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COMMENDATIONS

Assistant United States Attorney DAVID BOHAN, Northern District of Illinois, has been commended by the Honorable John W. Cooley, United States Magistrate, for his outstanding performance at the preliminary hearing of U.S. v. Hamilton.

Assistant United States Attorney WILLIAM H. BRIGGS, JR., District of Columbia, has been commended by the Governor of the State of Rhode Island, J. Joseph Garrahy, for his successful defense of a request for a temporary restraining order which would have prohibited the transfer of federal property to the State of Rhode Island.

Assistant United States Attorneys VINCENT J. CONNELLY and JAMES R. STREICKER, Northern District of Illinois, have been commended by James O. Ingram, Special Agent in Charge of the Federal Bureau of Investigation in Chicago, Illinois, for their successful prosecution of Buddy Scott for Perjury in a case involving 1.1 million dollars of stolen blue chip common stock certificates that were stolen from the Illinois Department of Financial Institutions.

Assistant United States Attorney LARRY MACKEY, Central District of Illinois, has been commended by Robert B. Davenport, Special Agent in Charge of the Federal Bureau of Investigation, Springfield, Illinois, for his outstanding work and cooperation in the indictments and subsequent arrests of Edward "Cornbread" Horton and associates.

Assistant United States Attorneys PATRICK MCLAUGHLIN and DENNIS ZAPKA, Northern District of Ohio, have been commended by Jeffrey Axelrod, Director of the Torts Branch, Civil Division, for their successful prosecution of the Hixenbaugh case that will have a national impact on the Swine Flu Immunization Products Liability litigation.

Assistant United States Attorney NANCY K. NEEDLES, Northern District of Illinois, has been commended by Nancy L. Buc, Chief Counsel of the Food and Drug Administration, for her fine representation of the three defendants in the Alice Ling case.

Assistant United States Attorney MARY THOMAS, Northern District of Illinois, has been commended by Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, for her handling of the Winthrop Towers case.

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

POINTS TO REMEMBER

Public Integrity Section Attorney Hiring

The Public Integrity Section is presently seeking experienced federal prosecutors to join the Section in Washington, D.C. The Section prosecutes significant public corruption cases nationwide, thus substantial travel is involved. It is an excellent opportunity for experienced Assistant United States Attorneys to work on sensitive, challenging cases without the pressures of a large docket. Women and minority attorneys particularly are encouraged to apply.

If interested, please call Robert Richter, Assistant Chief for Operations at FTS 724-6970 or write Mr. Richter at P.O. Box 50168, F. Street Station, Washington, D.C. 20004.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General Alice Daniel

Canadian Transport Co. v. United States, No. 77-1693 (September 5, 1980) D.J. # 61-16-137

SUITS IN ADMIRALTY ACT; DISCRETIONARY FUNCTION EXCEPTION. C.A.D.C. HOLDS THAT DISCRETIONARY FUNCTION EXCEPTION TO GOVERNMENT TORT LIABILITY IS APPLICABLE TO SUITS IN ADMIRALTY ACT, AND TO SUIT AGAINST COAST GUARD CHALLENGING ITS DECISION TO REFUSE LANDING RIGHTS TO VESSEL COMMANDED BY POLISH CAPTAIN

In connection with its responsibilities for the national defense, the Coast Guard is charged with implementing the Special Interest Vessel ("SIV") program. The SIV program consists in part of unpublished regulations governing the anchorage and movement of foreign vessels in United States waters. Acting under authority of the above regulations, the Coast Guard informed the Canadian Transport Company that its ship, the TROPWAVE, which was under sail from Holland, would not be permitted to dock at Norfolk until the vessel disembarked all communist block personnel, including its Polish captain. The ship complied and as a result, incurred certain financial losses. It filed suit against the U.S. to recoup its losses, pleading its case under three alternative jurisdictional theories: (1) the Suits in Admiralty Act; (2) a tort claim based on the alleged violation of a treaty; and (3) a Fifth Amendment claim. Plaintiffs' suit was dismissed for lack of jurisdiction.

On appeal, the D.C. Circuit affirmed the government's contention that a discretionary function exception must be imputed into the Suits in Admiralty Act. (There is a conflict among the Circuits on this issue.) The court accordingly ruled that plaintiffs could not hold the government liable for its failure to publish the SIV regulations, and thereby give notice to ships of the rules with which they must comply, since the decision to keep the regulations confidential was a discretionary decision, and protected from judicial review. The court ruled, however, that the case must be remanded to the district court to determine whether the Coast Guard complied with its own regulations, since a failure to comply with established policy is not protected by the discretionary function exception.

The court rejected plaintiffs' alternative jurisdictional arguments. It ruled that the U.S. had not waived its sovereign immunity for the alleged treaty violations, and rejected the contention that the Suits in Admiralty Act gave rise to a cause of action for Fifth Amendment violations.

Attorney: Fred Cohen (Civil Division)
FTS 633-5054

Sims v. CIA, Nos. 79-2203, 79-2554 (September 29, 1980)
D.J. # 145-1-704

FREEDOM OF INFORMATION ACT; DEFINITION OF "INTELLIGENCE SOURCES." D.C. CIRCUIT GRANTS CIA A REMAND TO PROVE THAT PERSONS CONDUCTING BEHAVIORAL RESEARCH ARE INTELLIGENCE SOURCES

The CIA in this case appealed from a district court order requiring disclosure under the Freedom of Information Act of names of individuals and institutions conducting behavioral research on behalf of the CIA in the 1950s and early 1960s. CIA argued on appeal that the researchers and institutions were "intelligence sources" under the National Security Act of 1947, and therefore their identities were exempted from disclosure under FOIA Exemption 3. The court of appeals accepted, with certain modifications, the definition of "intelligence source" proffered by the CIA, vacated the district court's judgment, and remanded for a determination of whether the individuals and institutions at issue came within this definition. Under the court's definition an "intelligence source" is a person or institution that provides the CIA with information needed by the CIA to perform its functions and which could not reasonably be obtained without a pledge of confidentiality. The court of appeals did not accept the government's alternative argument that the researchers' identities were protected by Exemption 6.

Attorney: Michael Kimmel (Civil Division)
FTS 633-5460

McNichols v. Klutznick, No. 80-2023 (September 29, 1980
D.J. # 145-9-536

CENSUS CASES. TENTH CIRCUIT ALLOWS INTERLOCUTORY APPEAL FROM DISTRICT COURT ORDER GRANTING CITY ACCESS TO CONFIDENTIAL CENSUS FILES AND ISSUES STAY PENDING APPEAL

Plaintiffs in this suit are challenging the census count for the City of Denver. Plaintiffs sought access to

confidential census files, particularly census documents showing the vacant addresses for the City. Plaintiffs maintain that the Census Bureau overcounted Denver's vacancies. The district court ordered the Census Bureau to turn over to plaintiffs the Bureau's "Follow-Up Address Registers" (FARs) or a list of vacant addresses culled from the FARs. The district court declined to stay its order beyond September 29, 1980, but did certify its disclosure order for interlocutory appeal under 28 U.S.C. 1292(b). On the Census Bureau's petition, the Tenth Circuit has now accepted the case for interlocutory appeal, and has granted a stay pending appeal of the district court's disclosure order. The Bureau's position is that the confidentiality of census files must remain inviolate.

Attorney: John Cordes (Civil Division)
FTS 633-3426

Stoleson v. U.S.A., No. 79-2306 (September 11, 1980)
D.J. # 157-86-73

FEDERAL TORT CLAIMS ACT, STATUTE OF LIMITATIONS. SEVENTH CIRCUIT EXTENDS U.S. v. KUBRICK BEYOND THE MEDICAL MALPRACTICE CONTEXT

In 1968, Mrs. Stoleson suffered cardiovascular difficulties which she attributed to her exposure to nitroglycerin at a munitions plant. However, Mrs. Stoleson filed no administrative claim until August, 1972, because she could not find a doctor to confirm her theory of causation until late 1971.

The district court found that, because Mrs. Stoleson knew of her injuries and was convinced of their cause back in 1968, Mrs. Stoleson's claim accured in 1968. Since she filed her administrative claim in August of 1972, all injury prior to August of 1970 was precluded by the 2-year statute of limitations under the FTCA.

The Seventh Circuit reversed and remanded for trial, holding that the medical malpractice standard announced in U.S. v. Kubrick governs in this case, i.e., the statute of limitations begins to run when the individual is aware of both the fact of the injury and the cause of the injury.

As to cause, the Court stated that the suspicions of a layperson like Ms. Stoleson, no matter how firmly believed, do not amount to knowledge of cause, especially where, as here, the medical profession did not understand or recognize

the causal relationship involved until three years after her injuries were sustained.

Finally, the Court pointed out that over the course of three years, Ms. Stoleson diligently pursued proof of her suspicions by visiting a variety of doctors until she visited the doctor whose original research in the area of nitroglycerin and cardiovascular difficulties (done in 1971) established the causal relationship Ms. Stoleson suspected all along.

Attorney: Howard S. Scher (Civil Division)
FTS 633-5055

National Pork Producers Council, et al. v. Bergland, et al., No. 80-1229 (September 23, 1980) D.J. # 98-28-10

FEDERAL MEAT INSPECTION ACT, PRODUCT LABELING. EIGHTH CIRCUIT UPHOLDS REGULATIONS PERMITTING THE SALE OF NITRITE-FREE PRODUCTS

Three individual congressmen and various organizations representing pork producers and meat packers brought this suit challenging USDA regulations permitting nitrite-free meat products to be sold under their generic names (e.g., "ham," "bacon," "frankfurters," etc.) so long as certain warnings and handling instructions are appended thereto and so long as the nitrite-free product is "similar" in size, flavor, consistency and general appearance to the product commonly prepared with nitrite. The challengers contended that the regulations were arbitrary and capricious because the Secretary failed to consider whether consumers would be subjected to botulism poisoning if they were to handle uncured products as they now handle cured products and whether the labeling requirement would eliminate the risk. They also contended, inter alia, that the Secretary exceeded his authority under the Federal Meat Inspection Act (FMIA) because the regulations were promulgated for the unlawful purpose of promoting a market for uncured products, thus favoring one class of producers over another, and because the "similarity" requirement constituted an improper subjective Standard of Identity, rather than an objective recipe. The district court agreed with the challengers and permanently enjoined implementation of the regulation. After expedited briefing and argument, the Eighth Circuit has just reversed. Accepting the government's arguments, the court held that the Secretary carefully considered the dangers of botulism, the handling practices necessary to assure safety, alternative preservatives to nitrites and the effect of the labeling requirement; thus the regulations were not arbitrary or capricious. The court also held that

the producers of nitrite-free products have no right tc be free from competition that receives aid or encouragement from the government, and that the "similarity" requirement was rationally related to the purposes of the FMIA and of "Standards of Identity," particularly that of promoting truthful labeling, and would not be invalidated merely because it was "subjective."

Attorney: Susan Chalker (Civil Division)
FTS 633-4795

Revis v. Laird, No. 78-1948 (September 15, 1980) D.J. # 170-11E-6

CIVIL RIGHTS; TITLE VII COVERAGE OF FEDERAL EMPLOYEES. NINTH CIRCUIT SETS RULE FOR RETROACTIVE APPLICATION OF TITLE VII TO DISCRIMINATION CLAIMS BY FEDERAL EMPLOYEES

Plaintiff, a Mexican-American, filed an administrative claim of racial discrimination against his employer, the Air Force, in August, 1970. His Civil Service remedies were exhausted in November, 1971, when the Commission notified him of its finding of no discrimination. Four months later, Congress amended the Civil Rights Act of 1964 to extend Title VII coverage to federal employees. Plaintiff filed this action under Title VII and 42 U.S.C. § 1981. The district court entered summary judgment for the government, holding that Title VII could not be applied here retroactively and that plaintiff's Section 1981 claim had been fully and fairly considered at the administrative level, so as to require no further judicial exploration under the standard of review set by Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974).

The Ninth Circuit affirmed the district court, holding that Title VII will apply retroactively only to federal employee claims that were pending either administratively or judicially on the date that the extension of Title VII was enacted. The court also reaffirmed its Bowers standard of review for Section 1981 claims, concluding that the trial de novo requirement of Chandler v. Roudebush, 425 U.S. 840 (1976), was confined to Title VII claims.

Attorney: Jan Pack (Civil Division)
FTS 633-3953

Joslyn N. Williams v. Daniel J. Boorstin, No. 79-1684 (October 3, 1980) D.J. # 170-16-53

CIVIL RIGHTS: PRIMA FACIE CASE OF DISCRIMINATION. D.C. CIRCUIT CLARIFIES ELEMENTS OF PRIMA FACIE CASE IN TITLE VII ACTION

This case involves a Library of Congress employee who engaged in a masquerade as a purported law student, applicant for the bar, then lawyer in order to obtain and keep a job where specific qualifications called for a lawyer. Williams became a prominent employee; in fact, he worked as general counsel of a labor union. His deception exposed, he was discharged, and then brought this Title VII suit alleging that he was fired in retaliation for his efforts to expose racial discrimination at the Library.

The district court found a Title VII violation because the decision to terminate Williams was significantly influenced by his activities as a union leader and was motivated in substantial part by hostile management reaction to his leadership of minority employees' protests against discrimination. The court concluded that it would have required "saintly discipline" for Library officials not to be influenced by Williams' activites.

The district court, however, refused to reward Williams and thus denied him any relief. Instead, the court ordered the Library to establish and fund a plan for the benefit of other Library employees with bona fide discrimination grievances. Congress then prohibited the use of appropriated funds to comply with the court's order.

On the government's appeal, the D.C. Circuit reversed on the ground that the district court's decision is inconsistent with the standards set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973). The court first held that the sequence of proof established in McDonnell Douglas applies where, as here, an employer discharges an employee who has engaged in activities fighting discrimination. The court then held that plaintiff could not establish a prima facie case because he was not qualified for the job which he held. The court also found that even if plaintiff did make out a prima facie case, the Library would still prevail because of the "but for" test; plaintiff would have lost his job absent any retaliation for his participation in protected conduct.

Attorney: Mark N. Mutterperl (Civil Division)
FTS 633-3424

Marshall v. Wait, No. 78-2345 (September 29, 1980) D.J. # 23645-220

MINE SAFETY ACT WARRANTS. NINTH CIRCUIT REQUIRES WARRANT FOR ADMINISTRATIVE SAFETY SEARCHES OF A SMALL MINE

This case involves a challenge to the safety inspection sections of the Mine Safety Act which provide that the Labor Department is to conduct safety inspections of all mines without the need for warrants. The Mine involved is a decorative rock quarry in Northern California operated by the owner and his wife. After the owner refused admission to federal inspectors, the Labor Department sought and gained an injunction from the district court to prevent the mine operator from hindering an inspection. The mine owner appealed and the government argued that no warrant was necessary because mining is a "pervasively regulated" industry and that a warrantless inspection therefore is reasonable. In a narrow opinion, the Ninth Circuit has reversed and found that a warrant is necessary. The court seems to limit its decision to only small owner operated mines, without employees, which produce only decorative rock, and which have been in operation for decades before the pervasive federal regulation began. Although the court did not say so, it apparently found the Mine Safety Act unconstitutional because the Act clearly authorizes warrantless inspections, and the court found that the mine at issue was indeed covered by the Act. This decision is squarely in conflict with decisions from the Third, Fifth and Sixth Circuits.

Attorney: Douglas N. Letter (Civil Division)
FTS 633-3427

Hansen v. HEW, No. 79-6125 (September 16, 1980) D.J. # 137-78-79

SOCIAL SECURITY BENEFITS; ESTOPPEL BASED ON INCORRECT AGENCY ADVICE

HEW denied a portion of plaintiff's claim for social security benefits based on her failure to timely submit a written application. On appeal to the Second Circuit, the panel (per Oakes and Newman, JJ.) held that HEW was estopped from withholding those benefits because plaintiff had relied on the incorrect advice of a claim officer concerning her eligibility as the basis for failing to submit the application. In so ruling the panel -- over a strong dissent by Judge Friendly -- significantly expanded the application of the equitable estoppel doctrine against the federal government.

The government's petition for rehearing en banc has been denied on an equally divided vote of the Court's ten active Judges. This case presents a square conflict with recent decisions of the Seventh and Eighth Circuits, and certiorari is being considered.

Attorney: Mark H. Gallant (Civil Division)
FTS 633-5108

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

Colville Confederated Tribes, et al. v. Walton, et al., ____ F.2d ____, Nos. 79-4979, 4309, 4383 (9th Cir., August 20, 1980). DJ 90-2-2-168

Indians; Water Rights

This action arose out of a water rights dispute between the Colville Confederated Tribes and a non-Indian who purchased Indian allotments on the Colville Reservation in Washington State. Affirming the district court, the court of appeals held, first, that a non-Indian purchaser of an Indian allotment does not acquire any portion of any Indian reserved water rights. Second, the court held that the State has jurisdiction to regulate the apportionment of nonreserved waters among non-Indians on the reservation. Third, the court ruled that where a reserved water right is found to have been created to serve a specific purpose, the Indians may change the intended use and devote the same quantity of reserved waters to a different purpose. Finally, the court held that, as the federal government was supplying the Indians with fingerlings from a hatchery, the Tribe did not presently require a reserved water right for fish spawning purposes. The Waltons are seeking in banc rehearing.

Attorneys: Deputy Assistant Attorney General Sanford Sagalkin, Larry A. Boggs and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2719/2731

Natural Resources Defense Council v. Munro, ____ F.2d ____, No. 78-2014 (9th Cir., August 25, 1980) DJ 90-1-4-1170

National Environmental Policy Act of 1969; Phase 2 power development plan requires an EIS

The district court held that the Bonneville Power Administration could not take any action with respect to "Phase 2" of the Hydro-Thermal Power Program (a long-range plan designed to meet the Pacific Northwest's forecasted energy needs) until it filed an EIS. On appeal, the Ninth Circuit noted that BPA was preparing such an EIS, and that the government had conceded that the court's subsequent

decision in Port of Astoria v. Hodel, 595 F.2d 467 (1979), holding that an EIS was required, mandated affirmance. As to whether the district court's injunction prevents BPA from taking routine actions to supply its customers with power, the court of appeals noted that BPA had failed to show any specific improper inhibitions caused by the injunction, which had been framed after consultation among all the parties. In addition, the district court has retained jurisdiction until completion of the EIS. The court could modify the injunction (and has at least once done so), and its decisions are subject to review.

Attorneys: Assistant United States Attorney Thomas C. Lee, D. Ore., FTS 423-2153; Larry G. Gutterridge and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2762

Matter of Land Cases Filed Under the Provisions of the Omnibus Territories Act of 1977 (The Guam Cases), ____ F.2d ____, No. 80-8094 (9th Cir., Aug. 28, 1980) DJ 90-1-5-1788

Omnibus Territories Act of 1977

The court of appeals denied, without opinion the United States' petition for an interlocutory appeal. This case involves upwards of 500 claims brought against the United States for "fair compensation" under Section 204 of the Omnibus Territories Act of 1977, 48 U.S.C. 1424c. The District Court of Guam is the tribunal vested with exclusive original jurisdiction to adjudicate such claims. In a prior interlocutory appeal by the United States, Franquez v. United States, 604 F.2d 1239 (1979), the Ninth Circuit affirmed the district court's order permitting the question of "fair compensation" to be tried to a jury, leaving the question of liability to be judge-tried. The interlocutory order involved in the instant case set the procedural sequence so that the receipt of jury verdicts determining "fair compensation" would precede the judge's determination on whether the government was liable to pay it. The government contested this procedural sequence, contending that it violated the relevant statute, prejudiced its defenses to the claims, and was an abuse of discretion.

Attorneys: Dirk D. Snel and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-4400/2731

City of Jackson, Mississippi v. Filtrol Corp., ____ F.2d ____, No. 78-3006 (5th Cir., August 29, 1980) DJ 90-5-1-2-44

Contracts; exculpatory clause; civil procedure; directed verdict improper

This is a diversity action by the City of Jackson, which held an EPA sewer grant, to recover the unexpected extra costs of construction of the funded sewer, which it incurred as a result of acid ground water pollution conditions. Acid seepage from Filtrol Corp.'s holding ponds allegedly caused the ground water pollution. The damage to the sewer line occurred in a right-of-way acquired from Filtrol, and an adjacent right-of-way. The government assigned its share in the cause of action (based on EPA's role as grantor) to the City in return for a share in any recovery, but the district court held that the United States was a necessary party. The district court granted Filtrol's motion for a directed verdict on various grounds, including caveat emptor, an indemnity provision in the grant of the Filtrol right-of-way, the "prior trespass" doctrine, contributory negligence, and defects in the City's title to its sewer easements. On appeal, the Fifth Circuit upheld the exculpatory indemnity clause as sufficient to insulate Filtrol from liability as to damage occurring on the Filtrol easement, but rejected all of Filtrol's legal defenses as to the damage occurring on the adjacent property. The court held that irrespective of whether the adjacent property was contaminated with acid before the City acquired its easement, Filtrol was strictly liable to the City for the extra construction costs resulting from acid contamination of the ground water attributable to Filtrol. The directed verdict was accordingly held erroneous, and the case remanded for retrial on the factual question of infliction of damage.

Attorneys: Joshua I. Schwartz; Carl Strass, and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2754/5244/2813

Daniels v. Andrus, ____ F.2d ____, No. 79-4549 (9th Cir., September 12, 1980) DJ 90-2-2-176

Indians; district court did not abuse its discretion when it refused to invalidate a referendum

Several Indians brought this action alleging that the termination of their rancheria violated the California

Rancheria Act. We conceded the invalidity of the termination and the district court ordered BIA to conduct a referendum in which the Indians voted to return title to all community property to the United States to be held in trust. Despite the result of the referendum, the Association (which was established after termination to administer community property) refused to recover the property to the United States. As a result we obtained an order under Rule 70, Fed. R. Civ. P., to accomplish the reconveyance. The Association, a defendant in the original suit, appealed the order on the grounds of the invalidity of the referendum and the denial of due process in the district court's grant of the Rule 70 motion. Since the Association had failed to appeal the original judgment calling for the referendum, the court of appeals treated the Association's present appeal as one from a Rule 60(b) motion and affirmed due to the lack of showing that the district court had abused its discretion in refusing to invalidate the referendum.

Attorneys: Jerry Jackson and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2772/2731

The Detroit Edison Company, et al. v. Nuclear Regulatory Commission and the United States, ____ F.2d ____, Nos. 78-3187 and 3196 (6th Cir., September 5, 1980) DJ 90-14-1824

Nuclear Energy; NRC has authority to condition nuclear power plant licenses to environmentally sound routes

In this petition for review, the Sixth Circuit upheld the NRC's authority to assert jurisdiction over off-site transmission lines and to condition nuclear power plant licenses on environmentally sound routing of transmission lines. The court held that Section 101 of the Atomic Energy Act authorizes the Commission to define transmission lines as part of the "utilization facility" subject to regulation. It also ruled that nothing in the Atomic Energy Act conflicts with the Commission's environmental evaluation of off-site transmission lines as part of the Commission's implementation of NEPA.

Attorneys: NRC Staff; Anne S. Almy and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-4427/2731

Motor Vehicle Manufacturers Association of the United States v. Costle, ____ F.2d ____, No. 80-1591 (6th Cir., September 19, 1980) DJ 90-5-2-1-386

Clean Air Act; Jurisdiction to enjoin EPA's regulations for emission control systems performance warranties held lacking

Following a hearing on the government's motion for summary reversal, the Sixth Circuit granted summary reversal and ruled that the district court lacked jurisdiction to enjoin EPA's regulations setting forth requirements for emission control system performance warranties under Section 207(b) of the Clean Air Act.

Attorneys: Michael A. McCord and Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 633-2774/2748

Park County, Montana v. United States, ____ F.2d ____, No. 78-1930 (9th Cir., August 29, 1980) DJ 90-1-5-1663

Quiet Title Act; 12-year statute of limitations bars suit against the United States

The Ninth Circuit affirmed the district court judgment which had denied the plaintiffs-two Montana counties--any relief in their suit to quiet title to a national forest trail which they claimed was actually a county right-of-way. The district court had ruled that the counties' suit was barred by the 12-year statute of limitations under the Quiet Title Act because the counties should have known of the adverse claim of the United States at least by 1962 when the United States installed a sign alongside the trail closing it to motor vehicle traffic. On appeal, the Ninth Circuit ruled that the statute of limitations under the Quiet Title Act applied to the counties even though they are political subdivisions of the state, a separate sovereign, and that the facts were sufficient to invoke the statute of limitations.

Attorneys: Michael A. McCord and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2774/2813

Russ v. Wilkins, ____ F.2d ____, No. 76-2776 (9th Cir., August 1, 1980) DJ 90-6-0-9

Indians; Reservation found not disestablished by 1890 Act

In a split decision, the Ninth Circuit reversed the district court judgment and ruled that a portion of the Round Valley Indian Reservation in California had been disestablished by an 1890 statute. The case arose when two members of the Covello Indian Community were arrested by a state game warden for killing a deer on land which they claimed was within the reservation's boundaries. The Indians then brought an action in trover to recover damages for the value of the deer. The district court ruled that the previous reservation boundaries had not been altered by the 1890 statute and that Congress had only intended by that Act to open a portion of the reservation to sale to non-Indians. Although the district court concluded the issue was not free from doubt, it could find no clearly expressed intent to alter the reservation boundaries. On appeal, the panel majority reviewed the text and legislative history of the 1890 Act and the General Allotment Act and concluded that Congress had intended to alter the reservation boundaries. The dissenting judge believed that the evidence was insufficient to overcome the presumption favoring the Indians.

Attorneys: Michael A. McCord and Carl Strass
(Land and Natural Resources Division)
FTS 633-2174/5244

Environmental Defense Fund v. Costle, ____ F.2d ____, Nos. 79-1473 et seq. (D.C. Cir., September 15, 1980) DJ 90-5-1-5-23

Settlement agreement approved

In a 59-page opinion, the court of appeals affirmed the district court judgment approving certain modifications to a settlement agreement but remanded the case to the district court for consideration of an issue which was raised for the first time at oral argument. EDF and other environmental groups had brought suit against EPA in 1973 and 1975 to force it to promulgate various regulations under the FWPCA dealing with toxic pollutants and to alter its criteria for listing toxic pollutants. Several industry groups subsequently intervened. The suits resulted in a settlement agreement between the environmental groups and EPA whereby EPA agreed

to promulgate various toxic pollutant regulations pursuant to a phased schedule. The district court adopted the settlement agreement despite objections from the intervening industry groups. However, in 1978 the environmental groups moved for an order to show cause why the Administrator should not be held in contempt for failure to meet the deadlines set forth in the settlement agreement. The industry groups subsequently moved to vacate the settlement agreement, arguing that Congress had superseded the settlement agreement by passage of the 1977 Amendments to the Clean Water Act and that the cases were therefore moot. Following negotiations between EPA and the environmental groups, those parties agreed to amend the original settlement agreement to commit EPA to promulgate regulations according to a new timetable and to use certain investigatory techniques in promulgating the regulations. The district court denied the industry groups' motion to vacate the settlement agreement and granted EPA's and EDF's joint motion to modify the settlement agreement. The industry groups appealed. On appeal, the D.C. Circuit ruled that: (1) the 1977 Amendments to the Clean Water Act did not supersede the original settlement agreement; (2) the cases were not otherwise moot; (3) EPA had not contravened the public notice and comment provisions of the APA or the Clean Water Act since the modifications to the settlement agreement did not constitute rulemaking; and (4) the EPA procedures had not denied due process to the industry groups. However, at oral argument the court itself raised the issue of whether the modified settlement agreement impermissibly infringes on the discretion Congress committed to the Administrator under the Clean Water Act. Since that issue had not been previously addressed, the court of appeals remanded the case to the district court for consideration of that sole issue.

Attorneys: EPA staff; Michael A. McCord and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2774/2762

United States v. 60.22 Acres in Klickitat County, Wash. (Dickey Farms), ____ F.2d ____, No. 78-1132 (9th Cir., September 5, 1980) DJ 33-49-93-96

Condemnation; Extent of government's original taking established

The United States had condemned a flowage easement over the subject land in 1938. It condemned a flowage easement in

the same area in 1975, and the question arose whether the 1938 action had already taken the easement requested in the 1975 action. The particular question was the height of the 1938 easement. The landowners claimed that that easement went only to 83.9 feet above mean sea level. The government claimed that the 1938 easement extended to 96 feet above mean sea level. The district court sided with the landowners. On appeal, in a published opinion, the court of appeals agreed that the clear language of the 1938 judgment, and the (partial) record of the 1938 proceedings, established that the government had taken up to 96 feet in that action.

Attorneys: Edward J. Shawaker and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2813/2762

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

OCTOBER 1, 1980 - OCTOBER 14, 1980

Recess. Both the House and Senate recessed on October 2, 1980 and will reconvene on November 12, 1980.

Attorney Fees. On October 1, the House agreed to the conference report on H.R. 5612, the Small Business Minority Contracting bill. Included as title II of the bill was the House Judiciary Committee version of S. 265, the Equal Access to Justice Act, which the Department of Justice has long opposed. The Senate also agreed to the conference report on October 1, and the measure is now on its way to the President.

Despite the Department's vigorous opposition to the Equal Access bill, and a probable veto recommendation from us, it is unlikely that the President will veto a bill giving aid to minority small businesses. The Department will, if necessary, cooperate with OMB to draft a signing statement which would be of assistance in future litigation under the Equal Access Act.

Court of Appeals for the Federal Circuit. Staffers negotiated away the differences in the respective versions of this legislation. (H.R. 3806, the House version, had passed in September; S. 1477, the broader Senate version - including the Bumpers amendment -- had passed last year.) The negotiated bill went to the Senate floor on September 30 without the Bumpers amendment. Bumpers attempted to attach his amendment once again. With White House assistance, the Department managed to get the bill pulled from the Senate floor and it appears to be dead for the 96th Congress.

Judicial Discipline. On September 30, the Senate passed a compromise version of S. 1873, the judicial discipline bill. The House also passed the bill on October 1.

The Department of Justice has long advocated judicial discipline legislation and the compromise version is acceptable.

Court of Appeals for the Fifth Circuit Split. On October 1, both Houses passed legislation to divide the United States Court of Appeals for the Fifth Circuit, sending the measure to the President for signature.

The Department supports this legislation.

Stanford Daily. The Conference report on this bill, S. 1790, passed the Senate on Monday, September 29, and passed the House on Wednesday, October 1. The final version of the bill contains the House guidelines language and the Senate remedies language with punitive damages against the government eliminated. Also, the bill contains language prohibiting the use of the exclusionary rule as a remedy for violations of the act or its

guidelines.

Office of Alien Property. H.R. 7729, the bill to eliminate the Office of Alien Property passed the House under suspension of the rules on September 30, 1980 by a voice vote. The Senate did not have time to consider the measure before recessing. Easy passage in the Senate is expected in November.

Mental Health Systems. This legislation, S. 1177, as originally passed by the Senate, did contain language limiting access to patient records, but the final version of the bill as passed by both House and Senate this week does not contain any such language, so will not pose any problems for government investigators. The Department of Justice has urged deletion of this section in favor of a single, uniform system of regulations for government access such as that contained in the Medical Records Privacy bill.

Paperwork "Reduction" Act. S. 1411 failed to pass the Senate before the recess. A compromise to the ADP problem was worked out at the last minute among Jackson, Chiles and Brooks and the members of the Senate Intelligence Committee removed their holds. However, new holds were put on by Republican Senators who did not want to see President Carter sign a bill before the election that alleges to reduce paperwork.

Motor Vehicle Theft. On September 25, 1980, the House Interstate and Foreign Commerce Committee reported out H.R. 4178, the Motor Vehicle Theft Act (22-1). The final version contains a 5 year sunset provision and a legislative veto. House floor action is not scheduled, however, the bill could come to a vote during the post-election session. Quick approval is expected in the Senate assuming the House passes the bill.

Amendments to 6103 of the Internal Revenue Code. The Treasury-Postal Service Appropriations bill, which contains provisions authorizing the IRS to go to Court to get non-tax related crime information released to the Department of Justice, is not scheduled to come up before the full Senate until the post-election session.

Pretrial Services. On September 30, 1980, the Senate passed S. 2705, Senator DeConcini's Pretrial Services bill which creates a statute establishing pretrial diversion requirements. The Department of Justice is opposed to statutory requirements because the current, administratively run program, works effectively and continued expansion and experimentation of the program would be restricted. The House bill, which failed on a suspension vote and is awaiting a rule, does not create a pretrial diversion statute. If the House bill passes this session the establishment of a pretrial diversion statute would have to be resolved at conference.

Consumer Product Safety Commission Post Employment Restrictions. The Congress passed H.R. 6395, which amends §2053 of Title 18, U.S.C., to eliminate an existing provision applicable to all Consumer Product Safety Commission employees serving at the GS-14 level or above which prohibits such employees for a period of twelve months after terminating employment

with the Commission from accepting employment or compensation from any manufacturer subject to the Consumer Product Safety Act. The Department of Justice supports enactment of this legislation and the President is expected to sign it into law.

Applicability of the Right to Financial Privacy Act of 1978 to the SEC. The Congress passed H.R. 7939, to amend the Securities Investor Protection Act to increase the amount of protection available under such act to customers of brokers and dealers, and to provide for the applicability of the Right to Financial Privacy Act of 1978 to the SEC.

The Department of Justice has no objection to this bill and the President is expected to sign it into law.

Railroad Deregulation. The rail deregulation bill awaits the President's signature, the conference bill having passed the House and Senate on September 30, 1980. The bill as passed did not contain what was considered a non-controversial provision of the House version - placing the Attorney General on the Board of Directors of the United States Railway Association (USRA). The USRA is involved in a highly publicized "valuation case" which has the potential of costing the United States Government millions, if not billions of dollars. Because of its very small part in the overall railroad deregulation legislation, it is not readily apparent why the provision was removed in conference.

Custom Court. The Custom Court bill is now an enrolled bill. This legislation was one of the Department's priorities before the 96th Congress and sets up a comprehensive scheme of judicial review of civil actions arising out of import transactions and federal statutes affecting international trade.

Remaining in the bill was a political affiliation test in the selection of judges in the new Court of International Trade. This was the price that was paid in order for the bill to pass before the recess, and perhaps this year.

Inspector General. The House Committee on Governmental Operations has filed its report on H.R. 7893, the Inspector General Amendments Act of 1980. The legislation places an Inspector General in the Department of Justice in the worst possible form with the broadest possible power to do the greatest amount of mischief.

It is expected that Congressman Brooks will push very hard in any post-election session to pass H.R. 7893 in the House. Senator Eagleton's staff appear to have a more reasonable attitude toward the problem but basically favors an Inspector General in some form.

DOJ Appropriations. The State/Justice/Commerce and Judiciary appropriations bill for FY 1981, H.R. 7584, was considered on the Senate floor at various times on September 24, 25 and 26, but was pulled from the calendar before any vote on final passage was taken. Unfortunately, there

was ample time for much senatorial mischief-making before the bill was pulled.

During floor consideration of H.R. 7584, the Senate restored most of the pernicious House amendments that had been deleted by the Senate Appropriations Subcommittee. These amendments included the items prohibiting the Legal Services Corporation from providing legal assistance to illegal aliens or "in promoting, defending, or protecting homosexuality"; the legislative veto device prohibiting the expenditure of funds to implement regulations disapproved by a congressional veto (approved 85 to 7); a new variant of the "year-end spending spree" limitations on government spending; and the Collins anti-busing amendment (49 to 42 vote).

Representative Collins' anti-busing amendment, offered by Senator Thurmond in the Senate floor, would prohibit funding of any Department action to require "directly or indirectly" the busing of any student to a school other than the school nearest the student's home. The amendment has passed the House on previous occasions but was always defeated in the Senate. This year 13 Senators who had previously opposed the amendment switched to the other side.

Senator Weicker counterattached by offering an amendment providing that the Collins language could not "be interpreted to prevent the Department...from initiating or participating in litigation to secure remedies for violations of the fifth or fourteenth amendments..." The Weicker amendment was supported by a healthy majority in two procedural votes. Sensing a protracted effort by Senator Helms and other anti-busing advocates to avoid a final vote on the Weicker amendment, Majority Leader Byrd pulled H.R. 7584 off the floor so the Senate could dispose of less controversial matters in the little time remaining before the elections recess.

Graymail. S. 1482, legislation to provide judicial procedures for the handling of classified information in criminal cases involving intelligence matters (the so-called "graymail" proposal), was approved by both Houses and cleared by the President. The differences between the House and Senate versions of the legislation were so minor that the designated conferees signed a "conference report" on an approved compromise bill without ever actually meeting as a conference Committee.

Telecommunications. On September 30, 1980, the House Judiciary Committee, by voice vote, voted to report "adversely without prejudice" H.R. 6121 (Telecommunications Act of 1980).

The debate at the full Committee markup indicated that the Committee believed that there was not enough time to adequately consider the antitrust consequences of the bill (the House Judiciary Committee's Sequential referral jurisdiction expired on October 1), yet the Committee would not be opposed to some form of deregulation measure in the next Congress.

Commission on International Antitrust Law. The Senate passed by voice vote S.1010, with amendments on September 30, 1980. The bill would establish a Commission to assess the effects of U.S. antitrust laws on international trade.

The twelve-month, eighteen-member commission appointed by the President would consist of: the Vice President (who would act as Chairman), the Assistant Attorney General for the Antitrust Division, the Chairman of the Federal Trade Commission, the Legal Advisor of the Department of State, the Chairman of the Antitrust Monopoly and Business Rights Subcommittee of the Senate Judiciary Committee, one Senator recommended by the Senate Majority Leader, two Senators recommended by the Senate Minority Leader, the Chairman of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee, three members of the House recommended by the Speaker, and six members from the private sector.

The Commission's general task would be to conduct a study of the international aspects of the United States antitrust laws and to report its findings to the President and the Congress. The Commission would examine the effect of the U.S. antitrust laws on the ability of U.S. enterprises to compete effectively abroad, sovereign immunity, the act of state doctrine, the defense of "foreign sovereign compulsion," the difficulties of enforcing U.S. court orders extraterritorially, and problems relating to reciprocal enforcement of antitrust laws between nations.

The Department of Justice has opposed S. 1010. At a hearing before the Senate Government Affairs Committee on October 31, 1979, Ky P. Ewing, Deputy Assistant Attorney General, Antitrust Division, testified that the Department questioned the usefulness of creating such a study commission since the proposed study would be largely duplicative of other ongoing studies and review processes. Ewing also testified that enforcement of the antitrust laws is not an inhibitor of foreign trade.

The bill has been referred to the House Judiciary Committee.

Omnibus Judicial Redistricting. On September 30, the House passed H.R. 8178, an omnibus judicial redistricting bill. Included in H.R. 8178 is the Department's proposal to place the Federal Correctional Institution at Butner, North Carolina, in one judicial district. The Senate passed the bill on October 1, sending the measure to the President for signature.

Immigration. The INS Efficiency bill, H.R. 7273 and H.R. 8115, relating to vehicle seizure by INS, will be on the House Suspension Calendar during the post-election session.

Due to the delay in taking up H.R. 7273, we urged Chairman Rodino to introduce a separate bill, a Vehicle Forfeiture and Seizure bill - which he did, H.R. 8115. While H.R. 8115 was reported out of the Committee, it was not taken up on the floor before recess.

In the post-election session, we will have to urge swift passage of one

of the above depending on which appears to have the best chance of the swiftest passage.

VOL. 28 October 24, 1980 NO. 22

Federal Rules of Evidence

Rule 615. Exclusion of Witnesses.

At defendant's trial for raping his former wife's daughter, the only witnesses against him were the 13 year old prosecutrix and her mother. When the prosecutrix was called as the Government's first witness, the defense requested sequestration of the mother. This request was denied, and the defense did not argue any further or bring up the issue again at trial. On appeal, defendant contended that, under Rule 615, sequestration of a witness is mandatory when a party makes a request, and that the court's failure to sequester the mother in this case was reversible error even absent a showing of prejudice.

The Court noted that the mandatory language of Rule 615 was intended to change the prior practice under which the trial court had discretion to determine whether a witness should be excluded, but did not read the rule to require reversal in every instance in which the rule was not fully complied with. The Court held that the failure to sequester witnesses is not, in itself, grounds for reversal unless the defendant can show prejudice resulting from the failure to sequester.

The Court also noted that the defense had failed to call Rule 615 to the court's attention at the time of the sequestration request, and had never informed the court of its theory that sequestration of the mother was necessary because of the defense contention that the claim of rape was prefabricated by the mother for some other purpose, and expressed the view that a trial court should not be reversed on grounds that were never urged or argued in the court below.

Finding that the defendant failed to show any prejudice arising from the trial court's refusal to sequester, the Court affirmed the conviction.

(Affirmed.)

Government of the Virgin Islands v. Edmund Edinborough, 625 F.2d 472 (3rd Cir. June 9, 1980)

VOL. 28 October 24, 1980 NO. 22

Federal Rules of Criminal Procedure

Rule 11. Pleas.

At her probation revocation hearing, the defendant admitted, through counsel, having violated one of the conditions of her probation. Appealing revocation, the defendant contended that the court erred in failing to address her personally to make an on-the-record determination that she understood what rights she was waiving when she admitted that she violated one of the conditions of her probation, essentially asking that the protections afforded to criminal defendants by Rule 11 be applied to defendants who admit to probation violations at probation revocation hearings.

Agreeing with the Ninth Circuit's ruling that Rule 11 is inapplicable in probation revocation proceedings, United States v. Segal, 549 F.2d 1380 (9th Cir. 1977), and noting the Supreme Court's holding that "probation revocation. . . is not a stage of a criminal prosecution," Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), the Court held that Rule 11 was inapplicable to the defendant's probation revocation hearing, since the defendant here did not plead guilty to a criminal charge, and since her admission was not a "functional guilty plea" because she faced no additional punishment or sentencing beyond that imposed upon her conviction.

(Affirmed.)

United States v. Peggy Jane Johns, 625 F.2d 1175 (5th Cir. September 15, 1980)