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POINTS TO REMEMBER

COMMITMENTS OF DEFENDANTS TO FEDERAL CUSTODY TO DETERMINE COMPETENCY TO STAND TRIAL UNDER TITLE 18 UNITED STATES CODE, SECTION 4244

The policy of the Department with regard to pretrial examinations to determine competency to stand trial was enunciated in DJ Memorandum No. 534, January 16, 1968, and repeated in 20 United States Attorneys' Bulletin 513, 22 United States Attorneys' Bulletin 407, and on pages 50-55 of the United States Attorneys' Manual. In sum, that policy is that "only in exceptional circumstances should defendants be committed to Federal custody for such examinations."

One exceptional circumstance, noted in a previous issue of this bulletin, is the examination of a person charged with making threats against the President in violation of 18 U.S.C. 871. Notice should now be taken of another similarly sensitive area. In 1972 Congress enacted legislation entitled "an Act for the protection of Foreign Officials and Official Guests," 86 Stat. 1071 (Title 18, United States Code, Sections 112, 970, 1116, and 1201). Persons charged with violations of this act, or related conspiracies or attempts against the person of a foreign official or the property of a foreign government, who are to undergo mental examination should ordinarily be committed to Federal custody for examination at the Medical Center for Federal Prisoners, Springfield, Missouri.

(Criminal Division)

POINTS TO REMEMBER

Plea Bargaining and Dismissals in Criminal Cases

Although United States Attorneys have wide discretion in dismissing charges or negotiating guilty pleas in criminal cases (See U. S. Attorneys' Manual, Title 2, pages 22-28), this power should be exercised only after appropriate consultation with the Federal investigative agency involved.

Recently, in one highly publicized case, a bank robber kept the robber proceeds without spending them. Later, when it became clear that the evidence was insufficient to convict him for robbery, he pled guilty to one robbery count with the understanding that if he returned the unspent proceeds, a suspended sentence would be recommended. Such a transaction, in which proceeds are exchanged for freedom should be avoided whenever possible.

Therefore, when lack of evidence makes plea bargaining or a dismissal likely, remember to check with the investigative agency concerned to determine whether or not further investigation would be likely to fortify the case against the defendant. In dismissals, such consultation with the investigative agency should come before any Form 900 (authorization for dismissal of indictment and information) is submitted to the Criminal Division for approval.

(Criminal Division)

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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

INDICTMENT AND COMPLAINT ALLEGING VIOLATION OF SECTION I OF THE SHERMAN ACT IN THE DYE INDUSTRY.

United States v. E. I. du Pont de Nemours and Company, et al., (Cr. 74-279; July 18, 1974; DJ 60-112-7)

United States v. E. I. du Pont de Nemours and Company, et al., (Civ. 74-1086; July 18, 1974; DJ 60-112-8)

On July 18, 1974, a federal grand jury in Newark, New Jersey, returned a one-count indictment charging nine companies with conspiring to fix, raise and maintain the prices of dyes. A companion civil complaint was also filed on the same day seeking injunctive relief against the nine corporate defendants.

Named as defendants in the indictment are: E. I. du Pont de Nemours and Company of Wilmington, Delaware; Verona Corporation of Union, New Jersey; Allied Chemical Corporation of Morristown, New Jersey; American Color and Chemical Corporation of Paterson, New Jersey; American Cyanamid Company of Wayne, New Jersey; BASF Wyandotte Corporation of Parsippany, New Jersey; CIBA-GEIGY Corporation of Ardsley, New York; Crompton & Knowles Corporation of New York, New York; and GAF Corporation of New York, New York.

Both the indictment and civil complaint charge the defendants and unnamed co-conspirators with engaging in a combination and conspiracy, in violation of Section 1 of the Sherman Act, beginning sometime early in 1970 and continuing thereafter, the substantial term of which was to fix, raise and maintain dye prices.

The indictment charges that the nine defendants, either directly or through affiliated corporations, have engaged in the manufacture and sale of dyestuffs in interstate commerce, and in 1971 accounted for approximately $300 million or some 60 percent of total dye sales in the United States.

The indictment and complaint allege that in formulating and effecting the conspiracy, the defendants and co-conspirators did the following:

(a) beginning in 1970, officials of defendant du Pont undertook discussions of a proposed across-the-board increase in the price of dyes with each of the other defendants, at various times and places, and sought the reaction of each with respect to the proposed increase;

(b) by the end of 1970, defendant du Pont had received reactions from the other defendants indicating that a price increase would be followed and accordingly, on January 7, 1971, defendant du Pont announced a ten percent across-the-board increase in the price of dyes to become effective on March 1, 1971; and

(c) between January 12, 1971, and February 1, 1971, each of the other defendants announced price increases, effective March 1, 1971, which were substantially the same as those of the defendant du Pont.

Staff: Donald Ferguson, Philip F. Cody and Melvin Lublinski (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Carla A. Hills

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

NINTH CIRCUIT HOLDS THAT THE UNITED STATES IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT IN CONNECTION WITH THE MORTGAGE INSURANCE PROGRAM OF 12 U.S.C. 1715(l).

Moon v. Takisaki (C.A. 9, No. 73-3711; D.J. 157-82-584).

Plaintiff purchased rehabilitated property, and gave a mortgage which was insured by the FHA under 12 U.S.C. 1715(l). When she failed to make the mortgage payments the mortgagor and the United States threatened foreclosure. After a suit by plaintiff against the United States in state court had been removed to the federal court and dismissed as an unconsented suit, plaintiff filed this action for damages under the Tort Claims Act. The district court again dismissed the action.

On appeal, the Ninth Circuit affirmed. The plaintiff claimed that the United States was guilty of deceptive practices under the Washington Consumer Protection Act and had induced plaintiff to execute the mortgage without comprehension of the consequences. The court of appeals held this claim to be barred by the "misrepresentation" exception to the Tort Claims Act, 28 U.S.C. 2680(h). Plaintiff also contended that the United States negligently engaged an incompetent contractor to perform the rehabilitation and failed to supervise the work. The Court held, however, that the Secretary is not authorized to undertake or supervise the work and thus owes no duty to the purchasers in that respect.

Staff: Assistant United States Attorney Susan L. Barnes (W. D. Washington)

FREEDOM OF INFORMATION ACT

FOURTH CIRCUIT HOLDS THAT ABANDONED PATENT APPLICATIONS ARE EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT BY VIRTUE OF EXEMPTION 3.

Sears v. Gottschalk (C.A. 4, No. 73-1699; D.J. 145-9-266).

Suing under the Freedom of Information Act (FOI), 5 U.S.C. 552, the plaintiff sought disclosure of all abandoned U. S. patent applications. Abandoned patent applications may contain trade secrets or confidential proprietary material. The request for disclosure was denied, inter alia, on the ground that 35 U.S.C. 122, which provides that an "application for patents, shall be kept in confidence", was a statute specifically exempting material from disclosure within the meaning of Exemption 3 of the FOI Act. The plaintiff contended, in response that if section 122 prevented abandoned patents from being available as prior art, then that section unconstitutionally violated the Patent Clause of Art. I. The district court sustained our contention that the patent applications were exempted from disclosure by section 122 and Exemption 3, and that section 122 was not unconstitutional.

On appeal, the Fourth Circuit affirmed. The court rejected the plaintiff's argument that section 122 applied only to pending patent applications and did not cover abandoned applications. The court then held that section 122 was the type of statute that comes within the purview of Exemption 3. The court ruled that the fact that the Commissioner of Patents had some discretion in permitting disclosure of information contained in the applications did not defeat the view that section 122 is within the scope of Exemption 3. Finally, the Court ruled that the plaintiff's constitutional claims were so insubstantial that a three-judge court was not required.

Staff: Barbara Herwig and Thomas G. Wilson
(Civil Division)

VETERANS REEMPLOYMENT BENEFITS

SEVENTH CIRCUIT HOLDS THAT "SUPPLEMENTAL UNEMPLOYMENT BENEFITS" ARE A FORM OF SENIORITY TO WHICH RETURNING VETERANS ARE AUTOMATICALLY ENTITLED.

Akers v. General Motors Corp. (C.A. 7, No. 73-1781; D.J. 151-26S-520).

General Motors Corporation and the United Auto Workers provided in their collective bargaining agreement that employees laid off from their jobs would receive weekly benefit payments as a supplement to state unemployment compensation. Under the agreement, for each week during which an employee received "any pay" from the company he earned one-half a "SUB" (supplemental unemployment benefit) credit, which he could accumulate to a maximum of 52. In the event he were laid off he received one weekly benefit payment for each SUB credit earned. The agreement expressly provided that SUB credits could not be earned while the employee was in military service.

Under Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. 459 (1970), a veteran returning from military service is entitled, as a matter of law, to be restored to his former job "without loss of seniority." Plaintiff, a returning veteran represented by the United States Attorney pursuant to 50 U.S.C. App. 459(d), brought suit to compel General Motors to award him SUB credits for the time he spent in military service on the ground that such credits were a form of seniority to which he was entitled as a matter of law. The district court held in plaintiff's favor. General Motors appealed, contending that SUB payments were a form of deferred pay for work performed, not seniority, and that since plaintiff had not worked for the company while he was in military service he was not entitled to SUB credits during such service. The Seventh Circuit, however, accepted the Government's argument that SUB credits accrued simply as time passed and not as a function of work performed, and held that such benefits were seniority benefits to which a returning veteran is automatically entitled under the Military Selective Service Act. Accord: Hoffman v. Bethlehem Steel Corp., 477 F. 2d 860 (C.A. 3, 1973).

Staff: Neil S. Koslowe (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

ASSAULTS AGAINST FEDERAL OFFICERS

SPECIAL AGENTS OF DEA ARE WITHIN AMBIT OF STATUTES PROHIBITING ASSAULTS AGAINST OFFICERS OF BNDD.

United States v. Keith Sanford Irick et al. (5th Cir., No. 74-1265, August 5, 1974)

The defendants were indicted for assaulting a special agent of the Drug Enforcement Administration in violation of 18 U.S.C. Sections 111 and 2. Pursuant to a pretrial motion, the trial court dismissed the indictment stating that it was fatally defective because the pertinent statutes, though they encompass assaults on "any officer or employee of the Bureau of Narcotics and Dangerous Drugs," do not specifically refer to the Drug Enforcement Administration, the successor to the Bureau of Narcotics and Dangerous Drugs.

Section 111 of Title 18, United States Code, prohibits, inter alia the forcible assault of "any person designated in (18 U.S.C. Section 1114) while engaged in or on account of the performance of his official duties . . . ." Section 1114 designates several categories of Federal officers and employees. Among the categories designated is the Bureau of Narcotics and Dangerous Drugs, the predecessor of the Drug Enforcement Administration.

The trial court found that an executive reorganization had created the Drug Enforcement Administration as the successor to the Bureau of Narcotics and Dangerous Drugs; however, the court also held that 18 U.S.C. Section 111 does not apply to assaults on Drug Enforcement Administration agents because Congress failed to amend 18 U.S.C. Section 1114 to substitute the Drug Enforcement Administration for the Bureau of Narcotics and Dangerous Drugs.

The Court of Appeals reversed, stating that the trial court erred because it failed to refer to the provisions of 5 U.S.C. Section 907(a). Section 907(a) provides for continuity of status and function in connection with executive reorganizations. The Court of Appeals indicated that, when a reorganization takes place, section 907(a) continues in effect laws existing prior to the reorganization. Under the Court of Appeals' interpretation of section 907(a) any

statute relating to an agency and enacted before the effective date of the reorganization of that agency has the same effect as if there had been no reorganization. Thus, the Court concluded that special agents of the Drug Enforcement Administration fall within the ambit of section 111, by virtue of the provisions of section 1114 in the same manner as did the special agents of the Bureau of Narcotics and Dangerous Drugs.

Staff: Assistant United States Attorney James R. Gough, Chief, Appellate and Civil Rights Section (S.D. Tex.); William L. Patton (Office of the Solicitor General)

INTERCEPTION OF COMMUNICATIONS

United States v. Jeris E. Bragan (4th Cir., July 16, 1974, No. 73-2066)

The defendant, a private detective, was convicted of violating provisions of the Omnibus Crime Control Act pertaining to wiretapping and wiretapping devices, 18 U.S.C. Sections 2511 and 2512. On appeal, defendant's principal assignment of error dealt with the district court's denial of a continuance which he sought for the purpose of substituting counsel more experienced in the law relating to wiretapping. The district court's denial of defendant's motion for separate trial for each of two wiretaps, the admission of the defendant's taped conversations with his accomplices, and the introduction into evidence of the victim's taped conversations, were also assigned as error.

The court of appeals, in affirming, found no abuse of discretion in denying the continuance. In briefly discussing the other assignments of error, the court held that there was no prejudice in the joinder of the offenses as all the evidence admissible in the joint trial would have been admissible in separate trials. Further, the taping of conversations with accomplices, done with their consent was not violative of the Act and the resulting tapes were admissible. Finally, admission of the victim's taped conversations was not precluded by the exclusionary rule in 18 U.S.C. 2516 and consent of the victim distinguishes this case from United States v. Liddy, 354 F.Supp. 217 (D.D.C.), rev'd 12 Cr. L. Rep. 2343 (D.C. Cir., Jan. 19, 1973). Moreover, as the defendant was neither a party to the admitted conversation, nor one against whom the interception was directed, he is not an aggrieved person under

18 U.S.C. Sections 2510(11) and 2518(10)(a) and therefore lacked standing to move for suppression of the tapes of his victim.

Staff: Justin W. Williams, Assistant United States Attorney; James L. Whitten (Criminal Division)

FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED

The Registration Unit of the Criminal Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S.C. 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

AUGUST 1974

During the first half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Charles Robert Irish of Madison, Wisconsin, registered as agent of the Government of the Republic of Zambia, Lusaka. Registrant participated in the negotiation of a proposed double taxation treaty between the United States and Zambia. This activity covered the period from July 8 - July 15, 1974. Compensation received was reimbursement of air fare plus $50 per day for approximately eight days. In addition, registrant served as legal adviser to the Ministry of Planning and Finance, Government of Zambia, from 1972 - 1974. This activity involved a formulation of tax policies with respect to foreign investors.

Loeb, Rhoades & Company of New York City, registered as agent of the Government of Israel. Registrant will assist in the placement of promissory notes for the Government of Israel with institutional investors doing business in the United States. Registrant will undertake to place a $300 million note issue for the foreign principal and upon completion of this placement registrant's fee is to be $500,000 including expenses. John L. Loeb, Henry A. Loeb, Robert A. Barbanell, Dudley F. Cates, William A. Davidson and John A. Sommers filed short-form registrations as partners working on the account. Bernard Berger filed as executive consultant and Peter M. Goldsmith filed as corporate bond research analyst. All report

compensation as approximate share of partnership profits.

Activities by persons or organizations already registered under the Act:

The United States-Japan Trade Council of Washington, D. C. reported the terms if its new agreement with the Japan Trade Promotion Office. Registrant's fee for extensive promotion of U. S. - Japan trade on behalf of the foreign principal is to be $420,016.00 for the period April 1, 1974 to March 31, 1975.

Amtorg Trading Corporation of New York which is the official Soviet purchasing agency in the United States filed exhibits in connection with its representation of V/O Venshtechnika. Registrant is to promote the principals aims within the U. S. which are scientific and technical exchange with foreign countries. Registrant is to receive 1% from the value of all contracts signed by the foreign principal as well as expenditures.

Short-form registrations filed on behalf of persons or organizations already registered:

On behalf of the Bahamas Tourist Office: Thomas E. Godet as representative reporting a salary of $8,000 per year, Andrew P. Scantlebury as representative reporting a salary of $750 per month and Winston D. Munnings as representative reporting a salary of $8,000 per year.

On behalf of the Camara Oficial Espanola de Comercio en Puerto Rico whose foreign principal is the Ministerio de Comercio de Espana, Madrid: Manuel R. Domenech; Santos Andino; Antonio Quintana; Antonio Lopez Granas; Frank Unanue; Salvador Gonzalez; Carlos Ubinas; Manuel Fernandez; Ricardo Viejo and Jose Martin Monasterios. All filed as members of the Board of Directors engaged in the promotion of trade and commerce between Spain and Puerto Rico. No compensation was reported.

On behalf of Culver International, Inc. whose foreign principal is the Korea Trade Promotion Corporation: John Williams Becker as Executive Vice President and Jon L. Plexico as President both are engaged in the promotion of trade on a part-time basis and report as compensation an unspecified portion of their regular annual salary.

On behalf of Tinker, Dodge & Delano, Inc. whose foreign principals are the Government of India Tourist Office and the Australian Tourist Commission: Julius N. Neuberger as advertising-media planner and reporting a salary of $20,500 per year.

On behalf of Pace Advertising Agency, Inc. whose foreign principals are Rapid Advertising Agency, Prague; Ligna Foreign Trade Corporation, Prague; CEDOK-Czechoslovak Travel Bureau and CSA-Czechoslovak Airlines: Betty Vaughn as public relations counsellor engaged in tourist promotion and reporting a salary of $8,000 per year.

On behalf of International Public Relations Co., Ltd. (New York) d/b/a Japan Whaling Information Center: Eli Gabel as public relations counsel engaged in attempting to influence the American public and government officials not to oppose continued commercial whaling by Japan. Mr. Gabel reports a salary of $7,000 per year.

On behalf of Creative Food Service, Inc. whose foreign principal is the New Zealand Meat Producers Board: Gwendolyn Jarrett as Consultant engaged in the promotion of New Zealand Meat in the United States.

On behalf of Sydney Morrell & Co., Inc. whose foreign principal is the Victoria Promotion Committee Trust: Pamela J. Noe engaged in public relations and reporting a salary of $12,000 per year.

On behalf of the Amtorg Trading Corporation of New York which is the official Soviet purchasing agent in the United States: Gennady Borisovich Trukhin as Senior Economist reporting a salary of $655 per month and Alexandre Vasiljevich Samartsev as Senior Engineer reporting a salary of $655 per month.

On behalf of the Chinese Information Service of New York City: Yaotung Chen as Information Officer and Chinese News Editor reporting a salary of $815 per month and Wenshu Han as Assistant Editor reporting a salary of $650 per month.

On behalf of the Finnish National Tourist Office of New York: Raimo Kalevi Lahti as Director reporting a salary of $1,675 per month, Timo Ilmari Paavola as Assistant Director reporting a salary of $1,280 per month and Kirsti Kyllikky Kulmala as Travel Consultant reporting a salary of $638 per month.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURTS OF APPEALS

ENVIRONMENT

NEPA; SEGMENTATION OF PROJECT FOR PURPOSES OF ENVIRONMENTAL IMPACT STATEMENT NOT REQUIRED.

Sierra Club v. Callaway (C.A. 5, No. 73-2745, Aug. 26, 1974, D.J. 90-1-4-380).

The Fifth Circuit reversed a decision of the district court permanently enjoining the Corps of Engineers from constructing the Trinity River Project and from continuing with the construction of the Wallisville Project in Texas pending further orders of the court. The injunction had been based on the Corps' alleged failure to comply with NEPA.

The court first held that the "rule against segmentation for EIS purposes" is not absolute. In the instant case, the court found that the district judge erred in requiring an EIS for the entire Trinity River Project as a condition precedent to an EIS for Wallisville. Wallisville is not a mere component or first segment of Trinity.

Second, it was error for the district court to require that the revised Wallisville EIS and the Trinity EIS be submitted to Congress, the CEQ, and other appropriate agencies for full review and authorization. NEPA does not require congressional or agency reauthorization of an agency's EIS. In addition, the trial court erred in imposing EIS guidelines more onerous than these promulgated by CEQ and NEPA.

The district court also erred in ruling that a prima facie showing of noncompliance with NEPA shifts the burden of proof to the agency responsible for the EIS. On another trial, plaintiffs will still have to establish their claims by a preponderance of the evidence.

Finally, the Fifth Circuit held that the Corps must submit a revised or supplemental EIS, since the initial EIS is insufficient and inadequate in several respects.

Staff: Peter R. Steenland (formerly of the Land and Natural Resources Division); Chief Assistant United States Attorney Jack Shepherd (S.D. Tex.).

ENVIRONMENT

PETITION FOR REVIEW UNDER CLEAN AIR ACT CHALLENGING INCREMENTAL PROCESS DATE UNDER REGULATION DUE 30 DAYS FOLLOWING EPA'S APPROVAL.

Granite City Steel Company v. Environmental Protection Agency (C.A. 7, No. 73-1846, Aug. 22, 1974; D.J. 90-5-2-3-159).

On May 31, 1972, pursuant to the Clean Air Act, EPA approved a regulation providing for incremental progress dates for meeting a previously adopted requirement that as of December 24, 1974, all coke-oven facilities in Illinois were to employ emission-reducing methods. Granite City Steel filed a petition for review. The company had not attacked the December 24 attainment date within 30 days following its approval, as provided for by 42 U.S.C. sec. 1857h-5(b)(1). The court of appeals dismissed the petition, holding that the petition should have been filed within 30 days after approval of the December 24, 1974, date because the attack on the incremental progress dates was, in essence, an attack on the attainment date itself.

Staff: Peter R. Steenland (formerly of the Land and Natural Resources Division).

DISTRICT COURT

ENVIRONMENT

CLEAN AIR ACT; SUIT TO ENJOIN ENFORCEMENT OF NOTICE OF VIOLATION.

West Penn Power v. Train, 6 E.R.C. 1722 (W.D. Pa., No. 73-1083, Jun. 19, 1974, D.J. 90-5-2-3-405).

West Penn Power Company, a Pennsylvania public utility, filed suit against the Administrator of the Environmental Protection Agency and the Pennsylvania Department of Environmental Resources seeking to enjoin EPA from enforcing its notice of violation (of the Clean Air Act) against the company and to obtain a declaratory judgment that it was not in violation of the Pennsylvania implementation plan or Clean Air Act.

The court dismissed the power company's complaint for lack of jurisdiction. The court held that neither the Administrative Procedure Act nor Declaratory Judgment Act was a basis for jurisdiction. Further, the court held that the basis for the court's jurisdiction must be found in Section 304 of the Clean Air Act, 42 U.S.C. sec. 1857h-2,

commonly referred to as the citizen suit provision of the Act.

The court set forth three grounds for its finding of lack of jurisdiction: First, the plaintiff had failed to comply with the 60-day notice requirement of Section 304. Second, the citizen suit provision provides jurisdiction over only those claims challenging the Administrator's failure to perform a non-discretionary duty under the Act. In this case, the plaintiff was suing the Administrator concerning his failure to perform duties which were discretionary, rather non-discretionary, in nature. Third, the plaintiff was actually attacking EPA's approval of a provision of the Pennsylvania implementation plan. The Clean Air Act requires such a challenge to be lodged within 30 days after the approval of that portion of the plan. The plaintiff had failed to do so, and thus its challenge at this late stage was fatally defective.

A motion for reconsideration submitted by West Penn Power was denied on August 13, 1974.

Staff: John E. Varnum (Land and Natural Resources Division); Assistant United States Attorney Joel B. Strauss (W.D. Pa.).

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