalia were seized.

Two days after Thornton's arrest, the U.S. Attorney's Office in Washington, D.C. recorded the criminal judgment as a lien, secured a writ of execution from the clerk of the federal court in Washington, D.C. and upon learning that Maryland authorities did not intend to press criminal charges, attached the seized money on a writ of attachment. The county refused to deliver the $10,000. The U.S. Attorney's Office then filed a Motion for Condemnation in the U.S. District Court for Washington, D.C. to have $10,000 paid over in satisfaction of Thornton's fine. The county failed to make a timely response and a default judgment was entered. The County appealed on both procedural and substantive grounds.

The D.C. Circuit affirmed the lower court's default judgment, ordering Prince George's County to deliver the $10,000. The Court held that the manner of enforcing a criminal fine judgment is provided for by 18 U.S.C. §3565, 28 U.S.C. §2413 and Fed. R. Civ. P. 69(a), and that no separate civil action need be filed under Maryland law to support the garnishment of the funds in the hands of Maryland authorities. The Court also rejected the argument of the County that it was the rightful owner of the seized money.

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LAND AND NATURAL RESOURCES DIVISION
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United States v. U.S. District Court for the Eastern District of California and 116.07 Acres of Land in Solano Co., et al., ____ F.2d ____, No. 81-7766 (9th Cir., January 27, 1982) DJ 33-5-1689-83.

Condemnation; Mandamus issued to vacate reference order to adjudicate just compensation by bankruptcy court.

The United States filed a declaration of taking in March 1978 to acquire an aircraft-operation easement in 116.07 acres. At that time, the owners of the land were appealing the 1975 dismissal of bankruptcy proceedings under Chapter XII of the Bankruptcy Act of 1898, as amended. The dismissal became final by July 31, 1979; on August 15, 1979, the owners filed new Chapter XII petitions in the bankruptcy court. The district judge in the condemnation case referred the issue of just compensation for the easement to the bankruptcy court for determination because the owners were involved in bankruptcy proceedings. The court of appeals granted the United States' mandamus petition filed in response to the reference; it ordered the district court to vacate its reference order and to resolve the issue of just compensation "in accordance with the procedures established in Fed. R. Civ. P. 71A(h)."

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Ashland v. Phillips, ____ F.2d ____, No. 81-1159 (10th Cir., February 10, 1982) DJ 90-1-18-650.

Prejudgment interest calculated on yearly basis sustained.

Ashland Oil Co. instituted this action in 1967 against Phillips Petroleum Co. seeking the reasonable value of helium contained in natural gas delivered to Phillips by Ashland. The United States had agreed to indemnify Phillips for any payments Phillips had to make for the helium up to $3.00 per mcf. After trial, the district court found that Ashland was entitled to the reasonable value of helium contained in the natural gas at the wellhead and to prejudgment

interest at 6% per annum. On appeal, the Tenth Circuit affirmed Phillips' liability, the valuation method employed, and the award of prejudgment interest, but set aside and remanded the computation of values for the contained helium. On remand the district court established $3.00 per thousand cubic feet as the value of the commingled helium, denied Ashland prejudgment interest, and awarded Ashland postjudgment interest from the date of judgment on remand. The Tenth Circuit affirmed the $3.00 value and award of postjudgment interest, but reversed the denial of prejudgment interest. In accordance with the Tenth Circuit's mandate, the district court awarded prejudgment interest and, on Ashland's clarification motion, ruled that the interest should be calculated at the rate of 6% per annum. Ashland appealed, contending that the district court erred in awarding the prejudgment interest at an annual rather than a monthly rate. The Tenth Circuit affirmed the award calculated on a yearly basis as an "appropriate measure of damage, expressed in terms of interest." Royal Indemnity Co. v. U.S., 313 U.S. 289, 296.

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Preservation Coalition v. Pierce, et al., ____ F.2d ____, No. 80-3101 (9th Cir., February 12, 1982) DJ 90-1-4-2103.

National Environmental Policy Act; Funding Conversion by HUD not a "major Federal action" requiring an EIS.

The Preservation Coalition sued HUD and a local redevelopment agency, asserting that NEPA required the preparation of an EIS upon a funding conversion of an urban renewal project to the Community Development Block Grant program. The court first found that laches did not bar the action, looking not to when the loan and grant contracts were executed but to a later date when the appellants became aware of plans to demolish historic buildings. Second, the Ninth Circuit found that the funding conversion did not constitute a major federal action under NEPA. Third, the court rejected the appellants' implicit invitation to fashion a per se rule that the contemplated destruction or significant alteration of buildings on the National Register is a major federal action. Finally, the court declined to consider issues disposed of by the district court, not preserved

by the appellants but raised in an amicus curiae brief filed by the National Trust.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MARCH 5, 1982 - MARCH 18, 1982

DOJ Appropriations. On March 3, 1982, the Senate Appropriations Subcommittee on State, Justice, Commerce, and the Judiciary held hearings on various programs and bureaus of the Justice Department. The Attorney General, the Deputy Attorney General and the heads of the litigating divisions testified. FBI Director William Webster testified on the FBI appropriation request as well as several FBI operations and functions. Among the topics discussed were the Abscam sting operation, DEA reorganization, and Libyan "hit squads".

Agents Identities Protection. On February 25 and March 1, the proposed Intelligence Identities Protection Act, S. 391, was extensively debated on the Senate floor. The debate concerned the proposed Chafee amendment which would replace the "subjective intent" standard of criminal liability currently in the bill with the "objective intent" standard used in the House-passed version of this legislation.

Wiretap Legislation. On March 2, the Senate Judiciary Committee ordered favorably reported S. 1640, a bill which would authorize warrantless emergency intercepts, when human life is endangered. The bill would also require the government to indicate in applications for warrants to intercept wire or oral communications if any surreptitious entry is required to effect a proposed interception. The Administration favored S. 1640 with certain suggested amendments. The Department's proposed amendments were adopted in the Committee markup.

Voting Rights Act. On March 1, William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, testified before the Senate Judiciary Subcommittee on the Constitution on extension of the Voting Rights Act. Reynolds set out the history of the Act's enforcement and the Administration's position supporting a straight 10 year extension of the Act as is.

Contribution. On March 3, William F. Baxter, Assistant Attorney General, Antitrust Division, appeared before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee to present the Department's proposal on contribution. Contribution concerns the apportionment of damages among antitrust violators.

S. 1402. S. 1402, a bill which would establish uniform standards of commercial motor vehicle widths and lengths on interstate highways, contains a provision granting independent litigating authority to the Secretary of Transportation. The Department, on behalf of the Administration, is communicating its strong opposition to this provision to the Congress.

FBI Undercover Operations. The House Judiciary's Subcommittee on Civil and Constitutional Rights held an oversight hearing on March 2 on the subject of undercover operations run by the FBI. The primary focus of the hearing was the Abscam investigation leading to the arrest and conviction of Senator Harrison Williams. Subcommittee Chairman Don Edwards stated at the conclusion of the hearing that he felt the testimony presented at this hearing and testimony previously taken by the Subcommittee showed that the safeguards of the rights of citizens were either inadequate or nonexistent.

Equal Access to Justice Act. On March 18, J. Paul McGrath, Assistant Attorney General, Civil Division, testified before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. The subject of the hearing was the implementation of the Equal Access to Justice Act. Mr. McGrath discussed the Department's experiences under the act during the first six months since it went into effect.

AT&T. On March 10, William F. Baxter, Assistant Attorney General, Antitrust Division, appeared before the Subcommittee on Telecommunication, Consumer Protection and Finance of the House Energy and Commerce Committee to discuss the settlement of the litigation involving AT&T. Mr. Baxter has made several appearances before the Congressional committees to explain the Department's position on the proposed settlement.

Habeas Corpus. The Department of Justice has submitted to Congress the Administration's legislative proposal to reform Habeas Corpus petitions. The legislation, if enacted, will strictly limit the federal court's review of habeas corpus petitions originating in the states.

Criminal Forfeiture. The Department of Justice has submitted to Congress the Administration's legislative proposal to reform the Exclusionary Rule. The legislation, if enacted, would modify the current rule and provide for a good faith defense on behalf of the seizing officer.

Nominations: On March 15, 1982, the Senate confirmed the following nominations:

J. Alan Johnson, to be U.S. Attorney for the Western District of Pennsylvania.

William L. Lutz, to be U.S. Attorney for the District of New Mexico.

David D. Queen, of Maryland, to be U.S. Attorney for the Middle District of Pennsylvania.

On March 16, 1982, the Senate confirmed the nomination of Christian Hansen, Jr. to be U.S. Marshal for the District of Vermont.

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Federal Rules of Criminal Procedure

Rule 5(a). Initial Appearance Before the Magistrate. In General.

Defendants were convicted of bank robbery and firearms violations, following their arrest by local police who notified the FBI. Federal charges were filed 5 days later and the defendants were arraigned for the first time before a U.S. Magistrate the next day. On appeal, defendants contend, inter alia, that there was unnecessary prearraignment delay in violation of Rule 5(a) and the McNabb-Mallory doctrine because the period of custody began the date they were arrested in view of a "working agreement" between the police and the FBI, thus making all state custody into Federal custody.

The Court held that the defendants had failed to show more than a "bare suspicion" of a working arrangement or that the state custody was used to circumvent Rule 5(a). The Court further held that the essence of the McNabb-Mallory rule embodied in Rule 5(a) is to prevent confessions and other evidence from being obtained invalidly prior to allowing the accused access to the court; that no effort was made to persuade the defendants to make confessions following the first exculpatory statements; and that the evidence, most of which was obtained the day of arrest, was not the fruit of any illegal activity on the part of police or the FBI. The Court concluded that Rule 5(a) did not become applicable until defendants were taken into Federal custody and there was no unnecessary delay where they were arraigned the day following the filing of Federal charges.

(Affirmed.)

United States v. Manuel Mendoza Torres, et al., 663 F.2d 1019 (10th Cir., November 5, 1981).

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