U.S. Department of Justice

Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

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

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

William P. Tyson, Director

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VOL. 35, NO. 3 THIRTY-FOURTH YEAR MARCH 15, 1987

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136, Universal Building North, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

MICHAEL R. BAER (Kentucky, Eastern) by Warden R.L. Matthews, Federal Prison System, for his successful assistance to the Federal Correctional Institution in an emergency medical matter involving an inmate.

LANCE A. CALDWELL (Oregon) by Assistant Director James W. Greenleaf, Federal Bureau of Investigation Academy, Quantico, Virginia, for his outstanding presentations on the prosecution of major bank fraud cases during 1986.

GARY LEE COBE (Texas, Southern) by Postal Inspector-in-Charge A. T. Brown, United States Postal Service, for his outstanding work in the prosecution of a mail theft and mail fraud case.

RICHARD A. COOK (Indiana, Northern) by Special Agent-in-Charge Philip V. Fisher, Drug Enforcement Administration, for his successful prosecution of a drug case, involving the manufacture of P-2-P.

GARY C. CROSSEN (Massachusetts) by Supervisory Special Agent Edward M. Quinn, Federal Bureau of Investigation, for his efforts in the successful conviction of a well-known organized crime figure.

ALAN GERSHEL and LYNN A. HELLAND (Michigan, Eastern) by Special Agent-in-Charge James G. Huse, Jr., United States Secret Service, for their work in a major investigation and successful prosecution of a credit card fraud case.

ALAN GERSHEL and MARK A. MILLER (Michigan, Eastern) by Special Agent-in-Charge Ronald W. Hendrix, Bureau of Alcohol, Tobacco, and Firearms, for prosecutorial oversight and support in implementing the Wayne County Firearms Task Force.

GENEVA S. HALLIDAY (Michigan, Eastern) by Colonel Robert F. Harris, Corps of Engineers, Department of the Army, for her excellent work in a race and sex discrimination case.

RUTH R. HARRIS (Mississippi, Southern) by Special Agent-in-Charge Roger T. Castonguay, Federal Bureau of Investigation, for her contribution to the successful prosecution of two money laundering cases.

NANCY L. HOLLEY (Texas, Southern) by Assistant Attorney General F. Henry Habicht II, Land and Natural Resources Division, for her fine work on a series of environmental prosecutions for the illegal importation of non-conforming vehicles.

JEFFREY J. KENT (Oregon) by Attorney General Edwin Meese III for his fine work in obtaining the defeat of the Oregon Marijuana Initiative.

NICHOLAS P. KOSTOPULOS and MICHAEL E. RUNOWICZ (Florida, Southern) by Assistant Director Joseph R. Davis, Office of Legal Counsel, Federal Bureau of Investigation, for their participation as defense counsel in the New Agents Moot Court program, January 20-21, 1987.

ALEXANDRA LEAKE (Massachusetts) by Special Agent-in-Charge James W. Greenleaf, Federal Bureau of Investigation (Boston), for her outstanding work in the investigation and prosecution of a former City of Boston building inspector.

MICHAEL K. LOUCKS (Massachusetts) by Inspector-in-Charge H. R. Elliot, United States Postal Service, for his exemplary prosecution of an alleged injury case brought by a former postal employee, and was awarded the United States Postal Plaque for his contributions to the Postal Service.

JEFFREY H. MOON (District of Columbia) by Assistant General Counsel George C. Davis, Consumer Protection Division, United States Postal Service, for his favorable conclusion of a challenge to Postal regulations that prevented certain solicitations and advertisements from being mailed.

ROSS G. PARKER (Michigan, Eastern) by the Ontario Provincial Police Investigative Branch and was awarded a plaque for his valuable assistance in the investigation and extradiction of a murder suspect.

DEBORAH A. RAMIREZ (Massachusetts) by Special Agent-in-Charge John J. Coleman, Drug Enforcement Administration, for her successful efforts in a drug case.

ELLEN G. RITTEMAN (Michigan, Eastern) by Assistant Director Joseph R. Davis, Office of Legal Counsel, Federal Bureau of Investigation, for her hard work and tenacity in bringing a Federal Tort Claims Act case to a successful conclusion.

VICTORIA A. ROBERTS (Michigan, Eastern) by Regional Counsel C. B. Faulkner, Federal Bureau of Prisons, for her successful prosecution of a Federal Tort Claims Act case.

NANCY L. SIMPSON (California, Eastern) by Assistant Chief Deputy District Attorney David P. Druliner, Sacramento, California, for her assistance and advice in obtaining a potential wiretap warrant.

RICHARD G. STEARNS (Massachusetts) by Federal Bureau of Investigation Director William H. Webster for his assistance during the undercover investigation of Provisional Irish Republican Army individuals, who were attempting to purchase weapons in the United States.

PAMELA J. THOMPSON (Michigan, Eastern) by District Counsel J. M. Mac Millan, Veterans Administration, for her excellent preparation and trial of a Federal Tort Claims Act case.

WILLIAM T. WARREN III and ROBERT J. WASHKO (Tennessee, Middle) by Assistant Director Joseph R. Davis, Legal Counsel Division, Federal Bureau of Investigation, for their participation as defense counsel in the New Agents Moot Court Program, February 2-3, 1987.

L. MICHAEL WICKS (Michigan, Eastern) by Acting Assistant General Counsel Jane S. Roemer, Contracts and Information Law, Environmental Protection Agency, for his efforts in the satisfactory settlement of a Freedom of Information Act case.

VICTOR A. WILD (Massachusetts) by Postal Inspector-in-Charge Michael W. Ryan, United States Postal Service, for his successful prosecution of a mail fraud case.

SUSAN G. WINKLER (Massachusetts) by Assistant General Counsel George C. Davis, Consumer Protection Division, United States Postal Service, for her assistance in a false advertising case.

CLEARINGHOUSE

Summary of Recent RICO Decisions.

The Organized Crime and Racketeering Section of the Criminal Division has prepared two computerized sets of summaries of recent RICO decisions. One set lists cases alphabetically with their significant holdings; the other set lists all the categories of RICO issues numerically and sets forth the pertinent holdings of each case in which each issue was addressed. An Assistant United States Attorney interested in obtaining a copy of the RICO summaries should contact the Legal Counsel (EOUSA), and request item number CH-44.

An Assistant interested in obtaining information on a specific issue should contact Alexander S. White, Organized Crime and Racketeering Section, on FTS 633-1214.

POINTS TO REMEMBER

Criminal Provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603.

This Act amends certain criminal provisions of the Immigration and Nationality Act, and adds new criminal provisions, making three basic changes in criminal immigration law:

1) Revisions of 8 U.S.C. §1324(a)

A schematic comparing the organization of the former and the revised section 1324(a) is shown below:

Former §1324(a)	Revised §1324(a)
(a)(1) - bringing an unauthorized alien to the United States (judicially construed to apply only to surreptitious bringing)	(a)(1)(A) - surreptitious bringing of any alien, authorized or not, to the United States.
	(a)(2) - Open or surreptitious bringing of an unauthorized alien to the United States.
(a)(2) - transporting an unauthorized alien in the United States.	(a)(1)(B) - Same, except for deletion of element of the crime requiring proof that defendant knew that alien arrived in United States within last three years.

(a)(3) - harboring an unauthorized alien.	(a)(1)(C) - Same, except for deletion of provision that employment of an alien shall not be deemed to constitute harboring.
(a)(4) - encouraging an unauthorized alien to enter the United States (judicially construed to apply only to surreptitious entries).	(a)(1)(D) - encouraging an unauthorized alien to come to, enter, or reside in the United States, whether the entry is surreptitious or not.

Note that under new §1324(a)(2), an intent to smuggle an alien is not an element of the crime. Accordingly, this provision would criminalize such conduct as conveying the Mariel Cubans to immigration stations in Florida to enable them to claim political asylum, acts found not criminal under the previous statute.

In addition, the minimum standard of proof for all subparagraphs except §1324(a)(1)(A) has been lowered to "reckless disregard" of the alien's status.

The five year sentence per alien provided by former §1324(a) is maintained for §1324(a)(1)(A) - (1)(D). However, under §1324(a)(2) certain first offenses are misdemeanors, and the unit of prosecution is a "transaction," which may include more than one alien. Thus, in a Mariel boatlift situation with 125,000 aliens, if the defendant presents the aliens immediately to the proper INS officials at a designated port of entry, only one violation occurs; if the defendant takes the aliens to an undesignated port of entry, 125,000 violations result.

2) New 8 U.S.C. §1324A

Under this paragraph, it will now become unlawful to knowingly hire, recruit, or refer for a fee an unauthorized alien for employment. Section 1324A provides for the establishment of an employment verification system, requiring employers to document that employees hired are not unauthorized aliens, and establishes a system of civil penalties and injunctions.

New subsection 1324A(f) provides for imprisonment of up to six months for a person who knowingly engages "in a pattern or practice" of hiring unauthorized aliens. The legislative history indicates that "a pattern or practice" of violations is to be given a common-sense rather than overly technical meaning, and must evidence regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. H.R. Rep. No. 99-682, Part 3, 99th Cong., 2d Sess. (1986), p. 59.

3) Amendment of 18 U.S.C. §1546

Title 18 of the United States Code, Section 1546 prohibits falsification of specified immigration documents. The Act amends §1546 by expanding the list of specified documents which it is a crime to falsify, by adding the following documents: border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States. The expanded list should aid in prosecution of persons who produce false documentation to support a fraudulent claim to legalization of status under the new Act.

The Act also adds new subsections (b) and (c) to 18 U.S.C. §1546. Subsection (b) provides a penalty of two years imprisonment, plus a fine, for anyone who uses a false identification document, or misuses a real one, for the purpose of satisfying the new employment verification provisions of the Act (8 U.S.C. §1324A(b)).

New subsection 1546(c) provides that section 1546 does not prohibit any state or federal law enforcement or intelligence activity.

Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639.

The Act contains numerous provisions designed to deter immigration-related marriage fraud. It also creates a new criminal provision, codified as 8 U.S.C. §1325(b), which provides a penalty of five years imprisonment and a $250,000 fine for any "individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws."

(For questions about these statutory amendments, please phone the General Litigation and Legal Advice Section, 724-7144.)

(Criminal Division)

Gun Control Act Amendment Overview Correction

In the October 15, 1986, Bulletin, Clearinghouse Section, (Vol. 34, No. 11, at page 255), reference was made to a Criminal Division memorandum on amendments to the federal firearms statutes. The memorandum, as distributed, contained an error and should be changed to reflect the following information:

The quotation of subsection (n) on page 9 should read:

(n) it shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The first full sentence on page 10 should read:

A person under indictment for a felony may not ship, transport or receive a firearm in commerce, but he may posses a firearm.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari in Casey v. Doe, 796 F.2d 1508 (D.C. Cir. 1986). The issue is whether the Administrative Procedure Act authorizes judicial

review of a decision by the Director of the Central Intelligence Agency to discharge an employee pursuant to Section 102(c) of the National Security Act of 1947, 50 U.S.C. §403(c).

A petition for a writ of certiorari in Department of Justice v. Julian, No. 85-2649 (9th Cir. 1986). The question is whether copies of presentence reports that are in the possession of the Parole Commission or Bureau of Prisons are subject to mandatory disclosure under the Freedom of Information Act.

A brief amicus curiae in Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985). The question presented is whether a labor union can be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., or 42 U.S.C. §1981 on the ground that it has passively acquiesced in the employer's discrimination by the manner in which it has handled grievances.

A brief amicus curiae in CTS Corp. v. Dynamics Corporation of America, 794 F.2d 250 (7th Cir. 1986). The question presented is whether the Control Share Acquisitions Chapter of the Indiana Business Corporation Law is unconstitutional under the Supremacy Clause or the Commerce Clause of the Constitution.

A brief amicus curiae in State ex rel. Miller v. Industrial Commission of Ohio, 497 N.E.2d 76 (Ohio 1986). The issue is whether, consistent with the Supremacy Clause and the Atomic Energy Act, Ohio may subject a private contractor operating a federally-owned nuclear production facility to a supplemental workers' compensation award for violation of state safety standards.

CIVIL DIVISION

FIRST CIRCUIT HOLDS STATUTE OF LIMITATIONS SUIT TO COLLECT PENALTIES RUNS FROM DATE OF ASSESSMENT.

This suit was brought to collect an administrative penalty assessed by the Department of Commerce against a Boston attorney alleged to have furnished information to a Saudi Arabian embassy in furtherance of the Israeli boycott. The general statute of limitations on enforcement of civil penalties is five years. 28 U.S.C. §2462. The suit was brought more than five years after the violations occurred, but less than five years after the penalty was assessed. The district court dismissed the case on limitations grounds, citing a Fifth Circuit decision holding that the statute starts to run on the date of violation rather than the date of penalty assessment. United States v. Core Laboratories, Inc., 759 F.2d 480 (5th Cir. 1985). The First Circuit reversed, holding that since the government could not bring its suit until the penalty was administratively assessed, the statute of limitations did not start to run until the assessment. As the First Circuit acknowledged, this is in square conflict with the Fifth Circuit.

United States v. Meyer, ___F.2d___, No. 85-4798, (1st Cir. Jan. 14, 1987). D. J. # 77-36-1439. Attorneys: John F. Cordes (FTS 633-3380) and Robert V. Zener (FTS 633-3542), Civil Division.

FOURTH CIRCUIT RULES THAT FBI CONDUCTED REASONABLE SEARCH IN RESPONDING TO FOIA REQUEST AND IT WAS NOT REQUIRED TO CONFIRM OR DENY EXISTENCE OF AN INFORMANT FILE.

The Fourth Circuit upheld the reasonableness of the Bureau's search for documents in FBI files relating to contacts between Lyndon LaRouche and his associates and the Teamsters Union. It held that the FBI was not required to conduct a general search of all field offices, that no inference of bad faith could be drawn from a delay of several months in processing plaintiff's request, and that the failure of the search to discover a responsive document presented to the court by plaintiffs did not show the search to be inadequate.

The court also held that the Bureau properly refused to confirm or deny the existence of an informant file on Teamster President Jackie Presser under exemption 7(C). At the time of the Bureau's action, Mr. Presser's informant status had not been officially acknowledged. However, after oral argument, this status was officially confirmed. Although the court was informed of this development, the opinion makes no reference to this fact.

Freeman v. Department of Justice, ___F.2d___, No. 86-1073 (4th Cir. Dec. 29, 1986). D. J. # 145-12-7054. Attorneys: Leonard Schaitman (FTS 633-3441) and Mark B. Stern (FTS 633-5534), Civil Division.

FIFTH CIRCUIT RULES THAT TEXAS' STATUTORY CAP ON MALPRACTICE DAMAGES APPLIES TO THE UNITED STATES IN A FEDERAL TORT CLAIMS ACT SUIT, UPHOLDS THE CAP UNDER THE FEDERAL CONSTITUTION, AND GRANTS MOTION TO CERTIFY TO THE TEXAS SUPREME COURT THE ISSUE OF THE CAP'S VALIDITY UNDER THE STATE CONSTITUTION.

This case is one of four in the Fifth Circuit raising the issues of the constitutionality and applicability to the United States of the Texas statutory cap on malpractice damages. The cap limits such damages (other than medical care expenses) to $500,000, adjusted upward for inflation. The Fifth Circuit held that the damages cap, if constitutional, does limit the government's liability, under the FTCA. The court also rejected the plaintiffs' federal constitutional challenge under the due process and equal protection clauses as "nigh frivolous." Expressing uncertainty about whether the Texas Supreme Court would uphold the cap under the state constitution, the Fifth Circuit certified that issue to the state court. In doing so, the court of appeals carefully explained why it found none of the lower Texas appellate opinions persuasive evidence of how the state high court would rule, thus providing a roadmap for how that court might uphold the statute.

The court rejected the government's arguments that the district court failed to discount properly to present value certain of the damages awarded in this case. It also held that the district court had erroneously failed to consider certain claims for damages for mental anguish and loss of companionship. The court concluded, however, that remand for further consideration of these claims will be necessary only if the state supreme court overturns the damages limitation cap.

Lucas v. United States, ___F.2d___, Nos. 84-1296 and 84-1437 (5th Cir. Dec. 24, 1986). D. J. # 157-76-845. Attorneys: Robert S. Greenspan (FTS 633-5428), Bruce G. Forrest (FTS 633-5672), and Irene M. Solet (FTS 633-3355), Civil Division.

EIGHTH CIRCUIT SUSTAINS THE STATUTORY VALIDITY AND CONSTITUTIONALITY OF REGULATIONS IMPLEMENTING THE AFDC FILING UNIT PROVISION.

This case involves a challenge to a Health and Human Services regulation implementing a statutory provision added by the 1984 Deficit Reduction Act (DEFRA). The Secretary of HHS claims the statute requires all brothers and sisters who live together file for AFDC benefits as one filing unit. The statute requires that the income of all siblings who join the unit be counted in determining the family's AFDC eligibility. It also triggers a provision which requires that child support be assigned to the state. The district court, in a state-wide class action, enjoined enforcement of the regulation on statutory and constitutional grounds.

The court of appeals (Wollman, J. and Battey, J., Heaney J. (dissenting)) reversed. It held that, assuming the provision was in conflict with state child support law requiring that child support income be used exclusively for the benefit of the child on whose behalf it is paid, the budget reduction goal represented a "substantial federal interest" to override state law. The court rejected plaintiffs' argument that the regulation caused a taking of property--child support--without just compensation. While acknowledging that the question would have been simpler if Congress had not required that child support income be assigned, the court determined that the statute actually caused a reduction in AFDC assistance to the family and not a taking of private property. The statute is now the subject of an appeal by the Secretary from a district court decision holding the statute unconstitutional. Bowen v. Gilliard, No. 86-509 (probable jurisdiction noted Dec. 8, 1986).

Gorrie v. Bowen, ___F.2d___, No. 86-5394 (8th Cir. Jan. 16, 1987). D. J. # 145-16-2689. Attorneys: William Kanter (FTS 633-1597) and Carlene V. McIntrye (FTS 633-5459), Civil Division.

NINTH CIRCUIT HOLDS THAT PRESENTENCE INVESTIGATION REPORTS ARE NOT EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT.

These cases concern whether presentence investigation reports prepared by a federal district court for use in sentencing a criminal defendant, and later used by the Bureau of Prisons for correctional purposes, and by the Parole Commission in connection with a parole hearing, are subject to mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. §552.

The Ninth Circuit held that FOIA Exemption 3 was not a valid basis for a per se exemption for presentence reports, but only allowed the withholding of those specific types of information expressly identified in Section 4208(c) of the Parole Commission and Reorganization Act (PCRA). The court also held FOIA Exemption 5 inapplicable because it concluded the government failed to identify an existing statutory or common law privilege that exempts presentence reports from discovery, which is required for Exemption 5. The court further held that Criminal Rule 32 and 18 U.S.C. §4208 of the PCRA constitute a congressional mandate which waives the government's privilege to withhold presentence reports from the subject of the report. Finally, the court rejected government's claim that the Parole Act and Criminal Rule 32(c)(3)(E) constitute an alternative disclosure scheme and supersede the FOIA.

This decision conflicts with the recent decision of the District of Columbia Circuit in Durns v. Bureau of Prisons, No. 85-5704 (September 12, 1986), suggestion for rehearing en banc denied December 23, 1986. The court in Durns held that presentence reports fall within the purview of Exemption 5.

Julian v. Department of Justice, ___F.2d___, No. 85-2649 (9th Cir. Dec. 30, 1986). D. J. # 145-12-5977. Attorneys: Leonard Schaitman (FTS 633-3441) and Sandra Wien Simon (FTS 633-4557), Civil Division.

NINTH CIRCUIT DENIES MOTION TO VACATE EARLIER DECISION AS MOOT AND RETAINS RULING THAT TEMPORARY SUSPENSION OF CIVIL JURIES CAUSED BY LACK OF APPROPRIATED FUNDS IS A CONSTITUTIONAL VIOLATION.

During the past summer, it appeared that there would be a shortage in the amount of funds appropriated to pay federal juries. The Administrative Office of the United States Courts advised the district courts, based on the Anti-Deficiency Act, to stop holding civil jury trials until the new fiscal year or until Congress appropriated more funds. A group of plaintiffs who had jury trials scheduled in Los Angeles brought a mandamus action after the district court there notified counsel that it would postpone jury trials until funds were available.

The Ninth Circuit ruled June 26, 1986, that the temporary cessation of civil jury trials violated the Seventh Amendment guarantee of a civil jury trial. Congress, on that same day, provided additional funds for juries through the end of the fiscal year. The district courts immediately recommenced having jury trials. The government moved for the panel to vacate its decision on mootness grounds. The panel denied the motion and held it is not required to vacate its opinion since there was a controversy when the court ruled. It held the case was not moot because the district court voluntarily ended its unconstitutional activity without admitting its error, and there was a likelihood the problem would recur. The panel reasoned the case involved a major constitutional issue on which guidance should be provided to the district courts.

Armster v. U.S. District Court, ___F.2d___, No. 86-7354 (9th Cir. Dec. 22, 1986). D. J. # 145-13-1022. Attorneys: Douglas Letter (FTS 633-3602) and Peter Maier (FTS 633-4052), Civil Division.

ELEVENTH CIRCUIT UPHOLDS CONSTITUTIONALITY OF CIVIL MONETARY PENALTIES ACT.

The Secretary imposed a civil monetary penalty of $1,791,000 against a chiropractor for submitting false Medicare claims totalling $145,550. The chiropractor challenged the assessment, primarily on the grounds that the penalty imposed under the recently enacted Civil Monetary Penalties Act was criminal in nature and, hence, in violation of his due process rights. The Eleventh Circuit (Hill, Fay, and Morgan) rejected the chiropractor's arguments and enforced the monetary assessment against him. The panel held that Congress intended for the penalty to be civil rather than criminal and that, given the need to protect the integrity of the Medicare system, the penalty was not so severe or disproportionate to transform what was intended to be a civil penalty into a criminal penalty. This decision is the first to address the constitutionality of the Civil Monetary Penalties Act as applied prospectively.

Mayers v. Department of Health and Human Services, ___F.2d___, No. 85-3803 (11th Cir. Dec. 22, 1986). D. J. # 137-17M-550. Attorneys: Anthony Steinmeyer (FTS 633-3388) and John Hoyle (FTS 633-3547), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

RES JUDICATA FROM PRIOR CONDEMNATION PROCEEDING BARS INDIANS' QUIET TITLE CLAIM.

The Winnebago Indian Tribe and several individual members of the Tribe sued the United States, the State of Iowa, and several private landowners to quiet title to lands located along the Missouri River. The Tribe claimed the land accreted to its reservation; the individuals (heirs of certain allottees) claimed the land accreted to the allotments of the ancestors and that while the allotments had been conveyed away, the accretion lands had not been conveyed. All of the land to which the Tribe claimed title and most of the land which the allottees' heirs claimed had been acquired by the United States in condemnation proceedings.

The Eighth Circuit barred the Tribe's claim based on the res judicata effect of the prior condemnation proceedings. The Tribe opposed the prior proceedings, arguing that the stipulation it entered in those proceedings with the State of Iowa, in which it relinquished its claim to the disputed land was void because it was not approved by the United States, Indian Non-Intercourse Act, 25 U.S.C. §177; and the void stipulation made the condemnation judgment void. The court held the void stipulation did not void the judgment between the United States, the plaintiff, and the Tribe. The Tribe was bound by the prior proceeding even though in a separate, parallel condemnation proceeding it was held that the United States lacked the authority to condemn tribal land. The "mistake" made in the prior condemnation proceedings (i.e., it was assumed the United States had the authority to condemn tribal land) did not open the judgment in that proceeding to collateral attack.

The court held concerning the heirs' claims that when the heirs' ancestors conveyed the allotments they also conveyed the accreted land. The court applied the well-established principle that accretions ordinarily pass upon a conveyance of real estate absent a specific title reservation (slip. op. at 4). It rejected the heirs' argument that their case came within the substantial accretion 2222 doctrine (several hundreds of acres had accreted to 40-acre allotments). It held the doctrine limited to "situation where the government granted a patent to land which had been surveyed long before entry on the land and which, unknown to the government, had benefitted from the addition of substantial accretions where the purchaser would be unjustly enriched by ownership of the accretions" (slip op. at 6).

Bear v. United States, No. 85-2585/2487NE (8th Cir. Jan. 21, 1987). D. J. # 90-2-4-819, 90-2-4-820, 90-2-4-821, 90-2-4-822. Attorneys: Sarah P. Robinson (FTS 633-4358) and Edward J. Shawaker (FTS 633-4010), Land and Natural Resources Division.

FEDERAL RULES OF EVIDENCE

Rule 803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public records and reports.

Federal Rules of Criminal Procedure, Rule 26. Taking of Testimony.

Defendant was prosecuted under the Assimilative Crimes Act for drunk driving, with a suspended license, on a military base violating Washington state law. He was convicted and appealed, arguing the breathalyzer test results were inadmissible unless the person who calibrated the instrument was produced as a government witness, and the calibration report was inadmissible under the Federal Rules of Evidence 803(8) exclusionary provision because it contained matters observed by a law enforcement office. The government argued that Rule 4.09(d) of the Washington Court Rules permits admission of a calibration report where the defendant failed to make a written demand upon the prosecution within seven days of trial to produce the maintenance operator.

The Ninth Circuit held the trial court erred in applying Rule 4.09(d) of the Justice Court Criminal Rules. See Kay v. United States, 255 U.S. 476, (CA 4, 1958), in which the court, relying on Federal Rules of Criminal Procedure 26, held that the Assimilative Crimes Act "does not generally adopt state procedures . . . and federal, rather than state, rules of evidence are applicable under the Act." It reasoned that evidence of the maintenance officer's calibration certificate was admissible under Federal Rules of Evidence 803(8)(B) as a report made as a routine act in a non-adversarial setting. Any error under the confrontation clause was harmless, given the other overwhelming evidence of defendant's intoxication. The judgment of the lower court was affirmed.

(Affirmed.)

United States v. Wilmer, 799 F.2d 495 (9th Cir. Sept. 5, 1986).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 26. Taking of Testimony.

See Rule 803(8), Federal Rules of Evidence, this issue of the Bulletin for syllabus.

United States v. Wilmer, 799 F.2d 495 (9th Cir. Sept. 5, 1986).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%
08-01-86	6.18%
08-29-86	5.63%
09-26-86	5.79%
10-24-86	5.75%
11-21-86	5.77%
12-24-86	5.93%
01-16-87	5.75%
02-13-87	6.09%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see United States Attorneys' Bulletin, Vol. 34, No. 1, Page 25, January 17, 1986.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
TELETYPES TO ALL UNITED STATES ATTORNEYS

02-05-87 From Jason P. Green, Legal Counsel (EOUSA), re: "Corporate Criminal Liability Reporter - Federal Litigators Group."

02-06-87 From William P. Tyson, Director, re: "Designation of Senior Litigation Counsels."

02-16-87 From William P. Tyson, Director, re: "Attorney General's Advisory Committee."

02-19-87 From William P. Tyson, Director, re: "Assistant United States Attorney and United States Attorney Pay Changes."

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*U.S. G.P.O. 1987-181-487:60058