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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Selective Service Nonregistrant Violations

In Selective Service nonregistrant cases, the Service (1) verifies, prior to indictment, that the alleged nonregistrant has not registered and (2) at a subsequent time, issues an appropriate certification package for the purpose of showing that the alleged nonregistrant has indeed failed to register. In order to obtain the appropriate information concerning nonregistration, United States Attorneys should contact Paul Knapp, Esq., Office of the General Counsel, Selective Service System, at FTS 724-0895.

Please contact Mr. Knapp at least 72 hours prior to the seeking of an indictment. He will initiate a check of Service records and supply information concerning (1) whether the subject has registered and (2) the last day for which Service records are current. Please contact Mr. Knapp at least 10 days prior to trial so that he can initiate the creation of a proper nonregistration certification package.

Questions concerning Selective Service nonregistrant prosecutions should be directed to the General Litigation and Legal Advice Section (FTS 724-7144).

(Criminal Division)

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Hadley v. Navy, No. 81-2904 (Nov. 4, 1982). D.J. #35-387.

Government Personnel: Third Circuit Upholds MSPB Ruling That The Board Did Not Have Jurisdiction To Review The Claim Of A Probationary Employee That His Employment Was Wrongfully Terminated Where Claimant Did Not Allege That The Termination Was For Partisan Political Reasons Or On Account Of Marital Status.

A former probationary employee of a Naval Air Station was discharged from this employment as a firefighter-trainee prior to the completion of his one-year probationary period. He challenged his discharge on the ground that he was fired because of his condition as a reformed alcoholic in violation of the Rehabilitation Act of 1973. He attempted to appeal his dismissal to the MSPB, but the Board held it had no jurisdiction to hear the appeal. The former employee then sought review in the Court of Claims, but that court also held it had no jurisdiction and transferred the case to the Third Circuit. In the Third Circuit, we argued that petitioner should have sought relief under Title VII of the Civil Rights Act and that the MSPB correctly held it had no jurisdiction to hear his appeal because the Board does not have jurisdiction to hear an appeal by a probationary employee challenging his dismissal unless he alleges that he was dismissed for partisan political reasons or on account of marital status. On November 4, 1982, the Third Circuit issued an order sustaining our position.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Ressler v. Pierce, Nos. 81-3294 and 81-3404 (Nov. 2, 1982).
D.J. #145-17-1854.

Due Process -- HUD Section 8 Rental Subsidies: Ninth Circuit Holds Due Process Applicable To Landlord's Selection Of Tenants For Subsidized Rental Housing.

Applicants for Section 8 rental subsidies sued the Secretary of Housing and Urban Development and the private owners of the Section 8 apartment complexes. Plaintiffs asserted that, with respect to application for such subsidies, they had been denied due process of law because there was no formal application and selection procedure with definite criteria, deadlines, waiting lists, or appeals. They demanded that the court impose such a procedure, culminating in HUD review of rejections. They also demanded that HUD and the landlords be required to utilize 100% of the subsidy allocations at all times, rather than permit a 15% fluctuation resulting in unused subsidies. HUD argued that the allocation of subsidies was within the Secretary's discretion and that the flexible policy was reasonable, so that it should be upheld. Further, HUD asserted that due process was not required because plaintiffs, as applicants for subsidies, had no protected "entitlement" to benefits. Finally, HUD argued that, even if due process applied, a HUD review was not necessary, since the landlord's employees could review rejected applications. The district court upheld HUD's allocation policy, but rejected HUD's arguments on entitlement and review. The Ninth Circuit affirmed the district court's decision.

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LAND AND NATURAL RESOURCES DIVISION
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United States v. 428.02 Acres of Land, Newton and Searcy Cos., Ark. (Patrick), No. 81-2243 (8th Cir. Sept. 3, 1982).
D.J. # 33-4-394-752.

Condemnation: Evidence Should Be Liberally Admitted; Highest And Best Use Finding Sustained.

This case involved the condemnation of a cave for inclusion in the ongoing Buffalo National River Project. The United States attempted to overturn a jury verdict on two grounds: (1) that the trial judge abused his discretion in permitting valuation testimony by an appraiser based upon an executory sales contract entered into by the landowners after condemnation of neighboring properties had begun; and (2) that the award was excessive because the record failed to establish that the highest and best use of the cave would be commercial development as a tourist attraction. The Eighth Circuit affirmed the jury award, relying in part on the Everglades decision in which the Fifth Circuit ruled that blanket exclusion of the type of evidence at issue here was an abuse of discretion because the excluded sales were the most comparable sales available. The court noted that liberal admissibility of any and all evidence that would aid the factfinder in arriving at a fair market value is essential. The court of appeals also rejected the Government's suggestion that the evidence should be excluded since the possibility of collusion existed between the contracting parties for the purpose of inflating a condemnation award. The court relied on a Third Circuit decision which stated that such objections go to the weight of the evidence rather than to its admissibility. On the second issue of highest and best use, the court of appeals noted that the Government did not preserve this issue for appeal, but added that, in any event, the record supported the view that the cave's highest and best use is for a commercially developed tourist attraction.

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United States v. 733 Acres in the Town of Truro, County of Barnstable, Mass. (Beesay), No. 82-1358 (1st Cir. Oct. 22, 1982). D.J. # 33-22-2368.

Condemnation: Squatters' Shacks Not Excluded From Condemnation By Section 4(d) Of Cape Cod National Seashore Act.

In connection with the Cape Cod National Seashore, the United States, as registered owner of a 733-acre tract, filed a condemnation suit in the nature of a quiet title action. The Government sought to require the owners of beach shacks to remove their property. Bessay, the owner of four shacks, who admitted that she did not own the underlying land, resisted arguing that her shacks were exempt from condemnation by virtue of Section 4(d) of the National Seashore Act, which exempts from condemnation one-family dwellings, the construction of which was begun before September 1, 1959, where the dwelling exists on land in the same ownership as the dwelling. The district court ruled that Bessay's shacks were not exempt from condemnation and entered summary judgment in favor of the Government.

On appeal, the First Circuit affirmed. In a per curiam opinion not for publication, it agreed with the district court and adopted its opinion.

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United States v. Wilson, Nos. 81-2350, 81-2351 and 81-2384 (8th Cir. Oct. 26, 1982). D.J. # 90-1-5-1477.

Indians: Tribe Has Burden Of Proving River Movements Against State And Private Parties.

This action was brought by the United States and the Omaha Indian Tribe to quiet title to certain lands which both through avulsive and accretive changes in the course of the Missouri River are alleged to have attached to the Omaha Indian Reservation. On the basis of 25 U.S.C. 194, which

puts the burden of proof on the non-Indian in property disputes to which an Indian is a party, the Eighth Circuit had previously found that the non-Indians in this case, including the State of Iowa, had failed to meet the burden of proving the nature of certain river changes, and that consequently the Indians must prevail. The Supreme Court affirmed substantially, except that it held that 25 U.S.C. 194 does not apply to a State, and therefore remanded the case for further consideration of the ownership of the lands claimed by the State, and also for the lands of certain individuals who claim to have received titles from the United States. Upon remand, the district court held that the Eighth Circuit's prior holdings with respect to the ownership of these lands constituted the "law of the case." The Eighth Circuit reversed, holding that the Tribe has the burden of proving the existence of the River movements upon which it relies to support its title, both against the State and against the private owners whose claim is based upon patents issued by the United States and remanding the case to the district court for further proceedings.

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Escondido Mutual Water Co. v. FERC, Nos. 79-7625, 80-7012, 80-7110 (9th Cir. Nov. 2, 1982). D.J. # 90-2-2-152.

Jurisdiction: FERC Has Jurisdiction To Issue Company A License Allowing It To Remove Small Amounts Of Water From Indian Reservation, So Long As Electric Power Was Generated.

In the first contested relicensing proceeding under the Federal Power Act (FPA), the court of appeals reversed and remanded for further proceedings a decision of the Federal Energy Regulatory Commission (FERC) issuing Escondido a new 30-year license to operate a minor hydroelectric project, initially constructed in 1924, which utilize Indian reservation and BLM lands. Interior, the Indian Bands and Escondido each filed petitions to review certain aspects of FERC's decision. The appellate court found it necessary to discuss only three of the numerous issues raised on appeal.

First, the court rejected Interior and the Bands' contention that FERC lacked jurisdiction under FPA to issue Escondido a new license. We had argued that the power produced by the project, which was equivalent only to that produced by six automobiles, was simply a makeweight to invoke FERC's jurisdiction, thereby allowing Escondido to remove water from the reservations which would otherwise have been available to the Indians. The court, however, deferred to FERC's broad interpretation of its governing statute, ruling that so long as any electric power was generated, however minor in amount or insignificant to the project as a whole, the Commission had jurisdiction. Second, the appellate court rejected FERC's position that it had sole authority under the FPA to authorize the use of Indian reservation lands. The court reasoned that Section 8 of the Mission Indian Relief Act (MIRA), which specified methods for obtaining rights-of-way across the Mission Indians' reservations, required Escondido to negotiate rights-of-way across such lands directly with the Bands in addition to obtaining FERC's authorization for the use of those lands. Because the court found no conflict between Section 8 of MIRA and the FPA, it concluded that the former was not repealed by Section 29 of the FPA, which repealed all prior inconsistent acts. Finally, the court agreed with Interior and the Bands that Section 4(e) of the FPA required FERC to include within the license conditions which the Secretary of the Interior determined were necessary for the adequate protection and utilization of the Indian reservation lands included within the project. FERC had maintained that it could accept, reject, or modify any condition developed by the Secretary because of its responsibility under Section 10(a) of the FPA to license only those projects that FERC judged to be the best adapted to a comprehensive plan of development. The court, however, reasoned that Section 10(a) did not modify the otherwise plain language of Section 4(e); rather, FERC's Section 10(a) determination must be made in light of the Secretary's Section 4(e) conditions. The unaddressed issues may be the subject of petitions for rehearing by at least some of the parties.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

NOVEMBER 24, 1982 - DECEMBER 8, 1982

Forfeiture Legislation. Efforts to have the House go to conference on H.R. 7140 are continuing. This bill, if approved in the form suggested by the Administration, would strengthen the ability of Federal law enforcement officials to strip narcotics traffickers of the assets and proceeds of their criminal enterprises. Current efforts are focused on the Ways and Means Committee which has jurisidiction over portions of the Senate-passed forfeiture bill. If the Ways and Means Committee can be persuaded not to object to a House-Senate conference on H.R. 7140, enactment of a very favorable forfeiture is possible.

Marshals Service of Private Process. There is still a slim possiblity that the 97th Congress could enact legislation to relieve the United States Marshals Service of the duty of routinely serving summonses and complaints for private parties in civil actions. Congressman Edwards has introduced a measure, H.R. 7154, which would effectively achieve this goal by amending Rule 4 of the Federal Rules of Civil Procedure. The bill is not considered controversial on either side of the Hill. It is unable, however, to command the spotlight. The Senate has approved similar legislation on two previous occasions.

Attorneys Fees. On December 9, 1982, Assistant Attorney General J. Paul McGrath is scheduled to testify before Senator Grassley's Judiciary Subcommittee on Agency Administration concerning the effectiveness of the Equal Access to Justice Act and potential modifications. Also scheduled to testify at the December 9 hearing are Senator Domenici and representatives of the Small Business Administration, the Administrative Conference, the National Labor Relations Board, the American Bar Association and the National Federation of Independent Business.

Crime Legislation. The Senate has again attached S. 2572, the Violent Crime and Drug Enforcement Improvements Act of 1982, to a House bill and has returned to the House the amended bill. Since this is the second time this procedure has been followed, the matter becomes privileged in the House and it is possible that an up/down vote may be achieved on this most significant initiative.

Bankruptcy. With the Supreme Court deadline of December 24 coming on fast, legislative action in view of the Marathon Pipeline decision is critical.

Extradition Amendments. A significant criminal justice measure which may be approved during the final session is legislation to facilitate extradition of foreign criminals found in the United States. As international extradition is based upon the principle of reciprocity, the United States' ability to extradite foreign criminals directly affects our ability to secure the return to the United States of drug traffickers, organized crime figures, terrorists and other major offenders who commit crimes here and then attempt to flee beyond our jurisdiction. The Senate has approved an extradition bill (S. 1940) and a major effort will be made to get the companion House bill (H.R. 6056) to the House floor for a vote in the final session.

H.R. 7106 - Retail Dealers Agreement Act. H.R. 7106 would establish a regulatory scheme governing the conduct of private parties involved in the distribution of office equipment. The Department has serious objections to the institution of this regulatory scheme and has submitted a letter objecting to the bill to the Congress.

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Federal Rules of Criminal Procedure

Rule 12.1(a). Notice of Alibi. Notice by Defendant.

Rule 12.1(b). Disclosure of Information and Witnesses.

Before the start of his trial defendant served notice on the United States Attorney that he intended to call certain named witnesses in order to establish an alibi. The Government had not requested this information under Rule 12.1(a) and made no response to defendant's "Notice of Alibi." At trial defendant moved for an order excluding the testimony of any government witnesses who would place him at the scene of the crime, arguing that since the Government failed to respond to his "Notice of Alibi" as required by Rule 12.1(b), testimony of such witnesses should be excluded. The motion was denied and defendant appealed.

The court of appeals held that a defendant's gratuitous and unsolicited disclosure of alibi witnesses does not trigger the government's reciprocal obligation under Rule 12.1(b) to furnish the names of witnesses linking defendant to the scene of the crime. Rule 12.1 is a prosecution-triggered alibi statute designed for the primary benefit of the Government. Since the Government did not make a written demand under 12.1(a), it was under no obligation to disclose to defendant the identity of its witnesses prior to trial.

(Affirmed.)

United States v. Sir Walter Raleigh Bouye, Jr., _____ F.2d _____, No. 81-2159 (7th Cir. Sept. 9, 1982).

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Federal Rules of Criminal Procedure

Rule 12.1(b). Disclosure of Information and Witnesses.

See Rule 12.1(a) Federal Rules of Criminal Procedure, this issue of the Bulletin for syllabus.

United States v. Sir Walter Raleigh Bouye, Jr., _____ F.2d _____, No. 81-2159 (7th Cir. Sept. 9, 1982).

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