U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

VOL. 30 DECEMBER 27, 1982 NO. 25

VOL. 30 DECEMBER 27, 1982 NO. 25

TABLE OF CONTENTS

Page

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

Index To Clearinghouse Of 1982

Issues 2 - 21

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

POINTS TO REMEMBER

New Procedures in IRS Section 7609 Summons Cases and Foreign Documents Cases

The Tax Division has adopted new procedures for the handling of petitions to quash IRS summons cases under Internal Revenue Code Section 7609 and requests for foreign documents under Section 982. The Tax Division's memorandum to the United States Attorneys is included as an appendix to this issue of the United States Attorneys' Bulletin.

(Tax Division)

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

Index To Points To Remember Of 1982

Issues 1 - 25

VOL. 30 DECEMBER 27, 1982 NO. 25

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

United States v. Security Industrial Bank, No. 81-184 (Nov. 30, 1982). D.J. # 77-13-444.

Bankruptcy Reform Act -- Lien Avoidance Provision: Supreme Court Construes Bankruptcy Reform Act Lien Avoidance Provision Not To Apply To Preenactment Liens.

The provision of the Bankruptcy Reform Act of 1978 (11 U.S.C. 522(f)(2)) allowing debtors to avoid nonpossessory, nonpurchase-money liens on certain exempt property has provoked a flood of litigation. Most courts have assumed that the provision applies to liens acquired before the enactment of the Act, and this has led creditors to challenge the provision as violating the Fifth Amendment. The Government has intervened in a number of cases to defend the constitutionality of Section 522(f)(2) as applied to preenactment liens.

In the instant case the Government appealed a judgment of the Tenth Circuit holding Section 522(f)(2) unconstitutional as applied to preenactment liens. On appeal it was argued that Congress intended Section 522(f)(2) to apply to such liens and that, as so applied, Section 522(f)(2) is constitutional. The Supreme Court avoided deciding the constitutional issue, however, by holding that Section 522(f)(2) should not be construed to apply retrospectively. The Court expressed substantial doubt that retrospective application of Section 522(f)(2) would comport with the Fifth Amendment's Just Compensation clause, and concluded that settled principles regarding the construction of bankruptcy legislation therefore require that Section 522(f) not be construed to affect preenactment rights in the absence of a clear expression of congressional intent to the contrary.

Attorneys: Leonard Schaitman (Civil Division)
FTS (633-3441)

Marc Johnston (Civil Division)
FTS (633-3305)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

United States v. Tex-La Electric Cooperative, Inc., No. 81-3715 (Nov. 26, 1982). D.J. # 145-19-110.

Rate Adjustment -- Department of Energy Interim Rates: Fifth Circuit Upholds Department Of Energy Process For Implementing Hydroelectric Rates.

When the Southwestern Power Administration asked Tex-La Electric Cooperative to pay new rates, placed into effect on an interim basis by DOE in 1979, Tex-La refused. The Government then brought this suit against Tex-La, but the district court held that under the applicable marketing statutes, the rates required "confirmation and approval" on a final basis. Two other district courts, and the Court of Claims (Cities of Futton, et al. v. United States) followed this lead.

The Fifth Circuit reversed. It found that the "confirmation and approval" requirement was altered by the Department of Energy Organization Act, which placed total rate authority under the Secretary of Energy. His delegation to an Assistant Secretary for interim rates and the Federal Energy Regulatory Commission for final rates, given the confusing and conflicting statutory provisions, "was all that he reasonably could do to carry out his statutory mandate. . ."

Attorneys: Robert S. Greenspan (Civil Division)
FTS (633-5428)

Bruce Forrest (Civil Division)
FTS (633-3542)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Harbison v. Goldschmidt, No. 80-1346 (Nov. 17, 1982). D.J. # 35-13-54.

Title VII -- Test For Proving Race Discrimination: Tenth Circuit Reverses Title VII Judgment Against FAA For Failure Of District Court To Find That Employee Would Have Been Promoted "But For" Discrimination And Because Of The District Court's Award Of Damages For Stale Claims Which Were Not The Subject Of Plaintiff's Administrative Complaint.

Plaintiff, a black employee of the Federal Aviation Administration, alleged that he had been discriminated against by the denial of a promotion to an assistant chief position (GS-12). The court of appeals accepted the argument that the district court's decision must be reversed and remanded the case because the district court failed to determine whether plaintiff would have received the promotion "but for" the discrimination that it found to have occurred. In so ruling the Tenth Circuit joined the D.C. Circuit and the Third Circuit in applying the "but for" test. The court of appeals also held that the district court erred in awarding damages on the basis of stale claims that had been administratively resolved years ago and which were not part of plaintiff's current administrative complaint.

Attorneys: Robert E. Kopp (Civil Division)
FTS (633-3311)

John Hoyle (Civil Division)
FTS (633-3547)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Trustees for Alaska v. Watt, No. 82-3107 (9th Cir. Oct. 26, 1982). D.J. # 90-1-4-2347.

National Wildlife Refuge Systems Administration Act Violated By Secretary Of The Interior When He Assigned Oil And Gas Exploration Tasks To U.S. Geological Survey Rather Than The Fish And Wildlife Service.

The district court held that Secretary Watt had violated the National Wildlife Refuge System Administration Act by assigning tasks associated with an oil and gas exploration project, Section 102 of Alaska National Interest Lands Conservation Act, in the Artic National Wildlife Refuge to USGS rather than FWS. On appeal, we argued that the issue was not ripe for review and the plaintiffs lacked standing because no final agency action had taken place that could possibly affect their interests. We also defended the Secretary's actions on the merits. The Ninth Circuit affirmed on the district court's opinion.

Attorney: Anne S. Almy (Land and Natural Resources Division) FTS (633-4427)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

National Wildlife Federation v. Gorsuch, No. 82-1335 (D.C. Cir. Nov. 5, 1982). D.J. # 90-5-1-5-22.

Clean Water Act Held Not To Impose Non-Discretionary Duty On Dam Operators To Apply For Discharge Permits.

The National Wildlife Federation petitioned the district court for a declaration that the Administrator of the Environmental Protection Agency (EPA) had a nondiscretionary duty to require over 2 million dam operators to apply for pollutant discharge permits under the Clean Water Act and for

an order directing her to perform that duty. The district court issued the requested declaration and order, from which EPA and numerous electric utilities and water agencies appealed. The sole issue on appeal was whether dam-induced water quality changes constitute the "discharge of a pollutant" as that term is defined in the Clean Water Act. The National Wildlife Federation, joined by the State of Missouri, argued that in light of the remedial purposes of the Clean Water Act, the phrase should be read broadly enough to cover dam-induced changes. The Government argued for a narrower reading under which dams would not require discharge permits, but would instead be regulated by the states under state-developed water quality controls. Concluding that EPA's long-standing interpretation of the Clean Water Act was entitled to great deference and that its view of the Act was reasonable, the D.C. Circuit reversed.

Attorney: Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS (633-2748)

Attorney: Nancy B. Firestone (Land and Natural Resources Division) FTS (633-2757)

Buttrey v. United States, Nos. 81-3234 and 81-3649 (5th Cir. Nov. 8, 1982). D.J. # 90-5-1-6-266.

Corps Of Engineers Functions Over Civil Projects Involving Water Resources Sustained.

In Buttrey I, Buttrey, a land developer, claimed that the Corps of Engineers improperly denied his application, under Section 404 of the Clean Water Act, 33 U.S.C. 1344, for a permit to dredge and fill a wetland area near Slidell, Louisiana. The district court rejected Buttrey's claims that he was entitled to a formal adjudicatory hearing prior to denial of the permit, that the Corps lacked jurisdiction to require a permit for the proposed project, and that denial of the permit application was arbitrary and capricious. Buttrey appealed.

In this first appellate court decision on the question of whether the Corps, in processing Section 404 applications, must afford permit applicants trial-type hearings, the Fifth Circuit concluded that the "paper hearing" (opportunity to submit written comment and rebuttal) afforded Buttrey fully

satisfied statutory and constitutional requirements. Specifically, the court first held, based on the statutory language and legislative history of Section 404, that the formal hearing procedures set out in the Administrative Procedure Act are inapplicable, notwithstanding that three other circuits have construed identical language in Section 402 of the Clean Water Act, 33 U.S.C. 1342(a)(1), to trigger the EPA's formal hearing procedures. Secondly, the court held that Buttrey was given all the procedural protections to which he was entitled under the due process clause of the Constitution. In this context, the court, largely adopting our distinction between development of adjudicative facts, which usefully employs trial-type procedures, and development of legislative facts, which generally does not, indicated that Buttrey failed to raise any disputed adjudicative facts and stressed that he was, in effect, attempting improperly to challenge the legislative findings concerning the value of wetlands in the applicable Corps' regulations.

As for the other issues raised on appeal, the court of appeals held that the Corps' determination that the project area is a wetland and its decision to deny the permit was not arbitrary, capricious, or in contravention of law. The court also indicated that judicial review of these judgments is properly confined to the administrative record.

In Buttrey II, relating to a separate project, Buttrey argued that Congress' total power with respect to the military is found in the war powers clauses and that nowhere in the Constitution has Congress been given the power to use the Army for functions unrelated to the purposes of an army. On this basis, Buttrey contended that the delegation of regulatory authority to the Army Corps of Engineers in Section 404 unconstitutionally permits the military to assert control over civilians. Noting that the constitutional authority for the Section 404 program derives from the commerce clause, not the war powers clauses, and that the delegation of authority to the Corps does not infringe on any other constitutionally protected interests, the Fifth Circuit rejected Buttrey's arguments. The court stressed the Corps' traditional exercise of civil functions in the water resources area, and the manner in which civilian control over these functions is maintained.

Attorney: Kay L. Richman (Land and Natural Resources Division) FTS (633-2772)

Attorney: Anne S. Almy (Land and Natural Resources Division) FTS (633-4427)

VOL. 30 December 27, 1982 NO. 25

Federal Rules of Criminal Procedure

Rule 6(f). Finding and Returning of Indictment.

Rule 6(e)(1). Recording of Proceedings.

On appeal of their conviction defendants alleged, inter alia, that their indictment was defective because of the twelve votes necessary to indict under Rule 6(f) only three of the voting jurors had attended every session. The district court held that neither the Fifth Amendment nor the Federal Rules of Criminal Procedures imposed a requirement of perfect attendance for all jurors as long as a quorum was present at every session and at least twelve jurors voted to indict. Defendants appealed.

The court of appeals upheld the decision and found that although the number of absences in this case bordered the limits of acceptability it was not severe enough to have violated defendant's rights. The language of Rule 6, which mandates only that a quorum be present at each session, suggests that Congress intended a degree of flexibility to inhere in grand jury proceedings. Attacks on grand jury voting can be avoided if absent or replacement jurors are furnished with the transcripts required to be taken under Rule 6(e)(1).

(Affirmed.)

United States v. Nunzio Provenzano, 688 F.2d 194 (3rd Cir. Sept. 1, 1982).

VOL. 30 December 27, 1982 NO. 25

Federal Rules of Criminal Procedure

Rule 6(e)(1). Recording of Proceedings.

See Rule 6(f) Federal Rules of Criminal Procedure, this issue of the Bulletin for syllabus.

United States v. Nunzio Provenzano, 688 F.2d 194 (3rd Cir. Sept. 1, 1982).

VOL. 30 December 27, 1982 NO. 25

Federal Rules of Criminal Procedure

Rule 16(a)(1)(A). Discovery and Inspection. Disclosure of Evidence by the Government. Information Subject to Disclosure. Statement of Defendant.

Defendant was convicted of conspiracy to interfere with commerce by threats or violence and attempted extortions. He appealed, alleging, inter alia, that the court committed reversible error when it admitted evidence of a taped conversation between defendant and his business associate. The tape was introduced by the Government to impeach defendant's testimony that he travelled to San Diego on a business matter at the request of his associate. Defendant made several pre-trial requests for discovery, including a request that he be allowed to listen to "tapes made of conversations," but he was not advised of the tape until he was cross-examined.

The court held that the tape should have been disclosed to defendant under Rule 16(a)(1)(A). The Rule requires the Government, on the request of the defendant, to make available to the defendant "any relevant written or recorded statements made by [him], . . . within the possession, custody, or control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government." Stressing that the Rule can serve its intended purpose only if the Government takes a broad view of what is relevant to the defense, the court found that: (1) the tape was in the "custody or control of the Government" or could have been discovered through the exercise of "due diligence," since it was in the possession of the Federal Bureau of Investigation, even though it was not turned over to the United States Attorney until the night before it was used; (2) the tape consisted of a statement made by the defendant during the course of the investigation of the crime charged, and it should have been presumed subject to disclosure since it may have been relevant to a possible defense or contention the defendant might assert, even though the relevance of the tape was not known for purposes of impeachment until the defendant testified on direct examination; (3) since voice identification of the extortionist was a material issue in the prosecution, the tape should have been disclosed, even though the Government did

not initially intend to rely on the tape for that purpose. However, the court held that reversal was not warranted since the error did not materially affect the verdict.

(Affirmed.)

United States v. Paul Rowton Bailleaux, 685 F.2d 1105 (9th Cir. Aug. 30, 1982).

VOL. 30 DECEMBER 27, 1982 NO. 25

U.S. ATTORNEYS' LIST EFFECTIVE DECEMBER 30, 1982

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	A. Melvin McDonald
Arkansas, E	George W. Proctor
Arkansas, W	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Stephen S. Trott
California, S	Peter K. Nunez
Colorado	Robert N. Miller
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Stanley S. Harris
Florida, N	K. M. Moore
Florida, M	Robert W. Merkle, Jr.
Florida, S	Stanley Marcus
Georgia, N	Larry D. Thompson
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Daniel A. Bent
Idaho	Guy G. Hurlbutt
Illinois, N	Dan K. Webb
Illinois, S	Frederick J. Hess
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	Sarah Evans Barker
Iowa, N	Evan L. Hultman
Iowa, S	Richard C. Turner
Kansas	Jim J. Marquez
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	J. Frederick Motz
Massachusetts	William F. Weld
Michigan, E	Leonard R. Gilman
Michigan, W	John A. Smietanka
Minnesota	James M. Rosenbaum
Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	Lamond R. Mills
New Hampshire	W. Stephen Thayer, III
New Jersey	W. Hunt Dumont
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	John S. Martin, Jr.
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
North Carolina, E	Samuel T. Currin
North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
North Dakota	Rodney S. Webb
Ohio, N	J. William Petro
Ohio, S	Christopher K. Barnes
Oklahoma, N	Francis A. Keating, II
Oklahoma, E	Gary L. Richardson
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
Pennsylvania, E	Peter F. Vaira, Jr.
Pennsylvania, M	David D. Queen
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	Henry Dargan McMaster
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	James A. Rolfe
Texas, S	Daniel K. Hedges
Texas, E	Robert J. Wortham
Texas, W	Edward C. Prado
Utah	Brent D. Ward
Vermont	George W. F. Cook
Virgin Islands	Hugh P. Mabe, III
Virginia, E	Elsie L. Munsell
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	David A. Faber
Wisconsin, E	Joseph P. Stadtmueller
Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood

Memorandum

681

VOL. 30 DECEMBER 27, 1982 NO. 25

Subject

New Procedures in IRS Section 7609 Summons Cases and Foreign Documents Cases

Date

DEC 29 1982

To United States Attorneys

From Glenn L. Archer, Jr.
Assistant Attorney General
Tax Division

The Congress at the request of the Justice Department and the IRS recently enacted new procedures relating to IRS summonses issued to financial institutions and other "third-party recordkeepers." Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Sec. 331. Under amended Internal Revenue Code Section 7609, taxpayers or other persons entitled to notice of issuance of such summonses will no longer be able to stay compliance simply by notifying the recordkeeper not to comply. Instead, for summonses issued after December 31, 1982, compliance can be stayed only by filing a petition to quash within 20 days after notice is given. The old procedures will continue to govern summonses issued on or before December 31, 1982. */ The shift in the burden of commencing litigation over Section 7609 summonses should be extremely beneficial to our respective offices and the IRS.

Another new form of litigation created by TEFRA relates to IRS efforts to obtain foreign documents from taxpayers. TEFRA Sec. 337. Internal Revenue Code Section 982 now permits the IRS to make a "formal document request" for foreign-based documentation. Absent substantial compliance with such a request within 90 days, the taxpayer will not be permitted to offer into evidence at a subsequent civil tax proceeding documents covered by the request. Within the 90-day period, however, the taxpayer has the right to file a petition to quash the request in the appropriate district court. Section 982 applies to formal document requests made after September 3, 1982. A few proceedings to quash have already been commenced.

With regard to Section 7609 summonses, while we anticipate that the statutory changes will reduce the amount of litigation, there will still be a significant number of cases, and your offices should start receiving petitions to quash Section 7609 summonses by mid- to late-January. In view of the importance of Section 7609 summonses to the investigative efforts of the IRS generally and in light of our expectation that the new procedures will raise numerous issues of first impression these cases (and

*/ It should be noted that TEFRA, Sec. 333, also amended Section 7602 to expressly authorize issuance of a summons for a criminal purpose. The Section 7602 amendments were effective on September 4, 1982, and in our view, apply to pending cases regardless of when the summons was served.

also Section 982 petitions to quash) will be handled by Tax Division attorneys at least during the initial stages of litigation until the courts become familiar with these new provisions and some precedent is created. For that reason, I am requesting that upon receipt of a petition to quash, your office contact the appropriate Civil Trial Section of the Tax Division by telephone to notify us of the case. The persons to be contacted are:

Civil Trial Section		
Northern --	James J. Jeffries, III	FTS 724-6575
Southern --	Herbert L. Moody, Jr.	FTS 724-6409
Western --	Stephen G. Fuerth	FTS 724-6543
Central --	S. Martin Teel, Jr.	FTS 724-6585

Unless otherwise instructed by the Tax Division, the petition should then be forwarded to us by express mail.

I would appreciate your bringing these new procedures to the attention of your legal and nonlegal personnel who will have responsibility over these matters.