United States Attorneys

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Citations for the slip opinions are available on FTS 739-3754.

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COMMENDATIONS

Assistant United States Attorney Daniel T. Kamin, Southern District of Texas, has been commended by William H. Webster, Director, Federal Bureau of Investigation, for his successful prosecution of Howard W. Cole in the first criminal copyright case ever prosecuted in the Southern District of Texas.

Assistant United States Attorney Lawrence T. Bennett, District of Columbia, has been commended by William H. Webster, Director, Federal Bureau of Investigation, for his representation in the case of Anne Jackson, et al. v. Ralph Young, et al.

Assistant United States Attorney Dale E. Danneman, District of Arizona, has been commended by Leon M. Gaskill, Special Agent in Charge, Federal Bureau of Investigation, for his excellent work regarding a bond default.

Assistant United States Attorney Robert S. Groban Jr., Southern District of New York, has been commended by Maurice F. Kiley, District Director, Immigration and Naturalization Service, for his outstanding prosecution in the case of Hibbert v. INS.

Assistant United States Attorney John Kaley, Southern District of New York, has been commended by Edward T. Coyne, Regional Director of Investigations of the U.S. Customs Service, Department of the Treasury, for his fine work in the case of United States v. David Barnes and Frank Zichella.

Assistant United States Attorney Martin Reisig, Eastern District of Michigan, has been commended by R.L. Plate, District Director for the Internal Revenue Service, for his work and assistance in connection with the case of United States v. Andrew Renfro.

Assistant United States Attorney George Metcalf, Eastern District of Virginia, has been commended by Charles E. Price, Special Agent-in-Charge of the Federal Bureau of Investigation, for his successful prosecution of Robert Nicholas Galanes in a perjury case.

Assistant United States Attorney James C. Lynch, Northern District of Ohio, has been commended by Everett Loury, District Director of the Internal Revenue Service, for his efforts in the recent conviction of a tax protester.

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POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorneys have entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

DISTRICT	UNITED STATES ATTORNEY	ENTERED ON DUTY
Hawaii	Walter M. Heen	6/15/78
Maryland	Russell T. Baker, Jr.	7/14/78
New Mexico	R.E. Thompson	6/30/78
Pennsylvania, E.	Peter F. Vaira, Jr.	7/13/78
Virgin Islands	Ishmael Meyers	6/16/78

(Executive Office)

* * *

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following Bluesheets have been sent to press in accordance with 1-1.550 since the last issue of the Bulletin.

DATE	AFFECTS USAM	SUBJECT
6-8-78	9-42.450	Plea Bargaining
6-28-78	9-73.110	Immigration and Naturalization: Venue for Criminal (violations under 8 U.S.C. 1325)
7-10-78	9-15.004	Presidential Agents

(Executive Office)

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UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500. This monthly listing may be removed from the Bulletin and used as a check list to assure that your Manual is up to date.

TRANSMITTAL AFFECTING TITLE	NO.	DATE MO/DAY/YR	DATE OF Text	CONTENTS
1	1	8/20/76	8/31/76	Ch. 1,2,3
	2	9/03/76	9/15/76	Ch. 5
	3	9/14/76	9/24/76	Ch. 8
	4	9/16/76	10/01/76	Ch. 4
	5	2/04/77	1/10/77	Ch. 6,10,12
	6	3/10/77	1/14/77	Ch. 11
	7	6/24/77	6/15/77	Ch. 13
	8	1/18/78	2/01/78	Ch. 14
2	1	6/25/76	7/04/76	Ch. 1 to 4
	2	8/11/76	7/04/76	Index
3	1	7/23/76	7/30/76	Ch. 1 to 7
	2	11/19/76	7/30/76	Index
4	1	1/03/77	1/03/77	Ch. 3 to 15
	2	1/21/77	1/03/77	Ch. 1 & 2
	3	3/15/77	1/03/77	Index
	4	11/28/77	11/01/77	Revisions to Ch. 1-6, 11-15 Index
5	1	2/04/77	1/11/77	Ch. 1 to 9
	2	3/17/77	1/11/77	Ch. 10 to 12

	3	6/22/77	4/05/77	Revisions to Ch. 1-8
6	1	3/31/77	4/05/77	Ch. 1 to 6
	2	4/26/77	1/19/77	Index
7	1	11/18/77	11/22/76	Ch. 1 to 6
	2	3/16/77	11/22/76	Index
8	1	1/04/77	1/07/77	Ch. 4 & 5
	2	1/21/77	9/30/77	Ch. 1 to 3
	3	5/13/77	1/07/77	Index
	4	6/21/77	9/30/76	Ch. 3 (pp. 3-6)
	5	2/09/78	1/31/78	Revisions to Ch. 2
9	1	1/12/77	1/10/77	Ch. 4,11,17, 18,34,37,38
	2	2/15/78	1/10/77	Ch. 7,100,122
	3	1/18/77	1/17/77	Ch. 12,14,16, 40,41,42,43
	4	1/31/77	1/17/77	Ch. 130 to 139
	5	2/02/77	1/10/77	Ch. 1,2,8,10, 15,101,102,104, 120,121
	6	3/16/77	1/17/77	Ch. 20,60,61,63, 64,65,66,69,70, 71,72,73,75,77, 78,85,90,110
	7	9/08/77	8/01/77	Ch. 4 (pp. 81-129) Ch. 9, 39
	8	10/17/77	10/01/77	Revisions to Ch. 1

9	4/04/78	3/18/78	Index
10	5/15/78	3/23/78	Revisions to Ch. 4,8,15, and new Ch. 6
11	5/23/78	3/23/78	Revisions to Ch. 11,12,14, 17,18, & 20
*12	6/15/78	5/23/78	Revisions to Ch. 40,41,43, 60
*13	7/12/78	6/19/78	Revisions to Ch. 61,63,64, 65,66

*Transmittals to be distributed to Manual Holders soon.

(Executive Office)

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PROCESSING OF IMMUNITY REQUESTS

You are reminded that the normal processing time for an immunity request is two weeks (I USAM 11.101). Emergency requests can be obtained in situations in which the need for an order to compel could not reasonably be anticipated. Too often requests are forwarded on the eve of trial, which places an unfair burden upon section attorneys and upon the Assistant Attorney General who must approve them.

(Criminal Division)

* * *

CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Driver v. Helms, No. 77-1488 (1st Cir., May 25, 1978)
DJ 157-16-4473

Service of Process and Venue in Suits Against Federal Officials; 28 U.S.C. 1391(e)

In this class-action suit arising out of the CIA mail opening program, plaintiffs seek, inter alia, damages from 25 present or former government officials. The action was brought in the federal district court in Rhode Island, where one of the named plaintiffs resides. Service of process was by mail. The individual defendants neither reside in nor have substantial contacts with Rhode Island, and the complaint did not allege that any illegal activities occurred in that state. The district court nonetheless held that service and venue in Rhode Island were proper as to all the defendants under 28 U.S.C. 1391(e).

Upon certified interlocutory appeal, in which the United States appeared as amicus, the First Circuit reversed in part, and affirmed in part. The court of appeals held that section 1391(e) does not apply to those defendants who, at the time the action was brought, were not serving in the capacity in which they performed the acts on which their alleged liability is based. However, the court of appeals held that section 1391(e) applied to personal damage actions against those defendants who, at the time the suit was brought, were serving in the same official capacity in which they performed the acts complained of, and that as to those defendants, section 1391(e) provided both venue and personal jurisdiction.

Attorney: Paul Blankenstein (Civil Division)
FTS 739-3427

Fitzgerald v. Staats, No. 77-1466 (C.A.D.C., June 2, 1978)
DJ 35-16-876

Prejudgment Interest on Back Pay Award

Plaintiff was discharged from his Federal job but, on administrative appeal, was ordered reinstated by the Civil Service Commisssion. He received full back pay, but he was not allowed interest on the back pay. He then sued for the interest. The D.C. Circuit has just held that he may not collect interest. It rejected Fitzgerald's argument that the Veterans Preference Act and the Back Pay Act, which in general terms call for making the employee who has been wrongfully discharged whole, is a waiver

of sovereign immunity for purposes of interest, holding rather that such a waiver of sovereign immunity must be unequivocally expressed. The Court also rejected the argument that the decision to withhold some back pay while the amount due was being determined was a set off of amounts due under a final judgment to cover possible claims of the United States against the judgment creditor; interest is allowed by 28 U.S.C. 227 on such set offs when the claim against the judgment creditor is later dropped.

Attorney: Rebecca L. Ross (Civil Division)
FTS 739-2230

Halkin v. Helms, Nos. 77-1922, 77-1923 (C.A.D.C., June 16, 1978) DJ 95-16-3837

States Secrets Privilege

In this action against, inter alia, the National Security Agency, the Secretary of Defense invoked the claim of state secrets privilege with respect to material relating to the interception of international communications. The C.A.D.C. has just upheld the Secretary's claim of privilege. The Court noted that "the utmost deference" was due to executive assertions of privilege upon grounds of military or diplomatic secrets, and, after an in camera examination, the Court was satisfied that there was a reasonable danger that disclosure of the information would expose matters which, in the interests of national security, should not be divulged.

Attorneys: Larry L. Gregg (Civil Division)
FTS 739-4686
R. John Seibert (Civil Division)
FTS 739-4267

Shannon v. HUD, No. 77-2255 (3rd Cir., June 5, 1978) DJ 130-62-2647

Attorneys Fees for Title VI

Plaintiffs prevailed in a private action under Title VI of the Civil Rights Act against the Department of HUD. They then sought an award of attorneys fees under the Civil Rights Attorneys Fees Awards Act of 1976 (which was enacted to limit the Supreme Court's decision in Alyeska Pipeline Co. v. Wilderness Society and generally authorizes the award of attorneys fees to prevailing parties in suits brought under Title VI and a number of other civil rights statutes). In the first appellate decision construing the 1976 Act, the Third Circuit has

affirmed the lower court's denial of attorney fees and adopted our view that the statute was not intended to authorize fee awards against the United States (except in a limited class of tax suits not pertinent here). As a basis for its decision the Third Circuit noted that a waiver of sovereign immunity must be clearly and unequivocally expressed in a statutory provision.

Attorney: Mark H. Gallant (Civil Division)
FTS 739-2689

Butz v. Economou, 46 U.S.L.W. 4952 (Sup. Ct., June 29, 1978)
DJ 106-51-281

Official Immunity From Damage Suits

The Supreme Court has made several decisions relating to the immunity of federal officials in suits for damages. In the most important of these, Butz v. Economou, plaintiff claimed that his First and Fifth Amendment rights were violated by means of an administrative prosecution brought to revoke his license as a commodities future merchant. Plaintiff sought damages from the Department of Agriculture officials allegedly involved, including the Secretary, an administrative hearing examiner, the judicial officer, the administrative prosecutor, and the auditors who investigated the administrative complaint. The Supreme Court, in a 5-4 decision, held that federal executive officials are not generally entitled to absolute immunity. Rather, they are entitled to the same qualified immunity, requiring a showing of good faith and reasonable belief, that is available to state officials sued under 42 U.S.C. 1983. However, the Court held that executive officials performing certain special functions which necessitate more complete protection, such as the administrative equivalents of judges and prosecutors, may still claim absolute immunity. In this case, it appears therefore that all defendants will be able to claim absolute immunity, with the exception of the auditors, who will have to make the factual showing necessary to obtain qualified immunity.

The absolute immunity available to federal executive officials sued on common law claims remains unchanged.

The Court denied certiorari in four other cases involving official immunity, thus leaving standing court of appeals decisions that a) absolute immunity applies to common law libel actions (Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution, 46 U.S.L.W. 3803 (June 27, 1978);

Machen v. Patterson, 46 U.S.L.W. 3803 (June 27, 1978)); b) only qualified immunity applies in a suit against the Chief of the Capitol Police by persons arrested at the Capitol building during the Mayday demonstrations in 1971 (Powell v. Dellums, 46 U.S.L.W. 3803 (June 27, 1978)); and c) a Government attorney who perjured himself before a Federal district judge in connection with a grand jury proceeding he was conducting is not entitled to prosecutorial immunity because his actions were investigative rather than prosecutorial (Goodwin v. Briggs, 46 U.S.L.W. 3780 (June 19, 1978)).

Attorney: Barbara L. Herwig (Civil Division)
FTS 739-3469

Haas v. Howard, Nos. 77-1439, 77-1481 (1st Cir., June 21, 1978)
DJ 145-17-1618

HUD-Insured Housing Projects; Approval Of Rent Increase And Failure To Pay Operating Subsidy

The district court in this case entered a preliminary injunction restraining a landlord of a HUD-insured project from implementing a HUD-approved rent increase. The district court based its preliminary injunction on HUD's failure to implement an allegedly mandatory "operating subsidy" statute enacted in 1974 which would provide rent relief to certain low-income tenants. The legality of HUD's failure to implement the 1974 statute is currently before the Supreme Court and the Supreme Court has issued a stay of a district court order requiring the immediate payment of operating subsidies in Underwood v. Hills, 429 U.S. 892 (1976). The plaintiffs in Haas are members of a nationwide class of tenants who are plaintiffs in Underwood. On our appeal of the district court's preliminary injunction, the First Circuit ruled that plaintiffs are barred by res judicata from seeking rent relief here that would circumvent the effect of the Underwood stay. The court also reaffirmed previous rulings that HUD rent approval decisions are not subject to judicial review unless HUD ignores a plain statutory duty or commits constitutional error. The court found these exceptions inapplicable and reversed the preliminary injunction.

Attorney: John F. Cordes (Civil Division)
FTS 739-3426

Husovsky v. United States, Nos. 76-1533, 76-1534 (C.A.D.C., June 27, 1978) DJ 157-16-2746

Duty To Inspect Condition Of Trees Near Urban Road; Award Of Damages Greater Than Administrative Claim

A major urban thoroughfare runs through Washington, D.C.'s Rock Creek Park, an urban forest preserve run by the National Park Service. Plaintiff sued after a tree on private land near the edge of the road's right of way fell onto the roadway, causing an auto accident in which he was severely injured. The D.C. Circuit has just upheld a finding that the United States is liable for failure to use reasonable care to identify the hazardous tree and prevent it from falling. Two alternate theories were used. First, the National Park Service actually assumed the responsibility (with the District of Columbia) of making regular weekly inspections of trees abutting the roadway; the Court then held that weekly drive-through inspections are inadequate for forest land adjacent to an urban thoroughfare. Second, although the tree was on technically private land, the Park Service had maintained it for many years as if it was part of Rock Creek Park. Damages greater than the amount sought in the administrative claim were allowed on the ground that new factual developments took place after the administrative claim was made. It did not matter, the Court held, that those new developments consisted of a significant improvement in plaintiff's health, since a longer life span meant greater continuing medical expenses and more pain and suffering.

Attorney: Ronald R. Glancz (Civil Division)
FTS 739-3424

Vallance v. United States, No. 78-1051 (5th Cir., June 13, 1978) DJ 157-73-428

Malpractice Claim By Serviceman For Treatment In Military Hospital

In another decision applying the Feres doctrine (Feres v. United States, 340 U.S. 135 (1950)), the Fifth Circuit has denied relief to a naval officer who filed a malpractice claim. Since he was on active duty when he sought medical treatment at a naval hospital, he was deemed to have been injured "in the course of activity incident to service." Feres, 340 U.S. at 146.

Attorney: William L. Johnson (Assistant United States Attorney, Fort Worth, Texas)
FTS 334-3291

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

Berry v. Doles, No. 76-1690 (June 26, 1978) DJ 166-19M-91

Section 5 of the Voting Rights Act

On June 26, 1978 the Supreme Court entered a per curiam opinion in the above styled case. The Court directed a three-judge district court, after having found that a voting change was not properly submitted by a jurisdiction covered by Section 5 of the Voting Rights Act of 1965 pursuant to the provisions of that statute, to require the jurisdiction to submit the change for federal approval within thirty days. The district court had failed to require prompt submission of the change. If, after that time, federal approval is not secured, the plaintiffs may request further relief, including the setting aside of elections held under the change. The Court had requested the views of the United States in this case, and followed the recommendations in our brief.

Attorney: Mark Gross (Civil Rights Division)
FTS 739-4126

Evans and the United States v. Washington, et al., ___ F. Supp. ___, C.A. No. 76-0293 (D. D.C., June 14, 1978) DJ 168-16-3

Rights of the Mentally Retarded

On June 14, 1978, Judge John Pratt entered a Final Judgment and Order in the above styled case. The court found defendant District of Columbia officials to have violated the constitutional rights of mentally retarded residents of Forest Haven, Laurel, Maryland, under the Fifth and Eighth Amendments, to adequate treatment and habilitation in the setting least restrictive of individual liberty and to freedom from harm. Plaintiffs, the United States as plaintiff-intervenor, and defendants negotiated the order which was entered by the Court. The order enjoins defendants to develop and provide each of the 1100 class members with an individualized habilitation program. Of particular significance is defendants' duty to develop and create the necessary community-based placements to provide all class members with community living arrangements, day programs and services as are suitable to each. The mechanism through which the necessary planning for and implementation of the order is to be accomplished is the appointment by defendants of a Developmental Disabilities Professional (DDP) with a qualified staff. Plaintiffs and plaintiff-intervenor are to participate in the selection of the DDP and in determining the criteria for

selection of the DDP and his/her staff. Defendants and the DDP must submit plans for implementation of the order for the court's approval. Defendants are also enjoined to remedy constitutional violations in the institution, involving, e.g., inadequate medical care, improper use of seclusion, restraint and psychotropic medication, unsafe, inhumane living conditions, inadequate staffing, staff/resident abuse and resident injury caused by other residents, in order to safeguard residents during the period of transition to the community.

Attorneys: Susan Daniel (Civil Rights Division)
Leonard Rieser (Civil Rights Division)
Steve Mikochik (Civil Rights Division)
FTS 739-5315

Brigham Young University, Provo, Utah (June 8, 1978)

1968 Fair Housing Act

On June 8, 1978 this Department and Brigham Young University signed an Agreement to insure compliance with the Fair Housing Act, allowing the University to continue to require its students to live in sex-segregated housing off-campus but eliminating any sex segregation of single non-students. The Division had notified the University and 36 landlords in the Provo area last February 28 that the Department considered the University's housing policy, which required off-campus landlords who rented to single students to provide separate complexes or wings of complexes for single men and single women, in violation of the prohibitions against sex discrimination in the 1968 Fair Housing Act. Under the Agreement, landlords who rent only to students of institutions that require sex segregation on religious and moral grounds may continue to provide separate quarters for men and women but such sex segregation policies may no longer be applied to non-students. The Agreement is based on Congressional policies that permit sex segregation in college dormitories and similar housing.

Attorneys: Frank Schwelb (Civil Rights Division)
Daniel O'Hanlon (Civil Rights Division)
FTS 739-4123

Fisher and United States v. Lohr and Sutton and Mendoza and the United States v. Tucson School District Number 1, ___ F.Supp. ___ (C.A. Nos. 74-90 and 74-204) (D. Ariz., June 5, 1978) DJ 169-8-29

School Desegregation

On June 5, 1978 the Court (J. Frey) entered an Order, Findings of Fact and Conclusions of Law in the above styled

cases. Although the court found that defendants had acted with segregative intent in assigning students to at least thirty schools (there are currently 96 schools in the system) only nine schools were found to retain vestiges of de jure segregation. With respect to the other schools, the court found that "even without any intentional segregative acts by the District, (they) would have a racial or ethnic balance noticeably different from that which they have at present." The court (1) enjoined defendants from further discrimination based on race or ethnic origin, (2) enjoined the further construction of new schools or permanent additions to existing schools, and (3) ordered defendants to develop and submit "with all due speed" a plan designed to eliminate any vestiges of discrimination based on race or ethnicity. The court's order contemplates fall relief "if possible".

Attorney: John Moore (Civil Rights Division)
FTS 739-3802

The Regents of the University of California v. Bakke, No. 76-811 (June 28, 1978) DJ 169-11E-11

Medical School Admissions Program

On June 28, 1978 the Supreme Court handed down its decision in the above styled case. The Court reversed that portion of the judgment of the California Supreme Court prohibiting the consideration of race in the Davis Medical School admissions program and affirmed that portion directing Bakke's admission.

Attorney: Jessica Silver (Civil Rights Division)
FTS 739-2195

CRIMINAL DIVISION

Assistant Attorney General Philip B. Heymann

Pinkus v. United States, ___U.S.___, No. 77-39, decided May 23, 1978

Obscenity: Jury Instructions

In Pinkus v. United States, the Supreme Court reversed petitioner's conviction for mailing obscene materials and advertisements for obscene materials because the trial court erroneously instructed the jury that "in determining community standards, you are to consider the community as a whole . . . , men, women, and children. . . ." The Supreme Court held that children are not to be included as part of the community where the intended recipients of the allegedly obscene materials are adults. On the other hand, the Court held that both "sensitive" and "insensitive" persons are part of the adult community and the trial court may refer to "sensitive" persons in its charge so long as it does not place undue emphasis on that aspect of the adult community.

In Pinkus, the trial court also charged that the jury should determine whether the materials appealed to the prurient interest of the average person of the community as a whole or the prurient interest of members of a deviant sexual group. The court approved such a charge where the materials catered to both persons of deviant persuasions and the average person, and where the government presented expert testimony of such deviant appeal on rebuttal. The Court also ruled that the evidence was sufficient to warrant giving a pandering instruction even though the government did not offer extensive evidence of the methods of production, editorial goals, methods of operation or means of delivery.

Finally, the Supreme Court remanded the case to the court of appeals to decide whether the trial court should have admitted two films as comparison evidence. The court of appeals had avoided this issue on direct appeal, invoking the concurrent sentence doctrine since the films would have been relevant to at most one of the eleven counts. Petitioner's sentences, however, were not fully concurrent since he had received cumulative $500 fines on each count, and the concurrent sentence doctrine therefore should not have been implemented in this case.

Attorney: Patty Ellen Merkamp
(Criminal Division)
FTS: 739-4182

United States v. Humphrey and Truong, ___F. Supp.___, No. 78-25-A (E.D. Va. March 30, 1978)

Espionage: Foreign Intelligence Exception to Fourth Amendment's Warrant Requirement

On May 19, 1978, Ronald Humphrey, an employee of the U. S. Information Agency and Truong D. Hung, a Vietnamese alien, were convicted of espionage and related offenses.

In ruling on pre-trial motions to suppress, the District Court found that the foreign intelligence exception to the Fourth Amendment's warrant requirement applied to warrantless electronic surveillances authorized by the Attorney General and warrantless searches of packages and envelopes authorized by the President and the Attorney General, and that certain information and documents obtained by these surveillances and searches was admissible while other evidence would be suppressed. The dividing line occurred when, during the course of the investigation, the primary focus shifted away from foreign intelligence gathering, and criminal prosecution became, in the Court's view, the primary focus of the investigation.

The Court found that no existing warrant procedure, either under Rule 41 Fed. R. Crim. P. or Title III, can be reconciled with the Government's need to protect its security and existence and that the nature of foreign intelligence gathering does not lend itself to present warrant requirements.

Attorneys: William B. Cummings, United States Attorney
Frank W. Dunham, Jr., Assistant U. S. Attorney
Justin W. Williams, Assistant U. S. Attorney
David R. Homer, Criminal Division
John L. Martin, Criminal Division

United States v. John Mauro and John Fusco, ___ U.S. ___, No. 76-1596; United States v. Richard Thompson Ford, No. 77-52, decided May 23, 1978.

Interstate Agreement on Detainers Act

The Supreme Court held that the United States is a receiving as well as a sending state under the Interstate Agreement on Detainers Act, 18 U.S.C. App. pp. 1395-1398 (1976). It unanimously held, however, in the Mauro and Fusco case, reversing 544 F.2d 588 (2nd Cir., 1976), that a writ of habeas corpus ad prosequendum, 28 U.S.C. 2241(c)(5), "issued by a federal court to state authorities, directing the production of a state prisoner for trial on criminal charges, is not a detainer within the meaning of the Agreement and thus does not trigger the application of the Agreement." Affirming United States v. Ford, 550 F.2d 732 (2nd Cir., 1977), the Court held, with two Justices dissenting, that "the United States is bound by the Agreement when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus ad prosequendum."

The important limitations of the Agreement invoked by the filing of a detainer are the requirement that, subject to continuances, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State," Article IV(c), and a prohibition on returning the prisoner to the sending State before completion of the trial, Article IV(e). Violation of either limitation requires dismissal with prejudice. Article IV(e), Article V(c). In case of conflict between the speedy trial provision of Article IV(c) and the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq., the Court states that "the more stringent limitation may simply be applied."

Attorneys: Elliott Schulder (Criminal Division) FTS 739-3692

Ezra Friedman (Criminal Division) FTS 739-4586

United States v. Alan Herbert Abrahams, ___F.2d___, No. 78-1131 (1st Cir., April 19, 1978)

Pretrial Detention

The First Circuit affirmed a district court order denying bail to a defendant pending trial. The defendant had a long history of committing criminal offenses, a proclivity for using fictitious identities, was an escaped New Jersey prisoner, had recently forfeited a $100,000 cash appearance bond, and faced serious charges in a number of jurisdictions. The Court felt these factors made this a "rare case of extreme and unusual circumstances" which overcomes the presumption in favor of release present in 18 U.S.C. 3146 and which justifies pretrial detention without bail.

Attorneys: Edward Harrington, United States Attorney FTS: 223-3187; Michael Collora, Assistant United States Attorney

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

Andrus v. Charlestone Stone Products, Co., Inc., ____ U.S. ____
No. 77-38 (S.Ct. May 31, 1978) DJ 90-1-18-1024

Mining

Reversing the Ninth Circuit, a unanimous Supreme Court agreed that water is not a "valuable mineral" under the Mining Law of 1872 and, hence, is not a locatable mineral thereunder. The Court emphasized the history of mining and water law, judicial and Interior decisions construing the statutes, and the practical problems of a contrary holding, especially from having two overlapping systems for acquisition of private water rights in the eastern States. There is some question of the status of the 22 claims in further proceedings. (The Court did not comment on the Verrue problem--the Ninth Circuit and district courts within that Circuit reweighing the evidence and substituting their judgment for Interior's in mining cases. The Solicitor General expressly declined to present the issue but alluded to it by footnote in the Government's petition.)

Attorneys: Sara S. Beale (Solicitor General's staff) FTS 739-3957; Larry A. Boggs and Carl Strass (Land and Natural Resources Division) FTS 739-2753/2720

National Coal Association v. Andrus (Surface Mining Litigation), ____ F.2d ____ No. 78-1406 (D.C. Cir, May 25, 1978) DJ 90-1-18-1287

Mining

The D.C. Circuit refused to enjoin the implementation of Interior's interim program regulations under the Surface Mining Control and Reclamation Act of 1977. The district court had rejected the industry's contentions as to the bulk of the regulations. Certain industry parties immediately moved for summary reversal or an injunction pending appeal to enjoin the regulatory program, either in whole or in part. In its per curiam order, the D.C. Circuit concluded that the district court had not abused its discretion in denying preliminary injunctive relief and went on, sua sponte, to summarily affirm the district court's denial of such relief. The second phase of the litigation, which involves constitutional issues and issues of record support for the regulations, is currently being briefed in the district court.

Attorneys: Michael A. McCord and Alfred T. Ghiorzi (Land and Natural Resources Division) FTS 739-2774/5037

United States v. 1,380.09 Acres in Caldwell Parish, La. (Bodcaw Co.), ____ F.2d ____ No. 75-2328 (5th Cir. June 1, 1978) DJ 33-19-398-8

Condemnation

A majority of the panel held that a condemnee may recover appraisal costs, but not expert witness fees, from the United States under the Fifth Amendment where the facts are unusual and equity or justice requires. It said the character of the land taken here (a narrow strip along a waterway), the difficulty of valuation, no recent appraisal, no government on-site appraisal until some 3 years after suit was commenced, and a jury award $45,000.00 more than the deposit of estimated compensation, so qualified this case. On remand the district court is directed to ascertain the part of the $20,512.50 attributable to witness fees and to deduct that part. The dissent (by Senior Judge Cowen, formerly Chief Judge, Court of Claims) viewed the case as a routine condemnation case, regarded the majority's distinction between witness fees and appraisal costs as untenable, and declared the majority's holding as being in conflict with a Supreme Court decision, decisions of other courts of appeals, and recent congressional intent.

Attorneys: Raymond N. Zagone and Jacques B. Gelin (Land and Natural Resources Division) FTS 739-2748/2762 and Eva R. Datz (formerly of the Land and Natural Resources Division)

Diamond Shamrock Corp. v. Costle, ____ F.2d ____ No. 77-1111 (D.C. Cir. May 30, 1978) DJ 90-5-1-7-336

Federal Water Pollution Control Act

The court of appeals affirmed the district court's dismissal of this suit by several chemical companies challenging EPA's Net-Gross Adjustment Regulations under the FWPCA. The court agreed that judicial review should be postponed under the ripeness doctrine until the regulations are applied in permit proceedings and the consequences realized, since no present hardship could be shown--all in the interest of enhancing the administrative process and assisting judicial review. Generally, the regulations at issue call for expression of permit effluent limitations when

discharging wastewater in "gross" terms, with two exceptions. The companies contended for "net" terms, i.e., credits for pollutants already in its intake water.

Attorneys: Glen R. Goodsell, Raymond N. Zagone and Jacques B. Gelin (Land and Natural Resources Division) FTS 739-5034/2748/2763

United States v. 478.34 Acres in Spencer County, Ky., (Cook), ____ F.2d ____ No. 76-1706 (6th Cir. June 1, 1978) DJ 33-18-299-1

Condemnation

The court of appeals remanded this jury-tried condemnation case for a new trial on two separate grounds. At trial, the Government had introduced into evidence a statistical survey of land sale prices within the county within a particular time period in order to refute the landowners' theory that the demand for residential lots in the southern half of the county was equal to the demand for such lots in the northern part of the county near the metropolitan Louisville area. The court of appeals ruled that such evidence was inadmissible in that it constituted hearsay testimony which did not fall within the exceptions for expert opinions or for deeds and public records. Second, the court of appeals held that, although the district court had properly excluded the landowners' evidence that the entire farm involved could be subdivided into large residential lots, the district court had erred by excluding evidence that the property was adaptable and needed or likely to be needed in the reasonably near future for residential strip development along the road in front of the farm.

Attorneys: Michael A. McCord and George R. Hyde (Land and Natural Resources Division) FTS 739-2774/2731

John P. Caporal, et al. v. United States, ____ F.2d ____ No. 76-2167 (10th Cir. June 2, 1978) DJ 33-37-402

Condemnation

The Tenth Circuit affirmed a commission award of $1.00 to Oklahoma City, for an alley and $610,000.00 to the landowners for an office building, both of which were condemned as part of the site for the Federal Courthouse. The landowners had sought compensation for the taking of the alley, but since the alley had not been vacated prior to the

taking of the adjacent property the Court of Appeals held they had no compensable interest in it. The valuation of the office building, the court held, "must be accepted by a reviewing court unless held to be clearly erroneous," which it found was not the case. The valuation of a leasehold interest in the property taken was also affirmed. The court took occasion to castigate the landowners' tactics of affording the leasehold area a higher valuation for the fee interest award and subsequently giving it a lower valuation for the valuation of the leasehold interest award. This the Court found to be less than proper and exemplary.

Attorneys: George R. Hyde (Land and Natural Resources Division) FTS 739-2731 and Eva R. Datz (formerly of the Land and Natural Resources Division)

Collingwood-On-The-Potomac Citizens Association v. Fish, ____ F.2d ____ No. 78-1182 (4th Cir. June 5, 1978)
DJ 90-1-4-1760

National Environmental Policy Act of 1969

On an expedited briefing and argument schedule, the Fourth Circuit affirmed, based on the decision of the district court holding that the National Park Service's plan to relocate a 2-mile portion of the George Washington Memorial Bicycle Trail does not require preparation of an EIS, is not arbitrary and capricious under the APA, and is not contrary to the implicit provisions of the statute appropriating funds for the project. Relocation is expected to commence immediately.

Attorneys: Larry G. Gutterridge and Jacques B. Gelin (Land and Natural Resources Division) FTS 739-2740/2762

United States v. John, and John v. Mississippi, ____ U.S. ____ Nos. 77-836 and 77-575 (S.Ct. June 23, 1978) DJ 90-2-7-3004

Indians

The Supreme Court ruled that lands held by the United States in trust for the Mississippi Band of Choctaw Indians and declared a reservation by Interior are "Indian country" within the meaning of the Major Crimes Act. Hence, that Act provided the jurisdictional base for federal prosecution of a Choctaw Indian for assault with intent to kill occurring on such lands and Mississippi lacked jurisdiction to prosecute him for the same offense.

Attorneys: H. Bartow Farr (Solicitor General's staff) Larry G. Gutterridge, Carl Strass, and Raymond N. Zagone (Land and Natural Resources Division) FTS 739-2740/2720/2748

Perkins v. Rumsfeld, ____ F.2d ____ No. 76-2279 (6th Cir. June 9, 1978) DJ 90-1-4-1482

Jurisdiction

The court of appeals affirmed the district court's dismissal of a complaint in a suit seeking to prohibit transfer of the communications electronics repair function from the Lexington-Bluegrass Army Depot to other depots in California and Pennsylvania. The court declared that military transfer authority is vested in the Secretary of Defense by statute and "In exercising this authority the Secretary is performing a discretionary and not a ministerial function. The Courts have no jurisdiction to interfere."

Attorneys: Kathryn A. Oberly and Edmund B. Clark (Land and Natural Resources Division) FTS 739-2756/2977

Harjo v. Andrus, ____ F.2d ____ No. 77-1122 (D.C. Cir. June 9, 1978) DJ 90-2-4-287

Indians

The district court granted summary judgment in favor of certain citizens of the Creek Nation in their suit to establish that the federal government did not act legally in recognizing the Principal Chief as the sole embodiment of the tribal government, excluding the National Council which under the Tribe's 1867 constitution was responsible for the Tribe's financial affairs. Based on its finding that the National Council had not met since 1916, and could not readily be convened, the district court declined plaintiffs' request that it order that the National Council be convened forthwith, and, instead, issued an equitable decree designed to let the Tribe's entire membership decide how it wanted to reconstitute its constitutional government. The court of appeals affirmed the district court's order and its subsequent order denying plaintiffs' motion to modify the judgment.

Attorneys: Jacques B. Gelin, Rembert A. Gaddy and Edmund B. Clark (Land and Natural Resources) FTS 739-2762/3248/2977

Appalachian Power Company v. EPA, ____ F.2d ____ No. 72-1733 (4th Cir. June 13, 1978) DJ 90-1-2-3-22

Clean Air Act

The court of appeals granted the Government's motion to dismiss the petition for review of the West Virginia State Implementation Plan, filed in 1972, based on (1) the Supreme Court's decision in Union Electric Co. v. EPA, 427 U.S. 246 (1976), and (2) the procedural adequacy of the State hearings undertaken prior to the SIP's approval by EPA. As to the latter reason, the court also found "persuasive the reasoning that the petitioners, by bypassing the State remedy [State court review] for correction of any defect in the State proceeding, lack standing to challenge any alleged errors in those State Agency proceedings later before the EPA or this Court."

Attorneys: Neil T. Proto and Edmund B. Clark (Land and Natural Resources Division) FTS 739-3888/2977 and Bethami Auerbach (Environmental Protection Agency) 755-0766

Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, ____ F.2d ____ No. 78-1069 (10th Cir. June 15, 1978) DJ 90-1-4-1631

Intervention

The Tenth Circuit, on interlocutory appeal, reversed the district court and permitted Kerr-McGee Nuclear Corporation and the American Mining Congress to intervene as a matter of right in a suit to enjoin NRC from issuing uranium mill operation licenses without first preparing an EIS. Under Rule 24(a)(2), F.R.Civ.P., the intervenors, as potential licensees, had a significant interest which could be substantially impaired, as a practical matter, by a decision on the merits. In addition, the intervenors' interests would not be adequately protected by United Nuclear, already permitted in as an intervenor, since that company, having received a license from NRC, was somewhat differently situated. (Neither the United States nor NRC took a position at the trial or appellate level on the motion to intervene.)

Attorneys: Maryann Walsh and Edmund B. Clark (Land and Natural Resources Division) FTS 739-5053/2977 and Nuclear Regulatory Commission staff

United States v. The Oneida Nation of New York, et al., ____ F.2d ____ No. 5-76 (C.Cls. May 17, 1978) DJ 90-2-20-512

Indians

The Court of Claims affirmed the Commission's holding that the United States would be liable if the Oneida Nation did not receive fair value for land they sold to New York in 1785 and 1788. The government argued that the State of New York had the legal right to purchase lands from its local Indians, and that under Article IX of the Articles of Confederation, the federal government had no right to interfere. After finding a promise by the central government to protect the Oneidas and their lands, the Court held that it was immaterial whether the central government had the legal power to prevent the sale by the Oneidas to New York. The Court held that it would be a violation of the fair and honorable dealings clause if the United States did not at least try to prevent the sale. In

a remarkable opinion, Judge Nichols dissented "from the main holding that the Continental Congress acted dishonorably in not attempting to dissuade the Oneida Indians from yielding to the importunities of New York, or to exert moral suasion on the state itself."

Attorneys: A. Donald Mileur and Edmund M. Bander (Land and Natural Resources Division) FTS 739-5068

Diamond Shamrock Corporation, et al. v. Douglas M. Costle, Administrator, Environmental Protection Agency, et al., ____ F.2d ____ No. 77-1111 (D.C. Cir. May 30, 1978)
DJ 90-5-1-7-336

Federal Water Pollution Control Act of 1972

This involved an appeal by several chemical manufacturers from an order of the district court dismissing their complaint on the ground that the action was not ripe for review. The essential issue on appeal was whether the net-gross regulations promulgated by the Environmental Protection Agency on July 16, 1975, 40 C.F.R. 125.24(c) and 125.28, were ripe for judicial review.

The subject regulations were promulgated pursuant to the Federal Water Pollution Control Act of 1972 for the purpose of providing that effluent limitations shall be expressed in gross terms except (1) where the effluent limitation is stated in regulations to be applicable on a net basis; and (2) where an applicant for a permit demonstrates that the wastewater treatment system, which is designed to reduce to the required level the pollutants added by the appellant, cannot remove the specific pollutants present in the applicant's intake water.

On appeal, the chemical manufactures contended that the regulations were unsupported by substantial evidence, and were vague and ambiguous. The Government contended that they were not ripe for judicial review in this action, and that when review was available, it would be on direct review in the Court of Appeals in the context of a permit proceeding under Sections 402 and 509(b)(1)(F) of the Federal Water Pollution Control Act of 1972.

The Court of Appeals affirmed the judgment of the district court and held that the regulations were not ripe for review in this action, that the regulations should be

reviewed in the context of a permit proceeding, that judicial review is facilitated by waiting until the administrative policy is implemented for then the court can be freed from theorizing about how a rule will be applied and what its effect will be, and that determination of ripeness is a commonsense judgment.

Attorneys: Glen R. Goodsell, Raymond N. Zagone and Jacques B. Gelin (Land and Natural Resources Division) FTS 739-5034/2749/2762

VOL. 26 JULY 21, 1978 NO. 14

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JUNE 13 - JULY 11, 1978

Justice Appropriation Bill. H.R. 12934, making appropriations for the Departments of State, Justice, and Commerce, the Judiciary, and related agencies for FY 1979, passed in the House on June 14. Before passage, however, appropriations for Justice (except for LEAA and DEA), for State, for the FTC and certain other agencies were deleted on points of order under a House rule that forbids appropriations which are not authorized by law. Each of the deleted appropriations require specific authorization and in each case the necessary authorization bill had not been enacted. There has been on announcement concerning the procedure which will be followed to solve this dilemma. Several alternatives are available, but none is completely satisfactory. This situation points up the difficult scheduling and procedural problems resulting from the comparatively new Congressional budgetary processes and the snowballing requirements for specific program and activity authorizations.

Levitas Amendment. Congressman Levitas indicated his intention to offer an amendment to the Justice Appropriation bill, H.R. 12934, which would forbid the use of funds appropriated in the bill for the Department of Justice to directly or indirectly urge the unconstitutionality of any statute of the United States unless such statute previously had been held unconstitutional by decision of the Supreme Court. Our Office of Legal Counsel considered this amendment to be clearly unconstitutional, as a violation of the separation of powers. This view was communicated to Congressmen Edwards and Brooks of the Judiciary Committee, Congressman Slack (floor manager of the bill) and many others. We were assured strong support in our opposition to the amendment. The disposition of the bill, wherein most Justice appropriations were deleted on points of order, rendered the subject moot and the amendment was not offered. We may expect, however, that Congressman Levitas will offer this proposal at some appropriate future time, perhaps when our authorization bill, H.R. 12005, reaches the floor.

Bilingual Courts. The House Judiciary Subcommittee on Civil and Constitutional Rights has tentatively scheduled for July 13 the first day of hearings on H.R. 10228 and S. 1315, the proposed "Bilingual, Hearing and Speech Impaired Court Interpreter Act". The Subcommittee apparently intends to hold three separate hearings on three different subjects covered by the legislation: services for the hearing and speech impaired;

services for persons not fluent in the English language, and the institution of the speaking of Spanish in the federal court in Puerto Rico. While the Department supports all three aspects of the proposal, we are most interested in the Puerto Rico courts provision. S. 1315, the Senate version, passed the Senate on November 4, 1977, and we remain optimistic that the legislation will also be passed by the House.

Department Legislative Proposal on Drug Dependent Federal Offenders. On June 12, the House Judiciary Subcommittee on Administrative Law and Governmental Relations approved for full committee action H.R. 12290, a Department legislative proposal that would transfer from the Department of Justice to the Administrative Office of the U.S. Courts the authority necessary to contract for aftercare services for drug dependent Federal offenders.

Federal Tort Claims Act Amendment. On June 15, the Senate Judiciary Subcommittee on Citizens and Shareholders Rights and Remedies held a hearing on S. 2117, our proposal to amend the FTCA to provide appropriate civil remedies against the government for constitutional and civil violations by government employees and immunity for government employees from civil liability. FBI Director Webster and AAG Babcock testified for the Department. After the hearing we indicated to Chairman Metzenbaum our intention to try to resolve expeditiously existing differences between various parties interested in the bill with a view toward early movement of the measure. In the House, the companion bill is ready for subcommittee markup and action on it is expected, although the subcommittee has a busy schedule.

Magistrates. The House Rules Committee is expected to grant a rule during the week of July 3 for H.R. 7492, our bill to increase the jurisdiction of U.S. magistrates. It should reach the House floor later in July. The counterpart bill, S. 1613, has already passed in the Senate.

Compensation for Victims of Crime. On June 21, the Senate Judiciary Committee ordered favorably reported S. 551, to provide grants to states for the payment of compensation to persons injured by certain criminal acts. The Department had previously endorsed the basic concept of the bill. The Committee did not adopt either of the changes we had recommended, but efforts to effect these changes can be made, if deemed necessary, during further considerations of the measure. We had recommended that qualifying Federal offenses be limited to "violent crimes that result in physical injury or death" while the Senate bill has a broader coverage of "physical injury or death caused by any criminal act or omission designated by the state." Further, the Senate bill authorizes awards of up to $50,000 while we had advocated a $20,000 limit. In practice, the difference would

not be great as of the nineteen existing State compensation programs, only six provide for payment in excess of $20,000. The House-passed bill, H.R. 7010, has maximum payments of $25,000. Both Senate and House bills provide for 100% federal contribution for Federal crimes and 25% for other qualifying crimes.

Judicial Tenure. On June 21, the Senate Judiciary Committee ordered reported S. 1423, the proposed Judicial Tenure Act. The bill is designed to establish new procedures for the censure or removal of Federal judges as an alternative to impeachment. The Attorney General supported the bill in September of 1977 in testimony before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery. In addition, staff attorneys from OLA and OIAJ have worked closely with the Judiciary Committee staff to refine the bill's provisions. The committee adopted an amendment providing for the payment of attorneys fees for a prevailing judge. Another amendment was agreed to which would enable the Judicial Conduct and Disability Commission to initiate a complaint against a judge who has pleded guilty, nolo contendere, or has been found guilty of a state or Federal felony or crime involving moral turpitude. Senator Bayh was the only committee member to express opposition to the bill. He argued that S. 1423, if enacted, would be a threat to the independence of the judiciary.

Cigarette Bootlegging. On June 21, the Senate Judiciary Committee ordered reported S. 1487, a bill dealing with cigarette smuggling, or over-the-road "bootlegging" of non-tax-paid cigarettes. The reported bill contains a number of amendments which were suggested by the Department in our report on the bill, including a redefinition of the term "contraband cigarettes" as a quantity in excess of 30,000 cigarettes, rather than 20,000 cigarettes, and an increase in the maximum penalties for violators from a fine of $10,000 and/or two years in jail to a fine of $10,000 and/or five years in jail. These amendments reflect the Department's view that the States should deal with casual, small volume cigarette smuggling, while the Federal Government's mission will normally be confined to assisting the States in suppressing organized crime involvement in the trade. The committee also eliminated provisions authorizing warrantless administrative searches of the premises of cigarette sellers and distributors who would be subject to record keeping requirements under the bill. This amendment was in response to a letter from the Department expressing serious doubts as to the constitutionality of the provisions in question in light of the recent Supreme Court decision in Marshall v. Barlow's Inc. and other relevant case law. There were additional amendments in the definitions section of the bill

which we will review as soon as copies of the amended bill are available in order to insure that none of the changes are antithetical to the Administration's position on the bill. The House counterpart bill is scheduled for mark-up by the House Judiciary Subcommittee on Crime on June 28.

Government Contracts-Disputes Resolution. On June 20, Deputy Assistant Attorney General Irving Jaffe of the Civil Division testified before the Senate Governmental Affairs Subcommittee on Federal Spending and Open Government and the Judiciary Subcommittee on Citizens and Shareholders Rights and Remedies concerning S. 3178 and S. 2292, bills to provide for the resolution of claims and disputes relating to Government contracts. DAAG Jaffe spoke in opposition to the bills, indicating that they would replace a simple and direct contract disputes resolution system with "a system of procedural complexity approaching Byzantine proportions." The new system proposed by the bills would obviate the necessity for contractors to use the administrative disputes resolution system in favor of a choice of several tribunals and in favor of direct access to the federal courts where de novo trials would be required. Mr. Jaffe indicated that such a system would cause a very substantial increase in federal court litigation in the complex area of government contract claims at a time when the Department is working toward the establishment of dispute resolution systems for civil cases which will reduce the need for litigation in the overburdened federal courts.

PCP. On June 21, DEA Administrator, Peter Bensinger, testified before the Senate Judiciary Subcommittee on Juvenile Delinquency and the Human Resources Subcommittee on Alcoholism and Drug Abuse concerning the phencyclidine (PCP) abuse situation. Mr. Bensinger endorsed legislation such as S. 2778 (introduced by Senator Bentsen) that would increase the criminal penalty for the unauthorized manufacture, distribution, or possession with intent to distribute PCP. He also encouraged implementation of provisions in S. 2778 that would impose upon purchasers of essential chemicals used in the making of PCP (such as piperdine) the requirement of providing proper identification, and that would impose upon sellers of precursors the requirement of maintaining records for reporting purposes.

Psychotropic Substances. On June 21, the Senate Judiciary Committee ordered reported S. 2399, the proposed Psychotropic Substances Act. The proposed Act would amend the Comprehensive Drug Abuse Prevention and Control Act of 1970 and other federal laws to meet obligations imposed on the United States by our ratification in 1971 of an international treaty known as the Convention on Psychotropic Substances. The Convention established a system for the international control of

psychotropic drugs such as LSD, mescaline, and amphetamine. The comparable House bill, H.R. 12008, was reported out of the Interstate and Foreign Commerce Committee on May 15 and is now pending on the calendar.

Bolivian Prisoner Exchange Treaty. On June 20, the Senate Foreign Relations Committee ordered favorably reported the treaty between Bolivia and the United States on the Execution of Penal Sentences. This treaty is very similar to the treaties with Mexico and Canada for the transfer of criminal law offenders. The Department's legislative initiative enacted last year (PL 95-144) would implement the Bolivian treaty should it be ratified by the Senate as is expected.

Anti-Terrorism Act. The Senate Foreign Relations Committee also on June 20 ordered favorably reported S. 2236, a bill to strengthen Federal programs and policies for combating international and domestic terrorism. This proposed legislation contains the Department's legislative initiative to implement the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. This bill had previously been reported by the Senate Governmental Affairs Committee and now goes to the Senate Committee on Commerce, Science, and Transportation.

Computer Fraud. On June 21, Deputy Assistant Attorney General John Keeney testified before the Senate Judiciary Criminal Laws and Procedures Subcommittee in support of S. 1766, the proposed Federal Computer Systems Protection Act. DAAG Keeney also suggested technical amendments which would strengthen and tighten this proposal.

Illinois Brick. On June 20, the House Judiciary Committee, by a vote of 23-12, ordered reported H.R. 11942, a bill which would overcome the effect of the Illinois Brick case that allowed only direct purchasers to collect damages in antitrust cases. There was strong lobbying against the measure by the Business Roundtable and the Chamber of Commerce and we worked equally hard in explaining our support for it. Weakening amendments which would have restricted recoveries by indirect purchasers to parens patriae situations were defeated. The Senate companion bill, S. 1874, has been reported out of the Senate Judiciary Committee.

Third-Party Searches. Ten bills have so far been introduced in Congress by members with widely varying political philosophies to overrule in varying degrees the Supreme Court's decision in Zurcher v. Stanford Daily. Philip Heymann, as AAG Designate, Criminal, testified before Senator Bayh's Subcommittee on Constitution on June 22 to discuss some of the issues raised by Bayh's own proposal, S. 3164, and others.

The testimony stressed the Department's sensitivity to the First Amendment concerns raised particularly by searches of news media facilities and stressed that the Department will soon issue regulations to institutionalize that concern. The testimony discussed the relative strengths and weaknesses of regulatory and statutory approaches to the problem but did not express any conclusions as to which route is preferable or the precise details that a regulation or statute should contain. The Subcommittee seemed satisfied with Mr. Heymann's thoughtful observations but clearly hopes for a legislative recommendation from the Department within the next few weeks. On June 26 John Keeney, DAAG, Criminal Division, testified before the House Subcommittee on Government Information and Individual Rights on the same subject.

Heymann Nomination. On June 23, the Senate confirmed the nomination of Philip B. Heymann to be Assistant Attorney General for the Criminal Division.

Wiretap. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice held a hearing June 22 on H.R. 7708, our foreign intelligence surveillance bill. The Attorney General testified. Further hearings are scheduled for June 28 and 29 and we are hopeful that soon thereafter the Subcommittee will take favorable action on the bill.

Witness, Marshal Fees. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice tentatively plans to mark up during the week of July 10 two Justice Department proposals concerning increasing witness and marshal fees (H.R. 8492, H.R. 9122). Also to be marked up are several proposals concerning juries and juror fees, which the Department also supports. All of these bills have already passed the Senate.

Attorney Fees. The Senate Judiciary Subcommittee on Improvements in Judicial Machinery expects to report out during the seek of July 10 a marked up version of S. 2354, the Domenici-sponsored bill on attorney fees. Our understanding of the Subcommittee version is that it will closely resemble the Department's attorney fee draft legislation except that, in adjudications and civil actions which the Government loses, fees and other expenses will be awarded against us unless we can demonstrate that our position "was substantially justified or that special circumstances make an award unjust." Our bill, on the other hand, would permit an award of fees only when a prevailing party could demonstrate that the Government's position was "arbitrary, frivolous, unreasonable or groundless." We are currently evaluating the Subcommittee draft to reach a Department position on it.

Anti-terrorism. On June 27 the Senate Commerce Committee approved S. 2236, the Anti-terrorism bill which had been reported out by the Senate Governmental Affairs Committee. The Senate Commerce Committee made only one minor amendment -- deleting the provision concerning taggants for smokeless power and black powder. The bill still contains a one-house veto provision, which we of course oppose, and some other provisions concerning reports to the Congress which we want modified and clarified.

Senate Judiciary Committee Business. When the Senate Judiciary Committee meets on July 12, it may take up several of our bills, including Rights of Institutionalized Persons, S. 1393; Diversity Jurisdiction, S. 2094; Arbitration, S. 2253; and Supreme Court Jurisdiction, S. 3100.

Department Authorization bill. The Department Authorization bills (S. 3151 and H.R. 12005) are ready for floor consideration in both Houses after the July 4th recess.

Wiretap. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice by a vote of 4 to 3 cleared our wiretap bill, H.R. 7308, and it is now ready for consideration by the House Rules Committee for a rule for floor consideration.

Nazi War Criminals. On June 27 the House Judiciary Committee met to markup H.R. 12509, a bill providing for the exclusion or deportation of aliens who persecuted others on the basis of race, religion, national origin or political opinion. Although the new grounds for exclusion or deportation would apply to all aliens who have engaged in persecution, the sponsors of the bill (Reps. Holtzman, Eilberg, Hall, Harris, Evans, Fish and Sawyer) are primarily concerned with a single class of undesirable aliens - Nazi war criminals. Presently, war criminals who entered under the Immigration and Nationality Act of 1952 are not deportable unless they were actually convicted of crimes or made material misrepresentations in securing a visa or other document. Although the bill received 22 "aye" votes and no negative votes, the Judiciary Committee could not report H.R. 12509 out because only 15 of the members who voted for the bill were present and the remaining 7 votes were by proxy (a minimum of 16 members must be present for a quorum).

CONFIRMATIONS:

On June 19, 1978, the Senate confirmed the following nominations:

Peter F. Vaira, Jr., of Illinois, to be U.S. Attorney for the Eastern District of Pennsylvania; and
Russell T. Baker, Jr., to be U.S. Attorney for the District of Maryland.

On June 23, 1978, the Senate confirmed the following nominations:

Mary Johnson Lowe, to be U.S. District Judge for the Southern District of New York;
Shane Devine, to be U.S. District Judge for the District of New Hempshire;
Rufus E. Thompson, to be U.S. Attorney for the District of New Mexico;
Paul F. Murray, to be U.S. Attorney for the District of Rhode Island.

On July 10, 1978, the Senate confirmed the following nominations:

Santiago E. Campos, to be U.S. District Judge for the District of New Mexico;
Louis H. Pollak, to be U.S. District Judge for the Eastern District of Pennsylvania; and
Robert H. McFarland, of Mississippi, to be U.S. District Judge for the District of the Canal Zone.

NOMINATIONS:

On June 26, 1978, the Senate received the following nomination:

Robert E. Hauberg, to be U.S. Attorney for the Southern District of Mississippi.

On June 30, 1978, the Senate received the following nomination:

Robert J. Cindrich, to be U.S. Attorney for the Western District of Pennsylvania.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.1. Notice of Alibi.

Defendant appealed his bank robbery conviction contending, inter alia, that the trial court erred when, by applying the sanctions of Rule 12.1, it excluded the testimony of his alibi witnesses. On August 27, 1976 the Government requested a notice of alibi witnesses under Rule 12.1. On September 7, defendant who at the time was not cooperating with his court appointed attorney, was denied a continuance and a request for substitution of counsel. The next day, the Government was informed of the proposed alibi witnesses and trial proceeded on September 9. Following notice to the court that the defendant intended to rely upon an alibi defense although his Rule 12.1 response had been one day late, the court warned the defendant that it might choose to exercise its discretion and exclude the alibi testimony. The trial court formally refused the testimony shortly before the Government rested.

The Court of Appeals affirmed defendant's conviction. The Court noted that the Government's initial request for notification came only eleven days before trial which, given the ten day time period for response, would not have allowed the Government much time to prepare to meet the testimony of the alibi witnesses and would make it difficult for the Government to have complied with its reciprocal duties under Rule 12.1 (b) unless the court had chosen to reduce the time limits or postpone trial. However, since the question of the Government's obligation to respond never arose, the Court of Appeals presumed that either a continuance would have been granted or that the Government would have been barred from presenting any not previously disclosed rebuttal witnesses.

The Ninth Circuit, noting the mutual benefit of notice-of-alibi rules, found two important factors working against defendant's claim; 1) his refusal to cooperate in his own defense, and 2) the overwhelming strength of the Government's case. The Court found the trial court's delay before barring the alibi witnesses was proper since it gave the court time to assess the strength of the Government's case and to exercise its discretion accordingly.

(Affirmed)

United States v. Dennis Leon Barron, ___ F.2d___, No. 77-1375 (9th Cir., May 24, 1978).

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FEDERAL RULES OF EVIDENCE

Rule 803(5). Hearsay Exceptions; Availability of Declarant Immaterial. Recorded Recollection.

Rule 803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public Records and Reports.

Defendant appealed his perjury conviction for false testimony given at his prior trial for drug offenses. The defendant's principal contention alleged that the Government had failed to prove that the perjurious statements were made under oath. In the perjury proceeding, the court reporter from the first trial identified a partial transcript of defendant's testimony which included the statement that the appellant, "having been first duly sworn" testified as was reported. No other testimony or proof was shown at the perjury trial to indicate that the statements were made under oath. The Court of Appeals found that the transcript's recital that the defendant was duly sworn was sufficient, absent timely objection, to prove the offense.

A trial transcript is admissible, although it is hearsay, to prove that the testimony was given and that the oath was taken as a public record of a matter observed by one with a duty to report under Rule 803(8) or upon proper foundation, may be read into evidence as past recollection recorded under Rule 803(5). According to the Court, "[a]lthough a statement [by the court reporter] that the witness was sworn is more conclusory than would be a report of the oath in haec verba, such an assertion does not represent an inference based upon such complex perceptions or remote events that it would necessarily be stricken as conclusory.

(Affirmed)

United States v. Luis Javier Arias, ___F.2d___, No. 77-2536 (9th Cir., May 19, 1978).

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FEDERAL RULES OF EVIDENCE

Rule 803(8). Hearsay Exceptions; Availability of Declarant Immaterial. Public Records and Reports.

See Rule 803(5), this issue of the Bulletin for syllabus.

United States v. Luis Javier Arias, ___F2d___, No. 77-2536 (9th Cir., May 19, 1978).