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COMMENDATIONS

Assistant United States Attorneys CLAUDE BROWN and MARK ELLISTON, Northern District of Texas, have been commended by Mr. Lawrence M. Whitfield, Regional Forester, U.S. Department of Agriculture in Atlanta, Georgia, for their successful prosecution of Louis R. Bean, Grand Dragon of the Ku Klux Klan, who was charged and found guilty of violating 16 U.S.C. 551 and 36 C.F.R. 261.10 (j).

Assistant United States Attorney WINSTANLEY LUKE, Eastern District of New York, has been commended by Vice Admiral J. S. Gracey, U. S. Coast Guard in New York, for his fine work in representing the Coast Guard in a recent case involving a show cause action.

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

POINTS TO REMEMBER

U. S. Attorney's Office Disqualified From Retrial By "Appearance of Impropriety" When Former Defense Counsel Becomes Assistant U. S. Attorney

United States v. Caggiano No. 81-5002 (6th Circuit, Argued April 1981)

The U. S. District Court for the Western District of Tennessee has held that where an accused's former defense counsel accepts a position with the United States Attorney's office, that office is disqualified from participating in the trial.

Defendant and five other co-defendants were indicted and stood trial for several charges. A mistrial resulted. However, a superseding indictment was brought by the same grand jury against all defendants. Before the second trial, the counsel for defendant Caggiano at the first trial, accepted a position as an Assistant United States Attorney for the Western District of Tennessee. Three defendants, including defendant Caggiano, moved to disqualify the U. S. Attorney's office for that district from participating in the retrial of the case claiming that the office was laboring under a conflict of interest. The court found that defendants had made "no showing of any actual prejudice to them. . . ." Despite these findings, the court expressed concern over the "appearance of impropriety" and, therefore, granted the motion as to defendant Caggiano while denying the motion as to the other defendants, finding that they had enjoyed no genuine attorney-client relationship with the former defense attorney.

The issue is currently on appeal in the U. S. Court of Appeals, Sixth Circuit. The United States' brief, outlining the right of immediate appeal and the error in disqualifying the U. S. Attorney's office from participating in the retrial, is available from Les Rowe, Executive Office for U. S. Attorneys, Department of Justice, Room 1630, Washington, D. C. 20530 (FTS 633-4024) or from Debra Watson, Criminal Division, Appellate Section, Department of Justice, Room 2250, Washington, D. C. 20530 (FTS 633-5201).

(Executive Office)

CIVIL DIVISION
Acting Assistant Attorney General Stuart E. Schiffer

Patrick W. Barron v. United States, Nos. 79-4492 & 79-4564, decided August 27, 1981 D.J. #157-21-357.

Federal Tort Claims Act: Ninth Circuit Rules in Our Favor on Indemnification, But Against Us on Liability in Independent Contractor Case.

An employee of a government contractor brought this action against the United States under the Federal Tort Claims Act arising from a serious injury he sustained when a trench collapsed during the construction of a sewage system at the Pearl Harbor, Hawaii, Navy Yard. We claimed immunity from liability, alleging that the responsibility for shoring the trenches rested solely with the contractor, and alternatively, sought indemnity from the contractor based on a contract provision requiring the contractor to reimburse the government for any damages suffered as a consequence of the contractor's negligence. The district court dismissed the indemnity claim, believing that it was barred by Hawaii's Workers Compensation Act; held that the United States was liable for 25% of the employee's injuries due to its failure to enforce the safety measures required by the contract, and that the contractor was liable for 75% but that neither the contractor nor the government could be required to pay the employee the 75% share under Hawaii law and the FTCA. Accordingly, the employee, who was found to have suffered damages of $800,000, was permitted to recover only $200,000. Cross appeals were taken.

The Ninth Circuit held that the government breached a duty owed to the employee under Hawaii law, that as a joint tortfeasor it could be required to pay the full $800,000 to the employee, but that it was entitled to recover an appropriate share from the contractor under federal contractual law. However, since the contractor had been erroneously dismissed and did not participate in the trial, the court of appeals said he was entitled to a jury trial on our indemnity claim to determine how the $800,000 damages should be divided.

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

Civil Division
Acting Assistant Attorney General Stuart E. Schiffer

The Wesley Medical Center v. Harris, No. 81-1101 August 26, 1981 D.J. #137-29-327.

Attorneys Fees: Tenth Circuit Grants Summary Reversal of Award of Attorneys Fees and Interest Against United States Predicated on "Bad Faith" Finding by District Court.

This was a mandamus action brought against the Department of Health, Education and Welfare, challenging HEW's method of reimbursing hospitals for certain Medicare expenses. The district court issued a writ of mandamus, and HEW did not comply with the order for a year and a half. The district court subsequently found HEW's delay to be vexatious and unnecessary, and entered judgment awarding interest and attorneys fees against HEW. We appealed, pointing out that no specific statute authorized attorneys fees and interest in this type of case. The Tenth Circuit has just granted our motion for summary reversal, agreeing that the claim of agency bad faith was irrelevant absent a statute which expressly waived sovereign immunity. The reversal will save the government a total of $68,728.00.

Attorney: Douglas S. Letter (Civil Division)
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CIVIL RIGHTS DIVISION
Assistant Attorney General Wm. Bradford Reynolds

In Re Alien Children and Plyler v. Doe, Nos. 80-1934, 80-1538 (S.D. Tex., E.D. Tex.) DJ 169-74-74, 169-75-40

Equal Protection Clause

On September 4, 1981, we filed our brief in the Supreme Court. These cases concern the constitutionality of a Texas statute which denies undocumented alien children a tuition-free public education. In the courts below we argued that the statute was not pre-empted by federal law, but violated Equal Protection rights of these children. In the Supreme Court, the government argued that (1) the statute is not pre-empted, and (2) undocumented alien children are "persons" covered by the Equal Protection Clause. The government did not address whether the statute violates the Equal Protection Clause.

Attorney: Mark Gross (Civil Rights Division)
FTS 633-2172

Liddell and United States v. St. Louis Board of Education, et al. CA No. 72-C100(1) (E.D. Mo.) DJ 169-42-36

Interdistrict School Desegregation

On September 3, 1981, the United States filed a motion to modify the order handed down by the court on August 24, 1981. We moved the court to alter the order by either striking a provision entirely or, in the alternative, by modifying the language to reflect the charge made by the court in its order of September 17, 1980. The modification concerns a provision in the order requiring the state defendants, the St. Louis Board of Education and the United States to submit to the court by February 1, 1982, a suggested plan of mandatory interdistrict school desegregation. In support of the motion the United States argues that the language was inappropriate because there did not exist a sufficiently comprehensive predicate of court finding of interdistrict violations or interdistrict effects of intradistrict violations to justify an areawide plan of interdistrict relief. Alternatively, we argue that if the court refused to eliminate the above provision, that the United States should be eliminated from the reporting provision requirement.

Attorney: Craig Crenshaw (Civil Rights Division)
FTS 633-2192

September 25, 1981

Havens Realty Corporation v. Coleman, No. 80-988 (S.Ct.)
DJ. 175-79-213

Fair Housing Act of 1968

On September 9, 1981, we filed our brief as amicus curiae in the Supreme Court, in which petitioners challenge the Fourth Circuit's decision that testers and fair housing organizations have standing to sue under the Fair Housing Act of 1968. As amicus, we urged the Court to dismiss the writ of certiorari as improvidently granted and, alternatively, argued for affirmance of the Fourth Circuit's conclusion that testers and the organization have standing.

Attorney: Mickey Matesich (Civil Rights Division)
FTS 633-4493

Gerena-Valentin v. Koch and Herron v. Koch, Nos. 81-5468, 81-CIV-1956 (S.D. N.Y., E.D.N.Y.) DJ 166-51-10

Section 5 of the Voting Rights Act

On September 9, 1981, we filed a memorandum on behalf of the United States as amicus curiae, two cases in which plaintiffs seek to enjoin the September 10, 1981, primary election for the New York City Council on grounds that the City has failed to obtain Section 5 preclearance of the 1981 councilmanic redistricting plan. The plan was submitted for Section 5 preclearance after it was enacted in June 1981, but no determination has been made since the City is presently compiling additional information necessary to complete its submission. A three-judge panel was also convened on September 8, 1981, to hear argument on plaintiff's motions for preliminary injunctive relief. In our brief, we indicate that the City's implementation of the redistricting plan without first obtaining Section 5 preclearance constitutes a clear violation of the Voting Rights Act. However, we advised that, in remedying the situation, the court's options included enjoining the primary election, or permitting the conduct of the primary but again considering the question of relief if the plan has not been precleared by the time of the November 1981 general election.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Montana Wilderness Association v. United States Forest Service, ____ F.2d ____, No. 80-3374 (9th Cir., August 19, 1981) DJ 90-1-4-2032.

Section 1323(a) of Alaska National Interest Lands Conservation Act requires the Secretary of Agriculture to provide access to owners of inholdings within the National Forest system.

On rehearing, the Ninth Circuit decision vacated its earlier reversal of the district court and affirmed, thereby upholding a ruling that Burlington Northern, Inc., had an enforceable right of access across national forest lands to its private timber inholdings within the national forest's exterior boundaries. Section 1323(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3210(a), enacted in late 1980, requires the Secretary of Agriculture to provide "access" to owners of inholdings "within the National Forest System." In its previous opinion, the court of appeals held that this statutory right of access applied only to national forest lands in Alaska. But its revised opinion held that it applied nationwide. Accordingly, the court of appeals ruled that Section 1323 provided an "assured" access right across a national forest in Montana and was an alternate ground for upholding the district court's ruling. The decision ruled, contrary to the government's contention, that the appeal was not made moot by Section 1323's enactment. The proposed access routes here would cross wilderness study areas established by the Montana Wilderness Study Act of 1977. However, the court refused to decide whether Section 1323 implicitly repealed Section 5(a) of the Wilderness Act, 16 U.S.C. 1134(a), which would deny access through a designated wilderness area but would authorize the Secretary to exchange federal land of equal value with the affected inholding. The court also refused to decide whether Burlington Northern's 1864 land grant conveyed an implied right of access; its earlier opinion had ruled that it did not.

Attorneys: Dirk D. Snel and Jacques B. Gelin
(Land and Natural Resources Division)
FTS 633-4400/2762

McDonald v. Watt, ____ F.2d ____, No. 80-3155 (9th Cir., August 21, 1981) DJ 90-1-18-1249.

Administrative Law; Interior's interpretation of its regulation, though reasonable, is such a departure from previous practice that it will be applied prospectively only.

This case concerned a regulation of the BLM for non-competitive oil and gas leasing which requires that whenever an offer is signed by an agent for the offeror, the agent had to submit an accompanying signed statement showing his interest, if any, in the offer. In this case, the agent signed a facsimile, the offeror's name, but did not submit the accompanying statement, and the offer was the first to be drawn. The person whose offer was drawn second challenged the validity of the offer and prevailed in the IBLA as well as the district court.

The BLM had a series of decisions which tended to support the proposition that if an agent merely signs a facsimile of the offeror's signature, the statement of interest need not be submitted. In the decision involved here and another recent decision, the IBLA rejected that proposition. The court of appeals held that the IBLA's interpretation of the regulations is reasonable and upheld that interpretation. If further held, however, that the IBLA interpretation was such a departure from the BLM's previous practice that the interpretation should be applied only prospectively, and should not be applied here. Accordingly, it reversed the judgment of the district court.

Attorneys: Margaret Weekes and Kathryn A. Oberly
(Land and Natural Resources Division)
FTS 633-2716

Air California v. U.S. Department of Transportation, ____ F.2d ____, Nos. 80-7279, 80-5621 (9th Cir., August 27, 1981) DJ 90-1-4-2175.

Administrative Law; Nonfinal action by FAA deprives court of jurisdiction.

The court of appeals majority held that it had no jurisdiction to review certain actions of the Federal Aviation Administration regarding air carrier access to Orange County airport, since FAA's actions "lacked finality." The FAA had held a hearing on claims by several airlines that Orange County had illegally denied them access to the airport. The

FAA officer who presided over the hearing found that continued denial of access to the complaining airlines would constitute a violation of governing statutes. FAA's general counsel wrote a letter to Orange County warning that failure to undertake negotiations to accommodate new carriers would warrant pursuance of contractual, injunctive, and civil penalty remedies. Later, FAA suggested to Orange County that federal grants would be jeopardized in the absence of an adequate response to the new carriers. One of the incumbent carriers (Air California), fearing that FAA's pressure on Orange County would result in some of its "slots" being taken away, sued FAA. The majority concluded that none of this agency action was sufficiently final to warrant judicial review. The majority found that the general counsel's letter was neither a definitive statement of the agency's position nor a document with determinate legal consequences. Furthermore, the "pressure" brought to bear by FAA was not directed at Air California but at Orange County, which was not a party to the suit. The majority stated that it was loath to recognize a test of final agency action which turned upon a non-party's willingness to resist pressure from a federal agency. The dissent maintained that review was appropriate, especially since Air California would never get its day in Court if Orange County simply gave in to the FAA pressure to admit new carriers.

Attorneys: David C. Shilton and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2737/4400

Three Mile Island Alert, Inc. v. NRC, ____ F.2d ____, No. 81-1557 (D.C. Cir., August 19, 1981) DJ 90-1-4-2355.

Administrative Law; Non-fund order requires dismissal of petition for review.

TMIA petitioned for review of an NRC order removing financial qualification issues from the Three Mile Island Unit 1 reactor restart proceedings. The respondents moved to dismiss the petition on the ground that the order was not final, but rather was an evidentiary ruling relating to the scope of the restart proceeding. The court of appeals dismissed the petition.

Attorneys: Irwin Rothschild, NRC; and Thomas H. Pacheco and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2767/2762

Campbell v. Watt, ____F.2d____, No. 80-3361 ((9th Cir., August 28, 1981) DJ 90-2-4-697.

Indians; petition for mandamus to compel tribal payments should not have been dismissed because court lacked sufficient evidence on which to rule.

The Ninth Circuit reversed the order of the district court denying Campbell's motion to proceed in forma pauperis with his petition seeking a writ of mandamus compelling the Secretary of the Interior to pay Campbell the per capita payments to which members of the Confederated Salish and Kootenai Tribes are entitled. The district court had denied the motion on the ground that the petition was frivolous, because Campbell is not a tribal member. However, the court of appeals held that the district court did not have enough evidence before it to conclude that Campbell could not have stated a claim that the Secretary had acted arbitrarily.

Attorneys: Laura Frossard and Jacques B. Gelin
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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

SEPTEMBER 2, 1981 - SEPTEMBER 15, 1981

DOJ Authorization. On September 10, the Senate failed to approve a fourth cloture petition designed to end the filibuster led by Senator Weicker against the anti-busing amendments to the DOJ Authorization bill, S. 951. The cloture petition by Senator Johnston failed by a 57 to 33 vote. Within an hour of the votes, a fifth motion for cloture was filed by Minority Leader Byrd with the vote being scheduled for September 16.

DOJ Appropriation. On Wednesday, September 9th, the House passed H.R. 4169, Commerce, Justice, State and the Judiciary 1981 appropriations bill by a vote of 246 to 145. The House adopted amendments to the DOJ appropriations that would: (1) prevent the use of INS funds for the processing or detention of any entrant, applicant for political asylum or refugee status at the Krome North facility if more than 525 aliens are detained there; and (2) prevent the use of DOJ funds to obstruct the implementation of programs of voluntary prayer and meditation in public schools (vote of 333 to 54).

Justice Assistance Act. The Subcommittee on Crime of the House Judiciary Committee marked up and reported to the full Committee H.R. 3359, the Justice Assistance Act of 1981, Chairman Hughes' LEAA bill.

S. 719 - Consultant Reform. S. 719 is legislation that would place restrictions and impose procedures on the use of consultants in the Executive Branch. The bill would cover such individuals as expert witnesses. Its restrictions and procedures would significantly impinge upon the law enforcement activities of the Department and the civil and criminal litigation efforts of the Department. The Department has communicated its opposition to the bill to the Senate Committee on Governmental Affairs.

S. 1131 - Interest on Overdue Payments. S. 1131 would require the Federal Government to make a payment of interest on payments owed either contractors or suppliers if the payment is not made within 30 days after the date in which payment is due or after receipt of a proper invoice. The Department objects to this legislation because procedures under the Contract Disputes Act of 1978 already provide for the payment of interest to creditors of the government when a payment is late. Additionally, the budgetary implications of S. 1131

are enormous. The Department has communicated its opposition to S. 1131 to the Senate Committee on Governmental Affairs.

Court of Appeals for the Federal Circuit. S. 21, the Court of Appeals for the Federal Circuit bill, was reported out of the Senate Judiciary Subcommittee on Courts earlier this session, but then referred back to Subcommittee with instructions that the Subcommittee complete reconsideration by September 17. The basis for the reconsideration was the Department's objection to a provision granting equitable jurisdiction to the Court of Claims.

Regulatory Reform. Markup of S. 1080, Senator Laxalt's regulatory reform bill, continues in the Senate Governmental Affairs Committee on September 15. The Senate Judiciary Committee has already reported out its own version of S. 1080. Passage of S. 1080 -- including a Levin-Boren type legislative veto device to be added on the floor -- appears assured.

On the House side, hearings on the subject in the Judiciary Subcommittee on Administrative Law and Governmental Relations were completed on September 10. Markup, of which several days have already been held, will resume in the near future.

On the House side, the Subcommittee on Courts of the Judiciary Committee favorably reported H.R. 2405 on September 10, 1981. The Subcommittee did not delete the equitable jurisdiction provision but agreed to debate the matter in full Committee if the bill's Senate counterpart delete's the provision.

Nominations: On August 19, 1981 the President submitted the nomination of Sandra D. O'Connor to be an Associate Justice of the Supreme Court.

On August 11, 1981 the President submitted the following nominations:

Henry R. Wilhoir, Jr. to be U.S. District Judge for the Eastern District of Kentucky.

Conrad K. Cyr, to be U.S. District Judge for the District of Maine.

John C. Coughneour, to be U.S. District Judge for the Western District of Washington.

Glen H. Davidson, to be U.S. District Judge for the Western District of Washington.

George L. Phillips to be U.S. Attorney for the Southern District of Mississippi.

On August 28, 1981, the President submitted the following nominations:

H. Franklin Waters to be U.S. District Judge for the Western District of Arkansas.

John E. Lamp to be U.S. Attorney for the Eastern District of Washington.

Emery R. Jordan to be U.S. Marshal for the District of Maine.

On September 8, 1981, the President submitted the following nominations:

Lawrence W. Pierce to be U.S. Circuit Judge for the Second Circuit.

On September 9, 10, 11 the Senate Committee on the Judiciary held hearings concerning the nomination of Sandra D. O'Connor to be an Associate Justice of the Supreme Court. On September 15, 1981, the Committee on the Judiciary favorably reported the nomination of Sandra D. O'Connor.

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Federal Rules of Criminal Procedure

Rule 18. Place of Prosecution and Trial.

Rule 21(a). Transfer from the District for Trial. For Prejudice in the District.

Multiple defendants were indicted in a RICO prosecution arising out of corruption and bribery in a state court system. Four were found guilty. Prior to trial, two of the defendants, including one who was later found guilty, filed motions for a change of venue contending that they would be unable to obtain a fair trial in the district; these motions were adopted by another defendant who was later convicted. The trial was transferred to another district even though two other defendants who were later found guilty did not favor the change of venue, one expressly refusing to adopt the motions and the other standing neutral on the motions knowing of no grounds on which to object. These two defendants appeal, alleging, inter alia, that their constitutional rights, as preserved by Rule 18 which provides that the prosecution shall be had in a district in which the offense was committed and Rule 21(a) which conditions a change of venue upon the defendant's request therefor, were abridged by the change of venue without their consent.

The Court rejected the Government's argument that the right to be tried in the state and district where the crime was committed is not absolute where pretrial publicity may jeopardize the right to a fair trial in that district and where, in a complex case, it is in the interest of judicial economy to have all defendants tried together rather than sever those defendants who do not favor a change of venue. Stating that waiver of the venue right on behalf of the defendant is not an option of the court even when the trial judge sincerely believes that such action would be for the defendant's own good, and also stating that no judicial economy exception to the Sixth Amendment could be found, the Court held that absent a waiver of the venue right by each of the defendants, the trial court's change of venue clearly abridged this important constitutional right.

(Reversed and remanded as to all four defendants, two on these grounds and two on other grounds.)

United States v. Harry O. Stratton, et al., United States v. Samuel S. Smith, 649 F.2d 1066 (5th Cir. July 6, 1981).

(A petition for rehearing has been filed with the Court of Appeals for the Fifth Circuit arguing, inter alia, that the defendant who stood neutral on the motions waived his venue right.)

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Federal Rules of Criminal Procedure

Rule 21(a). Transfer from the District for Trial. For Prejudice in the District.

See Rule 18, this issue of the Bulletin for syllabus.

United States v. Harry O. Stratton, et al., United States v. Samuel S. Smith, 649 F.2d 1066 (5th Cir. July 6, 1981).

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Federal Rules of Criminal Procedure

Rule 17(c). Subpoena. For Production of Documentary Evidence and Objects.

In United States v. Cuthbertson, 630 F.2d 139 (3rd. Cir. 1980), the Third Circuit set forth guidelines for the district courts to use in applying Rule 17(c) to subpoenas duces tecum directed to third parties, in the context of a case involving a third party which was a news medium. In a later case arising from the same matter, which is too lengthy and complicated to be adequately summarized here, the Third Circuit discussed at some length the application of those guidelines, particularly as to the requirement that the materials sought be evidentiary in nature.

United States v. Gerald M. Cuthbertson, et al., 615 F.2d 189 (3rd Cir. May 29, 1981)

List of U. S. Attorneys as of September 24, 1981

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Michigan, W	Robert C. Greene
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Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
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New Jersey		William W. Robertson
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New York, E		Edward R. Korman
New York, W		Roger P. Williams
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North Carolina, M		Benjamin H. White, Jr.
North Carolina, W		Harold J. Bender
North Dakota		James R. Britton
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Ohio, S		James C. Cissell
Oklahoma, N		Francis A. Keating, II
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Texas, W		Edward C. Prado
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Virginia, E		Justin W. Williams
Virginia, W		John S. Edwards
Washington, E		John E. Lamp
Washington, W.		John C. Merkel
West Virginia, N		Stephen G. Jory
West Virginia, S		Wayne A. Rich, Jr.
Wisconsin, E		Joseph P. Stadtmueller
Wisconsin, W		John R. Byrnes
Wyoming		Richard A. Stacy
North Mariana Islands		David T. Wood