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Citations for the slip opinions are available
on FTS 724-7184

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

POINTS TO REMEMBER

PREPARING FORM 792 REPORTS ON CONVICTED PRISONERS FOR THE PAROLE COMMISSION

In Volume 27, Number 14 of the United States Attorneys' Bulletin, dated July 20, 1979, an item was published on this subject, advising all United States Attorneys and all attorneys in the Criminal Division that they are required to prepare and submit a completed Form 792 as soon as a defendant has been sentenced to a prison term of 1 year or more. Some confusion resulted from the fact that Section 9-34.221 of the United States Attorneys' Manual, which deals with this subject, was not in agreement with this policy. To remedy this situation, a United States Attorneys' Manual Bluesheet Transmittal reflecting this policy change is now forthcoming.

(Criminal Division)

NOTIFICATION TO SPECIAL AGENT IN CHARGE CONCERNING ILLEGAL OR IMPROPER ACTIONS BY DEA OR TREASURY AGENTS

In all cases where the actions of an agent of any Treasury law enforcement agency or of the Drug Enforcement Administration result in the granting of a motion for suppression of evidence, or are otherwise deemed illegal or improper in a judicial opinion, the appropriate Special Agent in Charge (or the equivalent) should be so notified by the United States Attorney's Office which is handling the case. These agencies have requested such action to enable them to determine where corrective action is appropriate.

(Criminal Division)

BAIL, EXTRADITION CASE

U.S. v. Williams, Misc. No. 79-8102, 5th Cir., 10/12/79
Attorneys: Edward F. Harrington and Robert B. Collings
(District of Massachusetts)

Following is the full text of an opinion which appears to be one of the most significant published opinions to come from a circuit court in an extradition case.

Per Curiam. Appellee Williams was arrested on September 26, 1979 Pursuant to a warrant issued by a United States Magistrate in Boston. The warrant was issued on the basis of a telegraphic communication from the Government of Canada to the Department of State requesting the extradition of Williams to face a charge of conspiracy to import a narcotic. A hearing before a magistrate to determine whether appellee should be extradited has been scheduled for October 31, 1979. On October 4, the district court ordered appellee released on bail pending the hearing. On October 5, a judge of this court stayed that order.

In a case involving foreign extradition, bail should not be granted absent "special circumstances." Wright v. Henkel, 190 U.S. 40, 63 (1903); Beaulieu v. Hartigan, 554 F. 2d 1 (1st Cir. 1977). Here, the District court reasoned that the special circumstances had been shown, inasmuch as appellee's brother facing an extradition hearing on the same charge in the Southern District of New York, has been released on bail over the government's objection.

The district court erred in limiting the "special circumstances" rule to post-hearing bail applications. Wright v. Henkel itself was a case of pre-hearing confinement, 190 U.S. at 41, 57, a fact which, the court ruled, did not distinguish it from post-hearing bail applications. Id. at 62. See also In re Klein, 46 .2d 85 (S.D.N.Y. 1930), United States ex. rel. McNamara v. Henkel, 46 F. 2d 84 (S.D.N.Y. 1912) (pre-hearing bail denied in absence of special circulmstances); In re Mitchell, 171 F. 289 (S.D.N.Y. 1909) (L. Hand, J.) (pre-hearing bail granted upon showing of special circumstances). We have discovered no cases confining Wright v. Henkel to post hearing bail applications.[1]

Nor do we think that the circumstance that appellee's brother has been released on bail is sufficiently "special" to permit appellee's release. Previous cases have limited "special circumstances" to situations where "the justification is pressing as well as plain." In re Klein, supra, or "in the most pressing circumstances, and when the requirements of justice are absolutely peremptory." In re Mitchell, supra. Such circumstances may

inlude a delayed extradition hearing, see McNamara, supra, and the need of the defendant to consult with his attorney in a civil action upon which his "whole fortune" depends, Mitchell, supra. In contrast, the discomfiture of jail, Klein, supra, and even applicant's arguable acceptability as a tolerable bail risk, cf. Beaulieu v. Hartigan, 430 F. Supp. 915 (D. Mass.), rev'd mem. 553 F.2d 92 (1st Cir. 1977), are not special circumstances. In the present case, while it may appear unfair that appellee should remain incarcerated while his brother is released on bail, such inequality of treatment does not constitute a sufficiently grave special circumstance to justify bail.

The order of the district court is reversed.[2] Mandate to issue forthwith.

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[1]Beaulieu v. Hartigan, 554 F.2d 1 (1st Cir. 1977), involved an appeal from the district court's denial of habeas corpus and granting of bail following an extradition hearing. Its language stating that bail should be limited to "special circumstances" therefore arguably applies only in the post-hearing context. The published opinion in Beaulieu, however followed a stay and a reversal of a district court order of bail in a pre-hearing context. See Beaulieu v. Hartigan, 430 F. Supp. 915 (D. Mass. 1977), rev'd mem. 553 F.2d 92 (1st Cir. 1977). The unqualified language in Beaulieu, 554 F.2d 1, should therefore be read to apply to pre-hearing bail applications as well.

[1]The district court remains free following remand to expedite the extradition hearing, if feasible.

Naming Of State In Clean Water Act Enforcement Actions Against Municipalities

Section 309(e) of the Clean Water Act, 33 U.S.C. 1319(e), provides as follows:

> Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment entered against the municipality in such action to the extent that the laws of the State prevent the municipality from raising revenues needed to comply with such judgment.

While it appears that the principal Congressional concern in including this provision in the act is to assure that the financially responsible party will be present in the action, the statute is not limited to naming states only in those circumstances. In keeping with the statute, the state must be named in all enforcement actions under section 309 of the Clean Water Act. United States v. City of Winston-Salem, No. C-75-557-WS (M.D.N.C. 1976). ("The State's jurisdictional attack is unpersuasive. 33 U.S.C. §1319(e) expressly provides that when a municipality is a party to a civil action brought by the United States under that section, the state wherein the municipality is located shall be named as a party. The language is mandatory and is not conditioned on the existence of a state law limiting the revenue powers of the municipality. The presence of the state law is important only in determining the amount for which the State may ultimately be held liable.") However, if it is intended that there be a cause of action against the state that is in addition to the guarantor role described in the statute, allegations must be made to support the separate cause of action. The statute does not require that

the state be named as defendant rather than join the Government as a plaintiff. As a regular matter, the state would be named as a defendant, but in appropriate circumstances the state may be asked if it would prefer to join as a plaintiff. Also in appropriate circumstances the Government should not oppose a motion by a defendant state to be realigned as a plaintiff. Obviously where it is apparent that the Federal Government is in fact looking to the state for injunctive or monetary relief in the suit, the state should remain a defendant.

Whether a state will be a defendant or plaintiff should be resolved before the complaint is signed by the Assistant Attorney General. Thus, it is best for the Pollution Control Section attorneys and the EPA regional attorneys assigned to the case to resolve this matter after the case has been referred to main Justice by EPA headquarters and before the complaint is sent to the U.S. Attorney's Office. This should be done promptly to avoid delay in referral to the U.S. Attorney's Office. EPA has informed the Department that its regional attorneys have been instructed to discuss this matter in the relevant litigation reports.

One factor to be considered in determining whether to name a state as a defendant or to seek its participation as a plaintiff should be the agency's interest in maintaining an appropriate working relationship with the state.

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CIVIL DIVISION
Acting Assistant Attorney General Alice Daniel

Earl Christian v. James Carter, et al., No. 79-1542 (8th Cir. October 9, 1979) DJ 35-42-64

Employees' Actions: Eighth Circuit Holds That Court Of Appeals Lacks Jurisdiction Over Pre 1974 Personnel Cases

The Eighth Circuit, in a per curiam opinion denying a petition for a writ of mandamus, held that it lacked jurisdiction over this federal personnel case. The petitioner, who sought to compel a Merit Systems Protection Board decision on his appeal of an adverse action, had filed his suit in the court of appeals pursuant to the 1978 Civil Service Reform Act, which vests review authority in the circuit court rather than in the district court as the former law had done. We argued that the savings clause of the Reform Act preserves the former law and requires district court jurisdiction over any Board action on a personnel matter that was pending administratively on the effective date of the Act (January 11, 1979). The Eighth Circuit agreed with our interpretation of the Act and dismissed the petition for lack of jurisdiction. This ruling will be helpful in the numerous "hold-over" cases in other circuits in which we have raised this jurisdictional argument.

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

Joseph B. Kennedy v. Federal Mine Safety and Health Review Commission, No. 79-1409 (D.C. Cir. October 3, 1979) DJ 236-452-301

Standing: D.C. Circuit Dismisses Petition For Review Filed By Administrative Law Judge

An administrative law judge filed a petition for review on his own behalf after the Federal Mine Safety and Health Review Commission vacated his order of censure against two Labor Department attorneys. The court of appeals, by per curiam order, granted our motion to dismiss for lack of standing. Thus, the court rejected petitioner's primary argument that "injury to a federal administrative law judge's interest in the exercise of a judicial power conferred by Congress is 'arguably within the zone of interests' protected or regulated by the provisions of the Mine Safety Act which incorporates the adjudicatory provisions of the Administrative Procedure Act."

Attorney: Mark N. Mutterperl (Civil Division)
FTS 633-3178

St. Mary's Hospital, Inc. v. Harris, No. 79-1421 (5th Cir. October 12, 1979) DJ 145-16-1355

Trade Secrets Act; Freedom Of Information Act: Fifth Circuit Sustains HEW's Authority To Disclose Medicare Cost Reports

A provision of the Social Security Act (42 U.S.C. 1306(a)) prohibits the disclosure of information obtained in the administration of HEW programs "except as the Secretary * * * may by regulation prescribe." By a 1975 regulation the Secretary directed the public disclosure of cost reports submitted by hospitals to obtain reimbursement under the Medicare program. A number of "reverse FOIA" suits were brought by hospitals to enjoin disclosure on the theory that the reports were "trade secrets" protected by the Trade Secrets Act (18 U.S.C. 1905) and within Exemption 4 of the FOIA. The district courts divided on the issue, and appeals to several Circuits were stayed pending the Supreme Court's disposition of Chrysler Corp. v. Brown, ___ U.S. ___, 99 S.Ct. 1705 (1979). The Fifth Circuit has just ruled that the cost reports can be disclosed pursuant to the Secretary's regulation because disclosure is "authorized by law" within the meaning of the Trade Secrets Act. Similar cases are pending in the Second, Fourth, Sixth and District of Columbia Circuits.

Attorney: Eloise E. Davies (Civil Division)
FTS: 633-3425

United States v. Huron Towers, Inc., et al., No. 77-1594 (6th Cir. October 2, 1979) DJ 130-37-5404

Mortgage Foreclosure: Sixth Circuit Holds Junior Mortgagee Has No Right To Trial Of Issues Relating To HUD's Senior Mortgage Claim Not Disputed By Mortgagor; Federal Law Controls Post-Foreclosure Redemption Rights Of Junior Mortgagee

In this suit to foreclose mortgages held by HUD on an apartment complex located in Ann Arbor, Michigan, the Sixth Circuit held that a junior mortgagee made a defendant to the action had no right to a trial to assert defenses of the mortgagor against HUD where the mortgagor agreed not to dispute the claims of HUD. Enforcement of the agreement between HUD and the mortgagor, the court concluded, did not deprive the junior mortgagee of due process. It was held further that the judgment of foreclosure was not defective in cutting off the junior mortgagee's post-foreclosure right of redemption provided by Michigan law. Federal law, not state law, was controlling, the court held,

and under federal law no such right of redemption exists.

Attorney: Samuel J. Behringer, Jr. (Assistant U.S. Attorney for the E.D. Michigan)
FTS 226-4383

Ronald R. Glancz (Civil Division)
FTS 633-3424

CIVIL RIGHTS DIVISION
Assistant Attorney General Drew S. Days, III

United States v. Trans-World Realty Corp. and Stuart Fearer, C.A. No. 78-6522-Civ.-CA. (N.D. Calif.) DJ 170-11-129

Section 804(a) of the Fair Housing Act of 1968

On October 12, 1979, Chief Judge C. Clyde Atkins entered a consent decree. The complaint in this action alleged that the defendants, a real estate brokerage business and its vice-president had engaged in "blockbusting" in the Eastgate subdivision of Lauderdale Lakes, Florida in violation of Section 804(a) of the Fair Housing Act and attempted to steer white Eastgate residents to other neighborhoods in violation of Section 804(a) of the Act and discriminated on the basis of race in the sale of dwellings, in violation of Section 804(b) of the Act. The action challenged the defendants' use of a particular letter sent to residents of this subdivision as part of a program of continuing solicitation for real estate listings known as "forming." Among its provision, the decree prohibits the defendants from engaging in most forms of real estate solicitation for two years in Eastgate or in companies to discriminate against women in setting the rates and conditions for disability insurance policies issued in California. After the district court had denied defendants' Rule 12(b)(6) motion to dismiss plaintiff's Section 1985 claim, the Ninth Circuit accepted defendants' interlocutory appeal pursuant to the district court's certification. We filed an extensive brief as amicus curiae before the Ninth Circuit and participated in oral argument. The Ninth Circuit adopted our reasoning in affirming the district court's denial of defendants' motion to dismiss the Section 1985 claim. The Ninth Circuit limited its holding to the question of statutory construction, deciding only that Congress had intended Section 1985 to apply to the facts alleged by plaintiff. The Ninth Circuit expressly reserved until after trial the question of the constitutionality of Section 1985 as so construed. The district court is now considering defense motions raising the constitutional question before trial. Our amicus brief in opposition to these motions argued that pursuant to the Ninth Circuit's mandate the district court must postpone decision of the constitutional question until after trial, and in the alternative that Section 1985 is constitutional as applied to plaintiff's allegations.

Attorney: John Oakley (Civil Rights Division)
FTS 633-3068

United States v. Board of Education, ISD No. 1, Tulsa County, C.A. No. 68-C-185 (N.D. Okla.) DJ 169-59N-2

School Desegregation

On October 16, 1979, the Court (Daugherty) signed a consent order providing for the desegregation of a number of elementary schools in Tulsa. The schools involved were a group which either opened all-black or tipped from white to black during the 1960's and all are projected to be desegregated over the next two years by use of the magnet school technique, which has already successfully desegregated a number of other Tulsa schools. We will monitor the plan's effectiveness to determine if mandatory reassignments will be necessary at some future date to desegregate these schools.

Attorney: Burt Dougherty (Civil Rights Division)
FTS 633-4749

Angell v. Zinser, C.A. No. H-79-229 (D. Conn.) DJ 175-14-85

Title VIII of the Fair Housing Act of 1968

On October 23, 1979, Judge M. Joseph Blumenfeld granted our motion to intervene as plaintiff. We allege that the withdrawal by the Hartford suburb of Manchester from the HUD Community Development Block Grant program following a voter referendum was racially motivated and had a segregative impact, in violation of Title VIII of the 1968 Fair Housing Act and the Fourteenth Amendment.

Attorney: Howard Feinstein (Civil Rights Division)
FTS 633-3814

Reichardt v. Life Insurance Co. of North America, No. C-74-117-WHO (N.D. Calif.) DJ 170-11-129

42 U.S. C. 1985(c)

On October 24, 1979, we filed an amicus brief in the United States District Court for the Northern District of California on the issue of the constitutionality of 42 U.S.C. 1985 (c) as applied to an alleged conspiracy of insurance companies to discriminate against women in setting the rates and conditions for disability insurance policies issued in California. After the district court had denied defendants' Rule 12(b)(6) motion to dismiss plaintiff's Section 1985 claim, the Ninth Circuit accepted defendants' interlocutory appeal pursuant to the district court's certification. We filed an extensive brief

as amicus curiae before the Ninth Circuit and participated in oral argument. The Ninth Circuit adopted our reasoning in affirming the district court's denial of defendants' motion to dismiss the Section 1985 claim. The Ninth Circuit limited its holding to the question of statutory construction, deciding only that Congress had intended Section 1985 to apply to the facts alleged by plaintiff. The Ninth Circuit expressly reserved until after trial the question of the constitutionality of Section 1985 as so construed. The district court is now considering defense motions raising the constitutional question before trial. Our amicus brief in opposition to these motions argued that pursuant to the Ninth Circuit's mandate the district court must postpone decision of the constitutional question until after trial, and in the alternative that Section 1985 is constitutional as applied to plaintiff's allegations.

Attorney: John Oakley (Civil Rights Division)
FTS 633-3068

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

Franquez v. United States, ____ F.2d ____, No. 78-2370 (9th Cir. Sept. 24, 1979) DJ 90-1-5-1788

Jurisdiction; Omnibus Territories Act of 1977

Section 204 of the Omnibus Territories Act of 1977 confers jurisdiction on the District Court of Guam to review claims of persons contending that the United States unfairly acquired their property on Guam at less than fair market value. The district court, over the objection of the United States, granted demands for jury trials in several actions brought under the Act and the government appealed. The Ninth Circuit affirmed. Finding the claims to be analogous to condemnation actions, the court of appeals held that Congress most likely intended that the district court would have discretionary authority to order jury trials, as is authorized in federal condemnation actions by Rule 71A, F. R. Civ. P.

Attorneys: Robert L. Klarquist and John J. Zimmerman (Land and Natural Resources Division) FTS 633-2731

Nader v. Schlesinger, ____ F.2d ____, No. DC-59 (TECA, Oct. 4, 1979) DJ 90-1-4-1988

National Environmental Policy Act, Adequacy of EIS under Section 211(d)(1) of the Economic Stabilization Act

The Temporary Emergency Court of Appeals, affirmed the district court's summary judgment, holding that the DOE's EIS on gasoline "tilt" regulation was adequate. The court stated that the standard of review, under Section 211(d)(1) of the Economic Stabilization Act, as incorporated by the Emergency Petroleum Allocation Act, is whether the EIS is "reasonable and not arbitrary or capricious." The court specified that "if the effect of the tilt regulation is to increase the price differential between leaded and unleaded

gasoline to the point where it may adversely affect the environment, DOE has proposed a rule limiting this differential so as to meet the adverse environmental effects."

Attorneys: Larry A. Boggs and
Dirk D. Snel (Land and
Natural Resources Division)
FTS 633-2956/4400

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

United States v. Byrd, _____ F.2d _____, No. 78-2459 (7th Cir. Oct. 15, 1979) DJ 90-5-1-6-64

Constitutional Law; Commerce Clause; Summary Judgment; Exhaustion of Administrative Remedies

A private landowner began filling wetlands adjacent to an intrastate lake without obtaining a permit from the Corps of Engineers. The district court found the filling activities violated Section 404 of the Clean Water Act and entered summary judgment enjoining further filling of the wetlands. On appeal, the landowner contended that his activities were beyond the reach of the federal government under the Commerce Clause and, in the alternative, constituted a taking of his property without compensation. The court of appeals affirmed, holding that, as the intrastate lake at issue is used by interstate travelers for recreational purposes, Congress has authority under the Commerce Clause to regulate the filling. The court further held that the taking question was premature, because, at this point, the Corps was only seeking to require the landowners to comply with the permit program and had not yet granted or denied permission to fill the wetlands at issue.

Attorneys: Robert L. Klarquist and Carl Strass (Land and Natural Resources Division) FTS 633-2731/4427

Alumet v. Andrus, _____ F.2d _____, No. 78-1546 (10th Cir. Oct. 4, 1979) DJ 90-1-4-1506

National Environmental Policy Act; EIS Costs

The Tenth Circuit, reversing the district court, held that the BLM had authority under the Federal Land Policy

and Management Act of 1976 to obtain reimbursement for those EIS costs associated with an application for rights-of-way to be used in connection with a mining operation on federal lands.

Attorneys: Peter R. Steenland, Jr., Neil T. Proto and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2748/2762

Joseph v. Bond, _____ F.2d _____, No. 78-1963 (D.C. Cir. Oct. 10, 1979) DJ 90-5-3-34

Exhaustion of Administrative Remedies; Taking by Overflight

The court of appeals affirmed the district court's dismissal of three counts of the complaint dealing with FAA practices regarding the timing and flight patterns of planes landing at National Airport. These counts were properly dismissed for a failure to exhaust administrative remedies. However, the district court was held to have jurisdiction of the landowner's claim for a taking of his residential property caused by the low overflights of planes going into and departing from National. The dismissal of this claim was reversed and remanded to the district court for further proceedings, including discovery.

Attorneys: Maryann Walsh, Robert L. Klarquist (Land and Natural Resources Division) FTS 633-4168/2731 and Edwin S. Kneedler (Staff of Solicitor General) FTS 633-5627

Ventling v. Bergland, _____ F.2d _____ (8th Cir. Oct. 12, 1979)
DJ 90-1-4-2025

National Environmental Policy Act; Adequacy of EIS

The court of appeals, without opinion, affirmed the decision of the district judge upholding the Forest Service environmental analysis with regard to road construction in conjunction with a proposed timber sale in the Black Hills National Forest. The district court held that the Forest Service had adequately considered alternatives, including use of the existing road system, to the extent reasonably necessary, and that no site-specific EIS was required.

Attorneys: Judith W. Wegner and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2740/2762

Ashland Oil, Inc. v. Phillips Petroleum Co., United States of America, _____ F.2d _____, (10th Cir. Oct. 15, 1979)
DJ 90-1-18-650

Helium Valuation

Ashland filed this suit to recover the reasonable value of helium extracted by Phillips and sold to the United States. Earlier appeals resulted in a remand for the development of additional facts relating to the valuation of helium at the wellhead by use of the work-back method. 554 F.2d 381. On remand the district court dramatically discarded all aspects of its prior ruling (valuing helium at from $11.76 to $16.98 per Mcf, 364 F.Supp. 6) and adopted a single value of $3 per Mcf of helium at the wellhead. 463 F.Supp. 619 (N.D. Okla. 1978). The court of appeals affirmed the district court's $3 value as supported by substantial evidence. As a result, the 60-70 cent per Mcf value of helium at the wellhead established in related litigation, which presents the same

issue and is still pending on appeal, appears to be out of jeopardy. 393 F.Supp. 949 (D. Kan. 1974). Because the government's liability covers any value over $3 Mcf, potential liability as high as $690,000,000 may be avoided. The Tenth Circuit reversed the district court ruling denying prejudgment interest, which it had previously approved, as not within the remand. Post judgment interest was held to commence from the district court's judgment on remand because of the extent of the first judgment's reversal.

Attorneys: John E. Lindskold and
Jacques B. Gelin (Land and
Natural Resources Division)
633-4080/2762

Menominee Tribe of Indians, et al. v. United States, _____ F.2d _____, No. 134-67 (Basic) (Ct. Cl. Oct. 17, 1979)
DJ 90-2-20-821

Indian Law; Termination; Jurisdiction

This involves a case arising out of the Menominee Termination Act of 1954, as amended, 25 U.S.C. 899 et seq. In an en banc unanimous decision, the Court of Claims vacated the opinion and findings of Trial Judge Spector, remanded for further proceedings in conformity with its decision, and dismissed in part plaintiffs' petition. Plaintiffs filed this action in 1967, pursuant to 28 U.S.C. 1491 and 1505, presenting nine claims for damages against the United States based primarily on the alleged breach of trust by Congress and officials of the Department of the Interior in enacting the Menominee Termination Act of 1954, as amended, and terminating federal supervision of the Menominee Tribe in 1961 pursuant to that Act. The Court held (1) that under 28 U.S.C. 1491 and 1505 Congress has not consented to suit by Indians on non-Constitutional claims for breach of trust based directly on the enactment by Congress of legislation it deems appropriate but which claimants deem a breach of fiduciary duty; (2) that the United States cannot be held liable for the Interior Department's affirmative actions or

passive omissions with respect to the passage and implementation of the Termination Act; (3) that the jurisdictional barrier of the Court also covers Congressional motives and interests, failure of Congress to prepare the tribe for termination and to make full and fair disclosure to the tribe of all pertinent facts, failure to give greater assistance in preparing the tribe for termination, and any alleged duress or pressure by Congress or its members to obtain tribal consent to termination; (4) that in this particular Act of termination the role of the Interior Department cannot be separated from that of Congress; (5) that routine declarations of Congressional policy in a statute do not give directives to federal officials above and beyond the specific duties placed upon them in the statute which would give rise to a cause of action against the United States; (6) that Congress has the unilateral power to abrogate or modify a prior Indian Treaty; (7) that the subsequent Menominee Restoration Act of 1973, 25 U.S.C. 903 et seq., wherein Congress apparently conceded that termination was not in the best interests of the tribe, was not a basis for jurisdiction for alleged damages arising out of the Termination Act of 1954, as amended; and (8) that consents to sue the United States are not to be found where expressed only equivocally.

Attorney: Glen R. Goodsell (Land and Natural Resources Division)
FTS 724-7491

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

OCTOBER 16 - OCTOBER 30, 1979

House Floor Schedule

House leadership has announced a revised schedule. There will be legislative business sessions scheduled for the balance of October and the first two weeks of November. The recess days are the same, the House will be in recess on the 5, 6, 12, and the entire week of the 18. The balance of November will be pro forma sessions. This adds seven legislative days to the schedule but will have only a minor practical effect in assisting committees and subcommittees to schedule and finish business. It is likely that December will be pro forma sessions as well.

Lobbying. On Tuesday, October 16, the House Judiciary Committee completed markup of the Lobbying Disclosure bill and approved it by a vote of 26 to 2. Among the amendments which carried: (1) substitute the Clerk of the House for the Comptroller General in making regulations; (2) exempt religious organizations, from reporting; (3) report even unpaid officers of lobbying organizations; and (4) prescribe that the Attorney General notify and attempt to conciliate before instituting civil enforcement. Amendments which failed included one to strike the use of civil investigative demands; the reporting of indirect lobbying (grass-roots soliciations); and deletion of the legislative veto over rule-making.

No date has yet been set for floor action.

Criminal Code Reform. The House Subcommittee on Criminal Justice is continuing markup of its Criminal Code Reform draft, though its efforts have been slowed down by several failures to reach a quorum.

Major issues decided recently included:

1. Deletion of a "reckless endangerment" offense, by unanimous vote of five attending members;

2. Adoption of an "obscenity" offense similar to that of the Senate code reform bill, with questions on state of mind to be considered at a later date;

3. The statute of limitations for federal misdemeanors was set at three years. No statute of limitations will be applicable to murder;

4. The Enmons decision was overturned, so that labor unions are now susceptible to extortion charges. The subcommittee made its decision clear by adding to the extortion offense a subsection

stating that "legitimate ends" (i.e., bargaining) was not a defense to an extortion offense;

5. Section 744, tampering with a government record was adopted with "intent to impair the government's ability to use the record" replacing an "intent to impair the availability of the record;"

6. On perjury, the subcommittee adopted a requirement that defendant's false oath was given "with reckless disregard for the fact that the statement is material." However, it will retain the current law provision that a perjury conviction may be barred on two irreconcilable contradictory statements; and

7. The subcommittee adopted "false swearing" as a new offense, but graded it as an infraction rather than as a Class A misdemeanor as originally considered.

The subcommittee has not been able to maintain the pace and schedule originally set by Chairman Drinan. It is therefore unlikely that they will be able to report out a bill and have it marked up at the full committee before the pro forma blues set in.

Judicial Discipline. A Senate floor vote on the proposed Judicial Conduct and Disability Act, (S. 1873), is expected this week. Under the terms of a prior agreement, passage of S. 1873 would automatically complete Senate action on the omnibus court improvements bill (S. 1477) as well, with the judicial discipline provisions of S. 1873 incorporated as a separate title in S. 1477. Senator Mathias will be one of the leading opponents of S. 1873, arguing that the bill "is of dubious constitutionality, unnecessary and unwise as a matter of public policy."

Even if the Senate promptly passes S. 1873, there are no signs that the House is in a hurry to move on a similar bill. Mr. Kastenmeier's House Judiciary Subcommittee on Courts will conduct what staffers term "a wider-ranging inquiry into the problem." The subcommittee plans to review the Department's alleged failure to prosecute judges for criminal misconduct, shortcomings in the Senate confirmation process, the House's failure to use impeachment, and the judiciary's failure to discipline itself. The Department will be invited to testify before the subcommittee on this subject early in 1980.

Due to heavy lobbying by the Judicial Conference and the ACLU, the Senate bill does not contain key items which were in the Judicial Tenure Act that passed the Senate last year. The current bill has no provision for non-impeachment removal of federal judges, nor does it provide for a separate investigatory commission on judicial conduct and disability. The members of the Kastenmeier subcommittee have indicated that any bill emerging from that panel is likely to be at least as mild as the Senate bill. The Judicial Conference and the ACLU are not content with the changes in the Senate bill. Accordingly, they will be pushing for a House bill which simply strengthens the Judicial Conference's own control of discipline.

FBI Charter. Another day of hearings was held on Wednesday, October 24, 1979, before the Senate Judiciary Committee, chaired by Senator Metzenbaum, on civil remedies. The leading witness was Ms. Coretta King, followed by Mr. Howard Simon, heading a panel of three lawyers representing the family of Viola Liuzzo and the Bergmans, victims of attacks on civil rights workers in the South. The Department of Justice panel, with the addition of Mike Shaheen, gave testimony next, which was frequently interrupted by the hostile questioning of the chairman. The next witness was Arthur Fleming, Chairman of the Civil Rights Commission, followed by a panel of representatives from the Bar Association of New York City, ACLU, and the National Lawyers Guild.

After Senator Metzenbaum left, Senator DeConcini held a short additional Charter meeting to hear testimony from Louis Clark of the Government Accountability Project of the Institute of Policy Studies, who proposed that there should be language in the Charter to protect whistleblowers.

The Senate Judiciary Committee has submitted a list of the final days of Senate hearings, which are: October 25, chaired by Biden on Criminal History Information; November 5, chaired by Thurmond on Background Investigations; November 9, chaired by Hatch and Simpson on Terrorism Investigations; November 13, chaired by Hatch and Simpson on Organized Crime Investigations; and, November 15, chaired by Kennedy, the closing session. The staff still anticipates appearances by Director Webster and Attorney General Civiletti on November 15.

The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee has one day of future hearings planned at which Department witnesses are being asked to testify. The date is November 13, which now conflicts with Senate testimony on the same day, but will be worked out, hopefully, to everyone's satisfaction. No other hearing days involving Department witnesses have been yet scheduled by the subcommittee.

Graymail. The markup on pending graymail legislation by the House Permanent Select Intelligence Subcommittee on Legislation scheduled for Wednesday, October 24, 1979, was postponed once again to be rescheduled perhaps in December.

Refugees. The House Judiciary Committee will file its report on the proposed Refugee Act (H.R. 2816) in the near future. Principals of the House Judiciary Committee and Foreign Affairs Committee met and argued that while reserving their jurisdictional rights, Foreign Affairs would not ask for a sequential referral, and further it would be in order for them to offer their amendments on the floor.

It is now much more likely that as a result of this settlement the bill can reach the floor before the pro forma waltz step begins. A conference will be required in order to reconcile the differences between the House and Senate versions of the Refugee Act.

The Administration has already obtained approval from both Judiciary Committees for an extension of the present refugee parole programs until

December 15, 1979. All concerned have expressed the hope that permanent refugee legislation will have been enacted by the expiration date to preclude any further use of the parole authority.

LEAA Reorganization. Conferees have been appointed in both the House and Senate and in general quite favorable to the Department/Administration position on this bill. Hopefully, action on this can be completed before the House adjourns November 2.

Year End Procurement. A "whistleblower" of sorts from within LEAA will be testifying November 15 on his own behalf and on his own time about the practice within the government of spending unduly large portions of appropriated funds immediately before the end of the fiscal year. LEAA General Counsel Tom Madden will also attend the hearing in order to rebut or clarify any errors or misinterpretations of action on the part of LEAA.

DOJ Authorization. Conferees have been appointed in both the House and Senate. Staff have already met several times. The last meeting of the staffs numbered eighteen which might preclude anything being completed or accomplished. However, the differences are slight and the conferees themselves should meet next week, and barring any last minute hitch, complete their work.

Fair Housing. On October 23, the House Judiciary Committee began, but did not complete, consideration of H.R. 5200, the proposed fair housing amendments. Further consideration of the matter had tentatively been scheduled for October 30. We have since been informed by Chairman Edwards, however, that the Republican members of the Committee have uniformly agreed to support Congressman Sensenbrenner in his efforts to eliminate the administrative procedures which the bill would establish in the Department of Housing and Urban Development (and which have been the basis for the Administration's strong endorsement of this legislation). Since he no longer has the votes on this vital issue, Chairman Edwards' current posture is not to proceed with markup.

On the Senate side, matters look similarly bleak. A majority of the Judiciary Subcommittee on the Constitution also supports elimination of the administrative procedures, and there does not appear to be a sufficient number of firm votes to ensure that a strong bill would emerge from the full committee.

In light of these developments, we are reevaluating our position on this legislation. Representatives from DOJ, HUD and the White House plan to meet with Mr. Edwards to discuss future strategy.

Court of Tax Appeals. On November 2, Maurice Rosenberg, Assistant Attorney General, Office for Improvements in the Administration of Justice, will testify before the Senate Finance Subcommittee on Taxation and Debt Management Generally. The subject of the hearings is S. 1691, which would create a Court of Tax Appeals. When this issue was heard before the Senate Judiciary Committee earlier this Congress, there was no consensus within the Administration; Daniel Meador (OIAJ) and Carr Ferguson (Tax Division) each represented his own views, with the Department of Treasury also presenting

separate views. In the interim, agreement has apparently been reached within the Administration to support some version of a tax appeals court, although not precisely along the lines of S. 1691.

Railroad Deregulation. On October 23, Donald Flexner, Deputy Assistant Attorney General for Antitrust, testified before the Subcommittee on Transportation and Commerce of the House Commerce Committee in favor of limiting antitrust immunity for railroad rate bureaus. Specifically, he advocated removal of immunity for establishment of general rate increases and for discussion of single line rates. He also stated that immunity for joint tariff publication was unnecessary. Such practice could continue without immunity. Finally, he supported opening rate bureau meetings to the public.

Bottlers' bill. On October 24, Richard Favretto, Deputy Assistant Attorney General for Antitrust, testified before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee in opposition to H.R. 3567 and 3573, bills that would confer a special antitrust exemption on exclusive territorial agreements between soft drink manufacturers and bottlers.

NOMINATIONS:

On October 26, 1979, the Senate received the following nominations:

John H. Shenefield, of Virginia, to be Associate Attorney General; and

Alice Daniel, of the District of Columbia, to be an Assistant Attorney General.

FEDERAL RULES OF EVIDENCE

Rule 803(6). Hearsay Exceptions; Availability of Declarant Immaterial. Records of Regularly Conducted Activity.

Rule 702. Testimony by Experts.

The defendant was convicted of receiving stolen goods in violation of 18 U.S.C. 2315. As part of its proof of the jurisdictional amount of $5,000, the Government introduced into evidence an appraisal of the stolen painting for $10,000, which was prepared by an appraiser for the insurance company which insured the painting. Over the defense's objection, the appraisal was admitted into evidence as a business record of the insurance company under Rule 803(6). The defendant contended on appeal that while Rule 803(6) authorizes the admission of a business record containing opinions, it does not dispense with the general requirement under Rule 702 that the qualifications of a witness be established, and that since the Government failed to establish the qualifications of the appraiser in this case, the evidence should have been found inadmissible.

Noting that Rule 803(6) expressly provides for the exclusion of a business record where a lack of trustworthiness is indicated and that this would enable a trial judge to exclude expert testimony contained within business records where the expert's qualifications are seriously challenged, the Court declined to adopt a rule requiring that the proponent of a business record containing expert opinion must affirmatively establish the qualifications of the expert in all cases. Noting that there were no specific facts in this case raising doubts as to the appraiser's qualifications and that the insurance company's reliance on the appraisal was evidence of the reliability of the appraisal, the Court held that the trial judge did not abuse his discretion in this case in admitting the business records containing the appraisal.

(Affirmed.)

United States v. Peter Livacoli, Sr., ___F.2d___, No. 77-2241 (9th Cir., September 13, 1979).

Federal Rules of Criminal Procedure

Rule 6(e)(3). The Grand Jury. Secrecy of Proceedings and Disclosure. Sealed Indictment.

Three defendants appeal their convictions of conspiracy to distribute and to possess heroin with intent to distribute.

The indictment was returned before the expiration of the five year statute of limitations period after the termination of the conspiracy; however, in order to enable the Government to attempt to identify unnamed indicted conspirators, to locate conspirators whose whereabouts were unknown, and to avoid tipping the hand of the Government, the trial judge ordered the indictment sealed, even though the name and whereabouts of one of the defendants was known. Almost sixteen months later, ten months after the statute of limitations period had expired, the indictment was unsealed. The defendants contend that this was an unreasonable delay, particularly in view of the fact that the name and whereabouts of one of the defendants was known to the Government, and (the defendants allege) because the Government could have found the names and whereabouts of the others if it had searched harder.

The court noted that the sealing of an indictment under Rule 6(e)[(3)] serves to toll the statute of limitations, even if the indictment was unsealed after the period has expired, but held that there is a limit to this privilege, and that the Government must unseal the indictment as soon as its legitimate need for the delay has been satisfied. Stressing that the most important policy behind statutes of limitations is to avoid prejudice to the defendant, the Court further held that when a defendant can show substantial actual prejudice, the Government must show that the delay is justified by a strong prosecutorial interest, not simply a legitimate interest. Applying this standard, the Court determined that the Government's legitimate need to locate the defendants whose whereabouts were unknown was sufficient justification for the lengthy delay in this case, absent

proof of actual, substantial prejudice. However, the Court also found that there was actual, substantial prejudice as to one defendant (the defendant whose name and whereabouts were known to the Government, though this is not purported to be the basis of the majority decision) who had suffered lapses of memory while testifying in his own defense, though no prejudice existed as to the other two defendants, who did not testify. Accordingly, the Court found that the statute of limitations had run as to that one defendant.

The dissenting judge argued that there was in fact no actual, substantial prejudice to any of the defendants, and that there was sufficient prosecutorial interest to justify the delay as to all defendants, expressing a belief that what the Court was actually doing was substituting its own judgment that a superseding indictment naming only the defendant whose name and whereabouts were known would not have tipped off the other conspirators for the judgment of the prosecutor.

(Affirmed as to two defendants, and reversed as to third defendant.)

United States v. Aaron Watson, 599 F.2d 1149 (1979)