United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

Vol. 22 September 20, 1974 No. 19

UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney Harvey E. Schlesinger, Middle District of Florida, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation for his outstanding efforts in the investigation involving Senator Edward J. Gurney.

CIVIL DIVISION
Assistant Attorney General Carla A. Hills

COURT OF APPEALS

EXHAUSTION OF MILITARY REMEDIES

FIFTH CIRCUIT HOLDS THAT COURT-MARTIALED SERVICEMAN MUST EXHAUST MILITARY REMEDIES BEFORE SEEKING HABEAS CORPUS RELIEF FROM CIVILIAN COURT EVEN WHERE HE ASSERTS LACK OF MILITARY JURISDICTION.

Scott v. Schlesinger (C.A. 5, Nos. 73-3382, 74-1636, decided August 16, 1974, D.J. # 145-14-897).

The plaintiff-serviceman was tried by a military court-martial and convicted of selling marijuana and LSD to servicemen both on and off the base at which he was stationed. Before exhausting his appeal rights to the Court of Military Review, the plaintiff sought habeas corpus relief from his conviction in federal court, alleging, inter alia, that the military lacked jurisdiction over the off-base transactions.

The district court denied relief and, on appeal, the Fifth Circuit affirmed on the ground that the plaintiff had failed to exhaust his military remedies. The Court concluded that the rule of exhaustion of remedies is applicable where a serviceman brings a proceeding challenging the service-connection of an offense for which he is to be tried, or for which he has been convicted. The Court rejected the plaintiff's contention that exhaustion should not be required because an appeal would be an exercise in futility since the Court of Military Review had already held that all sales of drugs to other servicemen are service-connected. Thus, the Court noted that the plaintiff was seeking review of some factual findings, which the Court of Military Review had authority to review; that the serviceman was raising some issues on appeal not raised in the habeas corpus suit, which may result in reversal; and that because of the uncertainty of the law with respect to service-connection, the Court of Military Review might reconsider its views.

Staff: William L. Johnson, Jr., Esquire
Assistant United States Attorney (N.D. Texas)

FREEDOM OF INFORMATION ACT

THIRD CIRCUIT GIVES BROAD HEARING TO EXEMPTION SIX OF THE FREEDOM OF INFORMATION ACT.

Wine Hobby USA, Inc. v. Internal Revenue Service (C.A. 3, No. 73-2072; decided August 19, 1974; D.J. # 145-3-1377).

Federal law allows the head of any family, upon registering with the IRS, to produce up to 200 gallons of wine for family use without being subject to permit, bonding, and tax requirements. The plaintiff, a corporation engaged in the business of selling amateur wine equipment, sought disclosure under the Freedom of Information Act of the names and addresses of those registered to make wine for consumption, with the purpose of sending catalogues to the registrants. The government declined disclosure on the ground that the registration information could be withheld pursuant to Exemption 6 of the FOI Act which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The district court, however, ordered the information produced.

On appeal, the Third Circuit reversed. The Court held that the term "similar" in the phrase "personnel and medical files and similar files" must be given a broad reading. The Court concluded that the list of registrants was "similar" to "personnel and medical files" in "the personal quality of information in the file."

The Court, then, turned to the question of whether the disclosures of the information would constitute a clearly unwarranted invasion of personal privacy. The Court ruled that this phrase requires a balancing of interests. It concluded that, when balanced, the plaintiff's solely commercial interest did not outweigh the invasion of privacy that would result from the entry of unwanted material into a registrant's home.

Staff: Leonard Schaitman and David M. Cohen (Civil Division)

GUN CONTROL ACT OF 1968

A STATE PARDON DOES NOT RELIEVE A FELON OF THE CONVICTION DISABILITIES OF THE GUN CONTROL ACT.

Thrall v. Wolfe (C.A. 7, No. 73-1539, decided August 23, 1974; D.J. # 145-3-1221).

Plaintiff's application for a gun dealer's license was denied by the Treasury Department on the basis of an earlier felony conviction, an express disability under the Gun Control Act of 1968 (formerly, Title IV of the Omnibus Crime Control and Safe Streets Act of 1968). 18 U.S.C. 922(g), (h), 923(d)(1)(B). In plaintiff's subsequent action for judicial review, the district court ordered the government to grant the license, accepting plaintiff's argument that an intervening State pardon "blotted out" the conviction. Cf. Ex Parte Garland, 71 U.S. 333, 380 (1866).

On appeal, the Seventh Circuit reversed. The Court held that neither the inherent nature of a pardon, nor the full faith and credit clause, nor the policies of the Gun Control Act, required that the pardon be given the effect of removing the conviction disabilities imposed by the Act. The Court noted that a different result was expressly intended by Congress with respect to the conviction disabilities of Title VII of the Omnibus Crime Act, 18 U.S.C. App. 1203.

Staff: Michael Kimmel (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Henry E. Petersen

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

Olgivy & Mather Inc. of New York City registered as agent of the British Tourist Authority, London. Registrant will act as advertising agent for the principal on a worldwide basis and for this service is to receive 10% of the gross commission on media advertising and production commission at cost plus 15%. The following persons filed short-form registrations as individuals working directly on the British account: Kenneth E. Caffrey, officer, reporting no compensation; John D. Walker, account supervisor, reporting $32,500 per year; Jay Schulberg, officer, reporting $30,000 per year; George Radwan, art director, reporting $14,000 per year; Lois L. Holtermann, media planner, reporting $15,500 per year; Walter Kashen, assistant media director, reporting $23,000 per year; William B. Taylor, director, reporting $65,000 per year; Robert E. Testa, staff assistant, reporting $6,600 per year and Andrew G. Kershaw, management supervisor, reporting no compensation.

Kearns International of San Francisco registered as agent of Tong Yang Cement Manufacturing Co., Ltd., Korea, Whashin Industrial Company, Inc., Korea, China Steel Corporation, Taiwan and Sonatrach, Algeria. For Sonatrach registrant will act as consultant, especially in the fields of economy, finances and technology, for a fee of $200,000 per year plus reimbursable expenses not to exceed $50,000 per year; for Whashin registrant will act as consultant and adviser concerning world economic affairs, international transactions, policy and contracts, financing, and customers and suppliers,

for a fee of $50,000 per year plus reimbursable expenses not to exceed $2,000 per month; for China Steel registrant will undertake to secure equity investment from one or more U.S. steel companies for a minimum of the proposed equity (US $28 Million) and up to the maximum of (US $112 million), registrant will also coordinate loan financing, arrange supplemental financing and act as consultant and adviser as requested, for a fee of $5,000 per month and for Tong Yang registrant will act as consultant and adviser concerning the status of the world cement industry, including production, markets, new cement manufacture and transport technology and financial trends, for a fee of $30,000 per year plus reimbursable expenses not to exceed $1,000 per month. Henry Kearns filed a short-form registration as President reporting a salary of $60,000 per year, Dell M. Malick filed as Vice President reporting a salary of $50,000 per year and Robert D. Ladd filed as Vice President reporting a salary of $30,000 per year.

Edward Gottlieb & Associates Ltd. of New York registered as agent of Cooperative Republic of Guyana, Georgetown. Registrant will act as public relations counsel and press relations representative in the United States. Registrant's activities also include the dissemination of material presenting Guyana's position concerning the possible nationalization of an American corporation. Registrant is to receive a fee of $3,000 for a 30 day period plus reimbursement of expenses not to exceed $2,000. John W. Gelinas filed a short-form as public relations consultant and reports a fee of $3,000 plus expenses for a four week period.

Ian W. Shaw of New York registered as agent of The National Bank of Australasia Limited, Melbourne. Registrant will maintain liaison with American banking correspondents and U.S. corporations with interests in Australia and will engage in the promotion of trade and investment between the U.S. and Australia. Registrant reports a salary of $27,000 per year. Graham M. Ludecke filed a short-form statement as assistant to Mr. Shaw and reports a salary of $14,524, living allowance of $9,000 and rent allowance of $7,800 per year.

Activities by persons or organizations already registered under the Act:

J. Sutherland Gould Associates of New York reported its new financial arrangements with the Swiss National Tourist Office and the Switzerland Cheese Association. Registrant's fee from the Tourist Office has been increased to $633 per month for the preparation of press releases and feature articles on Swiss tourist attractions and from the Cheese Asso-

ciation registrant's fee is $400 per month for editing promotional material.

Public Service Audience Planners of Hollywood filed exhibits in connection with its representation of the Royal Danish Consulate General, Scandinavian National Tourist Offices, Finnish National Tourist Office and Swedish National Tourist Office. Registrant is engaged in the promotion and distribution of films disseminated by the foreign principals. Registrant receives $12.50 - $15.00 per TV bookings, $6.50 - $7.50 per cable bookings and $3.25 - $3.50 per general group bookings.

Stitt, Hemmendinger & Kennedy of Washington, D.C. filed exhibits in connection with its representation of Associacao Comercial e Industrial de Novo Hamburgo, Brazil. Registrant will attempt to persuade U.S. opinion that Treasury should apply a liberal discretion in applying the Contervailing Duty Law to developing countries.

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

On behalf of Milbank, Tweed, Hadley & McCloy of New York whose foreign principals are four banks, five foreign petroleum companies and three foreign governments: Lana R. Borsook as attorney reporting $2,375 per month; Roger Boyle as attorney reporting $33,000 per year and Francis S. L. Wang as attorney reporting $1,750 per month.

On behalf of the United States Office of the British Broadcasting Corporation of New York: Christopher Jeans as TV producer reporting $28,093.92 and James J. O'Conner as studio engineer reporting $15,080 per year.

On behalf of Dailey & Associates of Los Angeles, whose foreign principals are Fiji Visitors Bureau and New Zealand Government Tourist & Publicity Department: Phillip Joanou as senior vice president engaged in public relations and advertising on behalf of the principals.

On behalf of Partido de La Liberacion Dominicana of New York whose foreign principal is the parent political party in Santo Domingo: Manuel Manana; Fausto Hernandez; Jaime Vargas; Alberto Aybar; Pedro Pablo Reyes; Jose Castillo; Hector Cerda; Lincon Cruz; Rafael Fernandez; Manuel Vargas and Feliz Baez as members of the Central Committee. All are engaged in the dissemination of political propaganda on a special basis and receive no compensation for their services.

On behalf of FAM Book Service of New York whose foreign

principals are seven Soviet-bloc book companies: Fan Markoff as officer reporting a 15% commission for purchase of American literature and a 20-30% discount for placement of subscription and books from the foreign principal.

On behalf of the Amtorg Trading Corporation of New York which is the official Soviet purchasing agent in the United States: Andrey E. Danilevsky as market survey expert reporting $695 per month and Valentin D. Nesterkin as senior engineer reporting $655 per month.

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

COURTS OF APPEALS

ENVIRONMENT

1972 AMENDMENTS TO FEDERAL WATER POLLUTION CONTROL ACT DID NOT TERMINATE PENDING REFUSE ACT SUITS.

United States v. Rohm & Haas Co. (C.A. 5, No. 73-1727, Sept. 9, 1972; D.J. 90-5-1-1-115).

The United States brought this action under the Refuse Act, 33 U.S.C. sec. 407, to enjoin defendants from discharging wastewater effluents into the navigable water of the United States without a permit. After trial, the district court found defendants to be in violation of the Refuse Act and entered an injunction limiting discharges and establishing a timetable for achieving these limitations. The district court also enjoined disposal of chemical wastes by means of barging to sea.

The Fifth Circuit affirmed in part and reversed in part upon appeal. The court rejected appellants' primary argument that this action was barred by the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S.C. sec. 1342(k), which were passed while the suit was pending and which suspend Refuse Act suits for a three-year period. The court held that the savings clause to the 1972 Amendment preserved Refuse Act suits pending at time of enactment. The court also rejected appellants' additional argument that under the doctrine of primary jurisdiction this matter should have been first presented in an administrative adjudicatory proceeding. However, the court of appeals reversed and remanded the injunction against deep sea disposal of wastes because the trial court failed to enter adequate findings of fact and conclusions of law supporting the injunction.

Staff: Robert L. Klarquist (Land and Natural Resources Division); Chief Assistant United States Attorney Jack Shepherd (S.D. Tex.).

ENVIRONMENT

NEPA CLAIM MUST BE PRESENTED TO AGENCY FOR CONSIDERATION BEFORE CLAIM IS RIPE FOR JUDICIAL REVIEW.

Grand Canyon Dorries, et al. v. Ronald H. Walker, et al. (C.A. 10, No. 73-1853, Aug. 20, 1974; D.J. 90-1-4-747).

Plaintiffs, who conduct commercial float trips on the Colorado River below Glen Canyon Dam, brought this action for injunctive relief to compel the Bureau of Reclamation to regulate water releases from the dam in such a manner so as to guarantee enough waters for their operations. Plaintiffs alleged that the federal defendants violated the National Environmental Policy Act (NEPA) in failing to file an Environmental Impact Statement concerning the continued operation of the dam. Plaintiffs' additional cause of action was an alleged breach of contractual rights implied in the concession licenses granted to them by the National Park Service.

Affirming the district court, the court of appeals held that the NEPA claim was not ripe for adjudication because the plaintiffs had never presented their claim to the Bureau of Reclamation for that agency's consideration before plaintiffs sought judicial review. The court also ruled that sovereign immunity barred injunctive relief against the United States in suits arising out of alleged breach of contract.

Staff: Robert L. Klarquist (Land and Natural Resources Division); United States Attorney C. Nelson Day (D. Utah).

ENVIRONMENT

NEPA; STANDING.

Coalition For The Environment v. Linclay, et al., No. 72-1770; Coalition For The Environment v. Volpe, et al., No. 72-1769 (Jul. 31, 1974; D.J. 90-1-5-374, 90-1-4-432).

Environmental groups in the St. Louis, Missouri, area brought declaratory judgment action to stop construction of a multi-million dollar private commercial-industrial

complex (Earth City) on the Missouri River, above the ordinary high water mark. The group alleged that the construction of a highway interchange, approved but not funded by the Department of Transportation, and the construction of an industrial levee above the ordinary high water mark without a Corps of Engineers' permit constituted major federal action and the preparation of an EIS under NEPA. The district court dismissed for lack of standing. The court of appeals reversed, finding that certain of the groups' membership had suffered aesthetic harm, since the land area could be left vacant (and therefore more pleasant to the eye) and that the highway interchange and Earth City would result in increased vehicle traffic and resulting harm to air quality.

Staff: Neil T. Proto (Land and Natural Resources Division); Assistant United States Attorney David W. Harlan (E.D. Mo.).

ENVIRONMENT

NEPA; ADEQUACY OF EIS ON TRANSMISSION WIRES FINANCED BY REA.

O. W. Mowry, et al. v. Central Electric Power Co., Inc., et al. (C.A. 4, No. 73-2171, Sept. 4, 1974; D.J. 90-1-4-611, 90-1-4-618).

Landowners brought suit to enjoin construction of transmission wires financed by the Rural Electrification Administration for failure to comply with NEPA and REA Bulletin 20-21. The district court issued an injunction and REA prepared an EIS. After a trial, the court found the EIS adequate and otherwise in compliance with NEPA and Bulletin 20-21.

The landowners appealed and filed a motion to remand to REA for failure to comply with Bulletin 20-21, and that their appeal be dismissed pursuant to Rule 42(b), F.R.Civ.P., if the motion was denied. The court of appeals stated:

> To grant the motion of the appellants would be to sustain the contentions of the appellants, without the perfection of their appeal. This we may not do.

Therefore, "* * * at the request of the appellant, the appeal is dismissed * * *."

Staff: Neil T. Proto and L. Mark Wine (Land and Natural Resources Division).

INDIANS

LACK OF JURISDICTION IN DISTRICT COURT CURED BY JOINING THE UNITED STATES AS A PARTY PLAINTIFF IN THE COURT OF APPEALS.

Lambert v. Nantahala Power & Light Co. (C.A. 4, No. 74-1122, Sept. 4, 1974; D.J. 90-2-9-48).

An Indian built a house on tribal land in North Carolina for which he had a certificate of possessory interest. The land is held in trust by the United States for the benefit of the Eastern Band of Cherokee Indians. The power company connected a line to the house which burned down almost immediately. The Indian sued the company in federal court on a theory akin to res ipsa loquitur and obtained a jury verdict. The Indian sought to join the United States as a plaintiff but, on the Government's objection, the district court declined.

The power company appealed, raising only the sufficiency of the evidence. The court of appeals, sua sponte, raised the question of the district court's jurisdiction (which was, in fact, non-existent). The court of appeals joined the United States as plaintiff by order and then sought the Government's views. The Government consented to its joinder, and suggested that this cured the previous lack of jurisdiction. The court affirmed, not mentioning jurisdiction.

Staff: Edward J. Shawaker (Land and Natural Resources Division).

PUBLIC LANDS

AN ON-GOING BUSINESS IS REQUIRED IN ORDER TO OBTAIN A PATENT TO LAND AS A TRADE OR MANUFACTURING SITE IN ALASKA

Cornell v. Morton, et al. (C.A. 9, No. 73-1930, Sept. 3, 1974; D.J. 90-2-4-223).

Cornell claimed a right to a patent to public land under a statute permitting persons actually engaged in an on-going business enterprise on public land in Alaska, to acquire up to eighty acres of such land being used in the business. Cornell cleared an airstrip, set out a few picnic tables and built a privy. He claimed he had a business: a rustic campsite. In fact, he never had any customers. By memorandum, the court summarily affirmed Interior's rejection of Cornell's claim.

Staff: Edward J. Shawaker (Land and Natural Resources Division); former Assistant United States Attorney Keith A. Goltz (D. Alaska).

DISTRICT COURT

ENVIRONMENT

NEPA; APPROVAL OF FINAL ENVIRONMENTAL IMPACT STATEMENT.

Brooks, et al. v. Volpe (W.D. Wash., Civil No. 9144, Aug. 9, 1974; D.J. 90-1-4-245).

This case was first presented to the court in 1970 when a petition was filed to enjoin the construction of a four-lane Highway, I-90, through Snoqualmie Pass in the Cascade Mountain Range in the State of Washington. The peition alleged that no environmental impact statement (EIS) had been prepared or filed. The district court held that no EIS was necessary for reasons given (319 F.Supp. 90). The court of appeals reversed (460 F.2d 1193). Thereafter, the defendants prepared an EIS which the district court found to be legally insufficient (350 F.Supp. 269). Further construction of the highway was then enjoined in 1972 and an appeal taken to the court of appeals where the district court ruling was affirmed (487 F.2d 1344).

Due to the protracted period of litigation, construction continued from June 1970 to October 3, 1972. The work completed left a permanent mark on the Snoqualmie

Valley which cannot now be undone. The defendant's prepared a final EIS and moved for an order of compliance and for dissolution of the existing injunction.

The court observed that its review of the EIS is necessarily narrow, either under 5 U.S.C. sec. 706(2)(a) or (2)(d), and that the court may not substitute its judgment for that of the planning officials. It observed that the purpose of an impact statement is to provide sufficient information to the agency decisionmakers so that an optimally beneficial decision will be made.

The court found in this case that the EIS was supported by abundant detail and dealt with all possible alternatives. After the final EIS was prepared, defendant secured a new plan from a German engineering firm which had designed roads in the Alps. This design apparently called for construction of a viaduct adopting multi-tiered roadways. This type of design had been used in Germany. The new plan was not discussed in the final EIS because it was not received until after the final EIS had been submitted for approval. Plaintiffs insisted that the German plan needed to be considered by the highway department before filing a final EIS. The court dismissed plaintiffs' contentions and pointed out in the opinion that the German plan had many weaknesses and was not feasible for use in the Cascade Mountain region. The final EIS was approved and the injunction dissolved.

Staff: United States Attorney Stan Pitkin; Assistant United States Attorney Albert E. Stephan (W.D. Wash.).

* * *

TAX DIVISION
Assistant Attorney General Scott P. Crampton

DISTRICT COURT

FREEDOM OF INFORMATION ACT

INTERNAL REVENUE SERVICE'S REFUSAL TO PRODUCE SELECTED PORTIONS OF INTERNAL REVENUE MANUAL ON GROUNDS THAT DISCLOSURE WOULD SIGNIFICANTLY IMPEDE LAW ENFORCEMENT UPHELD.

Anthony Imbrunone v. United States Internal Revenue Service (ED Mich.) Civil No. 4-70099; decided July 17, 1974; D.J. # 5-37-2912

The taxpayer was indicted for income tax evasion and attempted to obtain various portions of the Internal Revenue Manual relating to "organized crime", allegedly for use in the preparation of his defense. Being unable to obtain this material through discovery under the Criminal Rules, he made a request for the same materials under the Freedom of Information Act, 5 U.S.C. 552. His request was denied and the denial was upheld by the Commissioner of Internal Revenue.

Thereafter, the taxpayer commenced this action to compel production of the materials. After suit was instituted, various portions of the Manual which had either been made public through other sources or which the Service no longer wished to protect were voluntarily made available to him. Production of the balance of the Manual material in dispute was opposed on the grounds that it did not come within the definition of an "administrative staff manual" which subsection (a)(2)(b) of the Act requires to be made public.

On cross-motions for summary judgment, the Court agreed with the Government's contention that the Manual material in question was not "administrative" in nature but was "law enforcement material", the disclosure of which would significantly impede enforcement of the revenue laws, citing Hawkes v. United States, 467 F. 2d 787 (C.A. 6, 1972).

The Court also rejected the taxpayer's request that it made an in camera examination of the Manual sections involved. It noted that in EPA v. Mink, 410 U.S. 74 (1973) the Supreme

Court held that in camera inspection is neither automatic nor necessary in every FOIA case. The Court held that the affidavit supporting the Government's motion meticulously described the content of the materials and the reasons for confidentiality. On that basis, the Court concluded that the materials need not be disclosed and dismissed the action.

Staff: Richard A. Scully (Tax Division)