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## COMMENDATIONS

Assistant United States Attorneys WILLIAM P. FANCIULLO, DAVID R. HOMER, and GEORGE A. YANTHIS, Northern District of New York, have been commended by Mr. Bruce E. Jensen, Special Agent in Charge, Drug Enforcement Administration in the New York District Office, for their outstanding accomplishments in the field of drug enforcement prosecutions.

Assistant United States Attorney ROBERT J. GOVAR, Eastern District of Arkansas, has been commended by Arkansas Attorney General Steve Clark for his dedication and skill in the successful prosecution of United States v. Huckaby, the first successful Medicaid fraud prosecution of an owner and administrator of a nursing home in the state.

Assistant United States Attorney DALE F. KAINSKI, Northern District of Ohio, has been commended by Colonel James H. Higman, Huntington District, Corps of Engineers, Department of Defense in Huntington, West Virginia, for his thorough preparation and competent representation which enabled the Government to obtain a favorable decision in a dispute concerning flood easement in Edie v. Tuscarawas County Savings and Loan Association.

Assistant United States Attorneys GEORGE A. KELT, JR., JOHN M. POTTER, and RONALD G. WOODS, Southern District of Texas, have been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for their dedicated efforts and professional skills which led to the successful prosecution of United States v. Garrett and Moore dealing with the use of an interstate means of communication to facilitate the bribe of a city official.

Assistant United States Attorney RICHARD B. KENDALL, Central District of California, has been commended by Mr. Ronald E. Saranow, Chief, Criminal Investigation Division of the Internal Revenue Service in Los Angeles, California, for his successful prosecution of Arthur C. Amy of filing false income tax returns and receiving stolen government refund checks in United States v. Amy.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

FBI v. Abramson, Supreme Court No. 81-1735 (May 24, 1982). D.J. # 145-12-3504.

FOIA: SUPREME COURT HOLDS THAT FOIA EXEMPTION 7(C) APPLIES TO FBI "NAME CHECK" SUMMARIES, COMPILED IN RESPONSE TO WHITE HOUSE REQUESTS, BECAUSE THE SUMMARIES WERE DERIVED FROM FBI INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES.

Howard Abramson, a journalist, requested from the FBI certain documents which it had compiled in response to name check requests from the Nixon White House. These "name check" requests, which are a routine function of the FBI, require the FBI to search its files for material pertaining to particular individuals. The FBI then summarizes the material and sends the summary to the requestor -- here, the White House. The request at issue here pertained to eleven specific individuals who had been prominently associated with liberal causes or who had been outspoken in their opposition to the Viet Nam War.

The district court, in a two-page order, ruled that the summaries were not compiled for law enforcement purposes but, notwithstanding that ruling, then found, without explanation, that Exemption 7(C) was validly invoked because disclosure would constitute an unwarranted invasion of personal privacy.

The court of appeals reversed as to the summaries. The court held that 7(C) pertains to documents, not "information," and that, as the district court had found, the summaries were not documents compiled for law enforcement purposes. The court did rule, however, that Exemption 7(C) would apply to attachments to the summaries, if the attachments were original documents from the FBI files compiled prior to the White House request and if they were compiled pursuant to a law enforcement investigation.

The Supreme Court, in a 5-4 decision, reversed the court of appeals, ruling that information initially gathered for law enforcement purposes retains its legal protection against disclosure even when the government later incorporates it into records used for other purposes. The Court ruled that the court of appeals "itself pointed the way to this . . . construction by indicating that Exemption 7 protected attachments to the name check summaries that were duplicates of original records compiled

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for law enforcement purposes." The Court stated that the court of appeals' construction, "while plausible on the face of the statute, lacks support in the legislative history and would frustrate the purposes of Exemption 7." It then held that "information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where recorded information is reproduced or summarized in a new document prepared for a non-law enforcement purpose.

Attorney: Howard S. Scher (Civil Division)
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U.S. Department of State v. Washington Post Co., Supreme Court No. 81-535 (May 17, 1982). D.J. # 145-2-208.

FOIA: SUPREME COURT UNANIMOUSLY REVERSES D.C. CIRCUIT'S RESTRICTIVE INTERPRETATION OF "SIMILAR FILES" PROVISION OF THE PRIVACY EXEMPTION IN THE FREEDOM OF INFORMATION ACT.

The Post's FOIA request, made at the height of the Iranian hostage crisis, was for documents indicating whether two named former officials of the Barzhagan government, believed to be in Iran, were U.S. citizens or held valid U.S. passports. An unrebutted State Department affidavit asserted that any statement regarding the possible existence of this information, or an official denial, could place these or other persons in danger of physical attack or imprisonment. Although "sympathetic" to the government's concerns, the D.C. Circuit panel ordered disclosure on the ground that the documents were not "personnel or medical files [or] similar files" eligible for consideration that disclosure would cause "a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The panel held that only files that were "highly personal" could qualify and that citizenship information was not an "intimate detail."

The Supreme Court reversed, adopting our view that "similar files" must be broadly construed to avoid damaging disclosures. Henceforth, any governmental documents identifying personal information about individuals will qualify and the "clearly unwarranted invasion" test will prevent improper withholding of information.

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The case was remanded for findings under the "clearly unwarranted" test and we will be meeting with State to review our strategy for future proceedings. Meanwhile, the decision will enable all agencies to withhold disclosure in virtually all instances where the harm in disclosure will exceed the benefit to the general public.

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Attorney: Bruce Forrest (Civil Division)
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Jaffee v. United States, Supreme Court No. 81-1346 (May 17, 1982). D.J. # 145-15-110.

CONSTITUTIONAL TORTS: SUPREME COURT DENIES CERTIORARI IN CONSTITUTIONAL SUIT BY SOLDIER SEEKING DAMAGES AGAINST HIS SUPERIOR OFFICERS FOR SUBJECTING HIM TO RADIATION DURING NUCLEAR WEAPON TESTS.

While in the Army in 1953, Stanley Jaffee was present at an atmospheric nuclear weapons test in Nevada. He now has contracted cancer. He and his wife sued his former military and civilian superiors, claiming that they deliberately and unconstitutionally exposed him to excessive radiation, and were responsible for his current cancer condition. The district court dismissed the suit on the authority of Feres v. United States. On appeal, however, a panel of the Third Circuit, in an opinion by Judge Gibbons, ruled that individual constitutional damages suits within the military are permissible. On our petition, the Third Circuit subsequently agreed to rehear the case en banc. On rehearing we argued that the important policy concerns recognized in the Feres line of cases required recognition of an absolute immunity from suit where one solider seeks damages from another for intra-military wrongs. We also argued that the need to insulate military decisionmaking and command authority from the inhibitions created by individual tort suits, along with the availability of comprehensive veterans' benefits to compensate

injured soliders, constituted a "special factor" precluding constitutional damages actions. The en banc court of appeals issued a comprehensive opinion not reaching directly the immunity question, but endorsing our "special factor" approach. Judge Higginbotham, who had concurred in Judge Gibbons' original panel opinion, apparently changed his view, and authored the en banc opinion rejecting the Jaffees' right to sue. Five other judges joined Judge Higginbotham's opinion, two judges concurred in part and dissented in part, and two judges dissented in full.

The Supreme Court has just denied the Jaffees' petition for certiorari. The Supreme Court's refusal to hear the case leaves intact the Third Circuit's favorable decision, which should become a major precedent barring efforts by soliders and sailors to sue their commanding officers personally.

Attorney: John F. Cordes (Civil Division)
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Playboy Enterprises, Inc. v. Deparment of Justice, D.C. Circuit No. 81-1605 (May 11, 1982). D.J. # 145-12-4538.

FOIA: D.C. CIRCUIT REJECTS BROAD EXEMPTION 5 CLAIM FOR OPR TASK FORCE REPORT ON FBI INFORMANT.

In this Freedom of Information Act suit, plaintiff sought access to a report prepared by a task force of lawyers in the Justice Department's Office of Professional Responsibility (OPR) concerning the activities of one Gary Thomas Rowe, Jr., an FBI informant, and the treatment of Rowe by the FBI. This report grew out of newspaper stories alleging that Rowe committed violent crimes while acting as an FBI informant inside the Ku Klux Klan.

The district court protected confidential sources, names of third parties, and grand jury material in the report, but ordered most of it released on the theory that it was factual. We had argued that Exemption 5 of FOIA broadly protected the entire report because, given its subjective and evaluative nature, even the recitation of facts in the report reflected the deliberative process. The D.C. Circuit has just rejected our argument,

characterizing the mission of the task force as simple factual investigation, and distinguishing Montrose Chemical Corp. v. Train, 491 F.2d 63. The Court reversed that portion of the district court's decision which only protected conclusions and opinions in the report if they were labeled as such.

This case was especially noteworthy because the OPR report had been the subject of discovery requests in a number of damage actions against the government and Attorney General Civiletti had successfully invoked executive privilege as a defense against such discovery.

We are now studying this decision to determine whether to seek rehearing or certiorari.

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Legal Services Corporation, et al. v. Dana, et al., D. C. Circuit No. 82-1227 (May 7, 1982). D.J. # 145-0-1190.

PRELIMINARY INJUNCTION: D.C. CIRCUIT AFFIRMS DENIAL OF PRELIMINARY INJUNCTION REQUESTED BY FORMER BOARD MEMBERS OF THE LEGAL SERVICES CORPORATION.

In January 1982, during a recess of the Senate, President Reagan made recess appointments of ten persons to the Board of Directors of the Legal Services Corporation. Plaintiffs were the incumbent Directors whose three-year terms of office had expired and who were replaced by the President's appointees. Plaintiffs filed a complaint seeking preliminary and permanent injunctive relief, seeking to prohibit the defendants from exercising their duties as Board members. Plaintiffs contended that the President

had neither statutory nor constitutional authority to make recess appointments to the Board. Plaintiffs relied chiefly on a provision of the Legal Services Act which states that the members of the Board are not to be deemed "officers or employees of the United States." The district court denied the motion for a preliminary injunction and plaintiffs took this appeal. We defended in the court of appeals on the ground that the Legal Services Act, by adopting the Article II format of appointment (appointment by the President with the advice and consent of the Senate), intended by implication to include the remaining, but unmentioned, incidents of the President's powers under Article II, including the recess appointment power. In the alternative, we argued that a contrary construction would be unconstitutional, since plaintiffs, under Buckley v. Valeo, were officers of the United States and subject to all Article II powers of the President. After expediting the appeal, the court of appeals has just affirmed the denial of the preliminary injunction in an unreported order without an opinion.

Attorney: Alfred Mollin (Civil Division)
FTS (633-4027)

Borders v. Reagan, et al., D.C. Circuit No. 81-1998 (April 27, 1982). D.J. # 145-1-894.

PRESIDENTIAL APPOINTMENTS: D.C. CIRCUIT VACATES DISTRICT COURT ORDER ENJOINING PRESIDENT REAGAN FROM DISMISSING THE PRESIDENT'S APPOINTEE TO THE DISTRICT OF COLUMBIA JUDICIAL NOMINATION COMMISSION PRIOR TO THE EXPIRATION OF THE APPOINTEE'S TERM.

In 1980, President Carter appointed Borders to serve a five-year term on the District of Columbia Judicial Nomination Commission. In 1981, President Reagan replaced Borders with Philip Lacovara. Borders subsequently brought suit to enjoin the President from removing him prior to the expiration of his term. The district court ruled in Borders' favor, and an appeal was taken. While the appeal was pending, Borders was arrested and convicted on charges of violating 18 U.S.C. 1952, which prohibits

traveling interstate to promote bribery (Borders attempted to bribe a federal judge in Florida). Borders, after his conviction, resigned and the court of appeals, on our motion, vacated the district court's judgment and remanded the case with instructions to dismiss Borders' complaint as moot.

Attorney: Alfred Mollin (Civil Division)
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In Re Odom, D.C. Circuit No. 82-1182 (May 5, 1982). D.J. # (new).

PRESIDENTIAL DISCOVERY: D.C. CIRCUIT DISMISSES MANDAMUS PETITION TO COMPEL PRESIDENT REAGAN TO TESTIFY CONCERNING THE CIRCUMSTANCES OF AN ACCIDENT WITNESSED BY THE PRESIDENT DURING THE COURSE OF A 1980 CAMPAIGN TRIP.

Plaintiff was a motorcycle policeman assigned to ride in a motorcade alongside President Reagan's limousine during a 1980 campaign trip. Plaintiff's motorcycle apparently malfunctioned, and plaintiff was injured in the resulting accident. The President may have seen some small portion of the accident. At least six Secret Service men had clear views of the accident. Plaintiff subsequently brought a products liability claim in an Alabama state court against the manufacturer of the motorcycle. After the state court suit was filed, plaintiff noticed the deposition of the President. The state court judge then signed a petition requesting the District Court of the District of Columbia to subpoena the President for the taking of the deposition.

The government moved to quash the subpoena on the grounds that the deposition of the President was not necessary to the state court suit (we had offered to make the six Secret Service men available for depositions) and on the ground that there was no jurisdiction to enforce a subpoena in support of state court litigation. Plaintiff filed a mandamus petition in the court of appeals, requesting the Court to require the enforcement of the subpoena. Without requiring a response by the government, the court of appeals dismissed the petition on the jurisdictional ground.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

E. B. Weiss v. R. C. Lehman, Ninth Circuit No. 79-4101 (May 12, 1982). D.J. # 157-22-158.

CONSTITUTIONAL TORTS: ON REMAND FROM SUPREME COURT, NINTH CIRCUIT SETS ASIDE JURY VERDICT IN BIVENS-TYPE CASE AND REMANDS FOR NEW TRIAL.

This case involves a Fifth Amendment due process claim against a Forest Service employee in his individual capacity for destruction of scrap metals mistakenly thought to be abandoned in a national forest. After a jury trial, the property owner recovered a judgment against the government employee. We originally appealed on the ground that an implied cause of action under the Fifth Amendment was inappropriate because there were other equally effective remedies available to the property owner. The Ninth Circuit ruled against us on that issue.

Shortly thereafter the Supreme Court decided Parratt v. Taylor, 451 U.S. 527 (1981), which discussed the parameters of a due process violation in the context of an action brought under 42 U.S.C. § 1983. Private counsel was retained to file a petition for a writ of certiorari seeking review of this case in light of Parratt. The Supreme Court vacated the court of appeals' judgment and remanded the case to the Ninth Circuit for consideration of the case in light of Parratt.

On remand, the Ninth Circuit, one judge dissenting, vacated the judgment of the district court. The court held that the plaintiff was deprived of his property. However, the court held, under Parratt, in order to have an actionable due process claim the plaintiff must prove that pre-deprivation process was both available and practicable under the circumstances but was not utilized by the government official. The court held that although the FTCA constitutes an adequate post-deprivation process, the record was bereft of any evidence regarding the practicability of pre-deprivation process in the circumstances of this case. The Ninth Circuit remanded the case to the district court to allow the plaintiff an opportunity to prove additional facts, including the defendant's intent to destroy personal property.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Matthew G. Yeager v. Drug Enforcement Administration, D.C. Circuit Nos. 79-2275, and 80-2465 (May 14, 1982). D.J. # 145-12-2820.

FOIA: D.C. CIRCUIT RULES FOIA SEGREGATION REQUIREMENT DOES NOT COMPEL RESTRUCTURING SUBSTANTIVE CONTENT OF COMPUTERIZED RECORDS.

This FOIA case involved a request for four entire DEA records systems, three of which are kept in computerized form. The district court entered summary judgment in DEA's favor on the basis of exemption (b)(7), and the court of appeals affirmed.

On appeal, the plaintiff did not contest the applicability of exemption (b)(7) to the records in this present state. He argued, however, that FOIA's segregation requirement should be interpreted to compel DEA to employ its computer capabilities to modify the form in which information currently exists in its records so that the information would be nonexempt. The court of appeals rejected this argument, holding that "FOIA does not contemplate imposing a greater segregation duty upon agencies that choose to store records in computers than upon agencies that employ manual retrieval systems," and that the segregation requirement compels only physical deletion of exempt information, not "any manipulation or restructuring of the substantive content of a record." The court of appeals rejected our argument that the judgment of the district court could also be sustained on the ground that a request for four entire systems of records does not "reasonably describe" those records as required by FOIA. It declined to rule on our arguments that FOIA does not require an agency to release computerized records in a magnetic tape (as opposed to printout) format, and that manuals and codebooks describing how to use a government computerized record system are protected by exemption (b)(2).

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

Weinberger v. Romero-Barcelo, ____ U.S. ____, No. 80-1990 (S.Ct., April 27, 1982) D.J. # 90-1-4-1806.

Injunction not mandatory when agency violates Clean Water Act.

The Supreme Court reversed the order of the First Circuit Court of Appeals directing the District Court in Puerto Rico to enjoin Navy practice bombing and shelling on Vieques Island pending receipt of an NPDES permit. The Supreme Court held that the Clean Water Act does not completely foreclose the exercise of a district court's discretion in formulating a remedy for a violation of the Act. Instead, it permits the court to order relief it considers necessary to secure prompt compliance with the Act. This relief can include, but is not limited to, an order of immediate cessation of the violating discharges. Justice Stevens dissented.

Attorneys: Anne S. Almy and Edward J. Shawaker
(Land and Natural Resources Division)
FTS 633-4427/2813

Glover River Organization v. United States, ____ F.2d ____, No. 81-1194 (10th Cir., April 12, 1982) D.J. # 90-1-4-1870.

Organization organized to promote flood control projects lacks standing to challenge Interior's listing of species as threatened or designation of its habitat under Endangered Species Act.

The Glover River Organization, which was organized to promote flood control projects in Oklahoma, brought this suit to challenge the Secretary of the Interior's listing of the leopard darter as a threatened species and the designation of its critical habitat under the Endangered Species Act. Glover's sole contention was that the listing and designation were invalid because the Secretary had failed to prepare an environmental impact statement. The district court agreed and issued an order staying the listing and designation until an EIS is completed. The Tenth Circuit reversed on the grounds that Glover lacked standing to maintain the action. The court concluded that Glover had failed to establish that the relief requested would remove the alleged harm because there was no

causal link between the listing and designation and the failure to construct or fund any dams or flood control projects in the area affected by the listing and designation.

Attorneys: Nancy B. Firestone and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2757/4413

Melluzzo v. Watt, ____ F.2d ____, No. 80-5561 (9th Cir., April 16, 1982) D.J. # 90-1-18-1385.

Mining: Interior's finding that claimant failed to locate common variety prior to July 23, 1953, cut-off date based on substantial evidence.

In a prior appeal from a decision by IBLA invalidating Melluzzo's six association placer mining claims for sand, gravel and building stone, the Ninth Circuit remanded for a redetermination of marketability in light of the court's subsequent decisions in Barrows v. Hickel, 447 F.2d 80 (1971); Verrue v. United States, 457 F.2d 1202 (1972); and Clear Gravel Enterprises, Inc. v. Keil, 505 F.2d 180 (1974). Melluzzo v. Morton, 534 F.2d 860 (9th Cir. 1976). IBLA again ruled against Melluzzo on the ground of lack of discovery and also on an issue which the court had not precluded the board from considering, the failure to locate the claims prior to July 23, 1955, when the Common Varieties Act removed such materials from location under the mining law. 32 IBLA 46 (1977). Melluzzo filed suit in district court seeking judicial review of IBLA's decision. On cross-motions for summary judgment, the district court dismissed Melluzzo's complaint.

The court of appeals, by per curiam opinion, affirmed on the date of location issue only, which it found dispositive. The court reviewed the record, which showed that Melluzzo had not recorded the claims until December 18, 1962, seven and one-half years after the 1955 cut-off date, although Arizona law requires recording within 60 days of location; evidence tending to indicate that ownership of these claims was designed to protect Melluzzo from potential liability for trespass in connection with a permit to a third party to remove gravel from copper lode claims in the same area; failure to file assessment affidavits under state law; and other inconsistent statements. Based on this evidence, the court concluded that the IBLA's determination on the location issue was based upon substantial evidence. Accordingly, the court found that it did not have to reach the marketability issue.

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

Natural Resources Defense Council v. NRC, ____ F.2d ____, Nos. 74-1586, 77-1448, 79-2110 and 79-2131, (D.C. Cir., April 27, 1982) D.J. # 90-1-4-2098.

NRC's fuel cycle rule struck down under NEPA.

The judicial controversy over NRC's attempts to promulgate an adequate "fuel-cycle" rule continues, with the D.C. Circuit once again striking down NRC's efforts as inconsistent with NEPA. When we last visited this long-running drama, the Supreme Court had unanimously reversed the court of appeals' overturning of NRC's original fuel cycle rule. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Vermont Yankee rejected the court of appeals' attempt to require procedural devices beyond those contained in the statutes, and remanded for consideration of whether the challenged rule was sustainable under standards set by the APA. Since the remand, NRC has revised the fuel cycle rule somewhat, and provided additional explanation and record documentation to support it. The court of appeals majority, consisting of Judges Bazelon and Edwards (from the Sixth Circuit) again finds procedural and substantive irregularities, while Judge Wilkey in dissent concludes that the majority "has taken no more than a giant step sideways from an analysis rejected unanimously by the Supreme Court in Vermont Yankee * * *."

The "fuel-cycle" rules are an attempt to list the environmental effects of the entire uranium fuel cycle from mining to disposal of nuclear wastes. The centerpiece of the rules is a "Table S-3" which lists, for a nuclear plant of a given size, the quantity of land, water and energy used and of heat, chemical and radioactivity released. This Table may be inserted into the EIS for any particular nuclear plant. By handling these issues generically, NRC hopes to avoid having to go through a repetitious analysis of fuel cycle impacts for every nuclear plant that is licensed.

The main controversy in this case is over the use in Table S-3 of a "zero-release assumption" for the permanent disposal of nuclear wastes. While NRC recognized and discussed the uncertainties associated with long-term disposal of wastes, it found that the probabilities favored the conclusion that bedded-salt repository sites could be found that will provide essentially 100% effective isolation of radioactive waste from the biosphere. This finding, and the zero-release assumption reflected in the table, mean that licensing boards may effectively ignore the uncertainties inherent in projections relating to long-term storage of wastes.

Judges Bazelon and Edwards conclude that the original (1974) interim (1977), and final (1979) fuel-cycle rules are arbitrary and capricious and violative of NEPA. While conceding that NRC may implement NEPA through generic rulemaking, the majority finds that NRC may not in doing so preclude licensing boards from considering the "costs" associated with nuclear waste storage in such a way that the costs can be weighed against benefits and potentially affect the outcome of any decision to license a plant. The majority finds that the risks (1) that a plant's wastes will eventually damage the environment by emitting radiation from a faulty permanent repository, and (2) that currently-planned permanent repositories may never be built, are "environmental costs" which must be factored into the NEPA calculus. It is not enough to study and describe these risks at a generic level, where this does not lead to an explicit weighing of these risks against the benefits of building nuclear plants.

Judges Bazelon and Edwards also find that the NRC violated NEPA in its original and interim fuel-cycle rules by precluding licensing boards from considering the health, socioeconomic and cumulative impacts of the various figures presented in Table S-3. This violation was cured in 1978 when NRC ruled that these impacts could be considered in individual licensing decisions. However, this ruling may jeopardize a number of licenses granted before 1978.

Judge Bazelon (joined by Judge Wilkey on this aspect of the decision, to which Judge Edwards dissents) rejects challenges brought by the States of New York and Wisconsin based on the alleged "economic infeasibility" of the values stated in Table S-3. The majority concludes that it was reasonable for NRC to assume that the federal government will continue to regulate the nuclear industry so that no private firms will be able to cut costs by allowing release of more effluent than projected in Table S-3.

Judge Wilkey filed a strongly-worded dissent to the invalidation of the fuel cycle rules. He points out that Vermont Yankee affirmed NRC's broad authority to deal with fuel cycle issues by rulemaking, and by implication its ability to deal generiсly with the uncertainties associated with storage of nuclear waste. Wilkey questions the majority's equation of uncertainties with "environmental costs" which must be weighed under NEPA. More important, he finds nothing which requires NRC to separately consider the uncertainties in individual licensing proceedings, instead of in an otherwise reasonable generic proceeding. The decision to treat the issue generiсly is a policy judgment entitled to deference.

Judge Wilkey concludes that since NRC in its generic proceeding adequately considered the relevant factors impinging on storage of nuclear wastes and committed no clear error of judgment, its fuel cycle rule must be upheld.

Attorneys: NRC Staff, David C. Shilton and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2754/2813

National Wildlife Federation, et al. v. Goldschmidt, ____ F.2d ____, Nos. 81-6179 and 81-6189 (2nd Cir., April 30, 1982) D.J. # 90-1-4-2143.

Challenge to adequacy of EIS on highway Section not ripe for judicial review prior to agency's determination to approve land acquisition and construction.

In connection with the planned construction of I-84 from Hartford, Connecticut, to Providence, Rhode Island, a group of environmental organizations challenged the adequacy of the EISs prepared for two proposed Sections in Connecticut. Based on the Secretary of Transportation's statement that, while he was conditionally approving those EISs, he would not permit any land acquisition or construction on those sections until a decision was made on the proposed Rhode Island section, on which the EIS was still being prepared, the district court dismissed the complaint as premature. 504 F. Supp. 314 (D. Conn. 1980). The court rejected challenges to the adequacy of the EIS/Section 4(f) statement of the I-84/I-86 connector segment which the Secretary had unconditionally approved. 519 F. Supp. 523 (D. Conn. 1981). The court of appeals, relying on "common sense" test called for in its decision in Environmental Defense Fund, Inc. v. Johnson, 629 F.2d 239 (1980), affirmed. The court distinguished between the "finality" which permits the agency to spend money on design work, and the "finality" which renders administrative action ripe for judicial review under Section 10(c) of the APA. The court ruled that the wisdom of the "gamble" to spend funds on design work (which will be wasted if ultimately the project is not built) is a matter left to the agency's discretion.

Attorneys: Jacques B. Gelin and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2762/2731

National Audubon Society v. Watt, ____ F.2d ____, No. 81-1763 (D.C. Cir., May 7, 1982) D.J. # 90-1-4-1431.

May 1977 stipulation by former Secretary of the Interior to halt construction on Garrison Diversion Project no longer binding.

In an unanimous opinion authorized by Judge Skelly Wright, the court held that a May 1977 stipulation in which former Secretary Andrus had agreed with Audubon to halt substantially all further construction of the Garrison Diversion project was no longer binding upon Secretary Watt. Audubon had brought suit in 1975 challenging the adequacy of two EISs on the Garrison project, a congressionally authorized 25,000-acre reclamation project in North Dakota. The 1977 stipulation imposed a stay of the litigation. In the stipulation, Andrus also agreed to complete an additional comprehensive EIS and a wildlife mitigation plan, to submit new legislation to Congress based upon the recommendations of the environmental studies, and to stop further construction until 60 days after Congress had either reauthorized the 250,000-acre project or authorized an alternative version of the project. Andrus completed the additional environmental studies which recommend a smaller version of the project, but he was never able to send legislation to Congress because OMB refused to approve his proposed legislation.

In May 1981, the district court enjoined Secretary Watt from proceeding with construction of the Garrison project in violation of the terms of the 1977 stipulation. Both the federal government and the State of North Dakota, which had intervened in the district court, appealed and filed motions to stay the district court's injunction. On appeal, the government argued that the stipulation was invalid or no longer binding for both statutory and constitutional reasons. The government contends that NEPA gave Secretary Andrus discretion to defer implementation of a congressionally authorized project until he had completed environmental studies or, should he believe modification of the project was warranted, until he had submitted alternative legislation to Congress and Congress had had a reasonable time to act upon it. But NEPA did not empower the Secretary to defer construction of such projects until Congress had reauthorized them. The government also argued that the stipulation was invalid because one administration could not constitutionally bind a subsequent administration to introduce legislation to Congress. Moreover, the government argued that the stipulation did not parallel the requirements of NEPA because NEPA could not constitutionally be construed to require the executive to submit legislation to Congress.

In January 1981, two weeks after oral argument on the merits of our appeal, the court of appeals entered a per curiam order granting the government's and the state's motions for stay.

In its opinion on the merits, the appellate court reasoned that the stipulation must be construed in light of the context in which it was undertaken and in light of the Secretary's obligations under NEPA. As to the former, the preamble of the stipulation indicated that Andrus agreed to the stay in order to re-evaluate the Garrison project in light of the Carter Administration's new policy toward federal water projects, a purpose which had already been served. As to the latter, the court agreed with the government that NEPA did not empower the Secretary to promise unconditionally to defer construction until Congress took action on the Garrison project authorization, regardless of how long that action might be deferred. The court implied a reasonable time limit and found that limit had expired because Congress was informed of Andrus' new environmental studies, had continued to pass appropriations for the project, but had failed to enact any amending legislation. The court expressly refused to reach the constitutional issues. Judge MacKinnon filed a special concurrence in which he rejected Audubon's claim on the underlying merits of the litigation that NEPA imposed substantive as well as procedural requirements. He also stated that the executive could not by contract compel Congress to adopt legislation to change a previously authorized project unless there was something illegal about the project.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MAY 14, 1982 - MAY 26, 1982

Immigration. HOUSE: On May 19, the House Judiciary Committee's Subcommittee on Immigration, Refugees and International Law unanimously voted to report the Immigration Reform and Control Act, as amended, to the full Judiciary Committee. SENATE: The Immigration Reform and Control Act markup by the Senate Judiciary Committee has begun. Markup should be completed shortly.

Freedom of Information Reform Act. On May 20, the Senate Judiciary Committee voted (16-0) to report the Freedom of Information Reform Act, as amended, to the Senate. Some helpful amendments are expected to be offered on Senate floor but, as reported, the bill is a major improvement over current law.

Federal Tort Claims. HOUSE: On May 19, the Subcommittee on Administrative Law of the House Judiciary Committee conducted a hearing on H.R. 24, the amendments to the Federal Tort Claims Act. Two United States Attorneys and representatives of the FBI appeared at the hearing. Senator Grassley's Judiciary Subcommittee on Agency Administration plans markup for May 27.

Arson Amendments. On May 19, the Subcommittee on Crime of the House Judiciary Committee held a hearing on amendments to 18 U.S.C. 844 to facilitate federal prosecution of major arson cases. The Department of Justice did not testify. The Subcommittee also marked-up and reported a bill that date which is entirely consistent with the position of the Department.

Extradition Act Amendments. On May 19, the Senate Foreign Relations Committee marked up S. 1940, the Extradition Act of 1981, which it had on the basis of a sequential referral. The Foreign Relations Committee judicial review procedure governing determinations of whether a foreign crime is a "political offense" represents a substantial change as compared with the review procedure approved by the Senate Judiciary Committee.

Tax Compliance Legislation. The House Ways and Means Committee held a hearing on May 18 with respect to legislation to improve tax compliance, primarily H.R. 6300. The Department of Justice, through Assistant Attorney General Archer of the Tax Division, supported increased criminal fines for tax crimes to-

gether with amendments in IRS summons procedures. There appears to be bipartisan support in the House for tax compliance legislation although the Ways and Means Committee is still in the early stages of developing a specific package of improvements.

ABSCAM. On May 12, the Senate Select Committee to Investigate Law Enforcement Activities of Components of the Department of Justice met to receive from committee counsel James Neal his preliminary report on the scope of the committee's investigation.

Mr. Neal noted at the outset that, based on his initial discussions with Department representatives, he anticipated full DOJ cooperation in the investigation. In this regard, several committee members noted that the committee must take scrupulous care to insure that privacy rights are respected and that no active, "legitimate" investigations are impaired by the quest for information. The members reasoned that such a policy would engender a cooperative attitude on the part of the Department. Mr. Neal proposed that the committee selectively examine a number of FBI white collar crime undercover operations conducted in recent years to provide a basis for comparison with the procedures and controls used in the ABSCAM operation only, rather than attempt to review the large number of other undercover operations conducted over the years. However, Chairman Mathias and the other committee members felt that limited, selective review of other undercover operations would adhere to the intended scope of the investigation as expressed in the Senate resolution authorizing the establishment of the committee, i.e., to review Department undercover operation policies and procedures and their impact on the civil liberties of all Americans, not just Members of Congress. The committee is also empowered to recommend remedial legislation.

Chairman Mathias requested Mr. Neal to provide a suggested list of selected undercover operations to be reviewed in the course of the committee's investigation. The committee will meet again on May 26 to discuss the list.

Realignment of House Judiciary Committee. During its business meeting on May 11, the House Judiciary Committee adopted new subcommittee assignments for some Democratic members of the committee. Under the realignment, Representative Sam Hall was elected chairman of the Subcommittee on Administrative Law.

Guaranteed Student Loans. On May 12, the Subcommittee on Postsecondary Education of the House Education and Labor Committee held a hearing on proposals to modify existing regulations governing discrimination prohibited under Title IX of the

Civil Rights Act of 1964. Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, represented the Justice Department.

Chicago U.S. Trustee Office. Associate Deputy Attorney General Stanley E. Morris appeared before the House Judiciary Subcommittee on Monopolies and Commerical Law concerning the U.S. Trustee Office in the Northern District of Illinois on May 7. Mr. Morris discussed the Department's proposal to receive authorization from Congress to close the Chicago office.

Tunney Act. On May 13, Abbott B. Lipsky, Deputy Assistant Attorney General, Antitrust Division, appeared before the Subcommittee to discuss the operation of the Tunney Act. The Tunney Act establishes standard procedures for the courts to follow when reviewing proposed judgements in antitrust actions to assure that they will not be contrary to the public interest.

S. 2419 - Venue. On May 13, Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, appeared before the Senate Judiciary Committee to discuss the Department's support of S. 2419, legislation concerning venue. The purpose of this legislation is to ensure that actions in which the federal government is sued which directly effect people other than in the District of Columbia, are brought into the judicial district where people are so affected.

Bail Reform. Representative Kastenmeier's Subcommittee on Courts has voted out a bail reform bill which includes pretrial detention. Representative Barney Frank voted with minority members of the Subcommittee to achieve this result. Although further amendments are needed to improve the bill, Representatives Sawyer and Railsback are prepared to offer these in full Committee. It seems likely that the Department's position will prevail if the bill gets to the House floor.

Registration of Communists Nationals. Senator Denton's Subcommittee on Security and Terrorism held hearings Wednesday, May 12, on two of the Senator's bills, S. 1959 and 1963, to strengthen controls over communist nationals within the United States, particularly in connection with their contacts with Members of Congress and Congressional staff. The Department witness, Deputy Assistant Attorney General Mark Richard, Criminal Division, pointed out, as tactfully as possible, the serious constitutional and other flaws in the bills. Senator Denton repeatedly expressed his deep concern over the problems posed by free access of communists agents to Congressional offices, Members, and staff, and the resulting potential that sensitive government information would fall into enemy hands. Mr. Richard offered to work with the Subcommittee to protect this threat.

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Federal Rules of Criminal Procedure

Rule 12.1. Notice of Alibi.

Defendant was convicted of conspiracy to possess and distribute narcotics. The thrust of his defense was that his movements during the crucial hours were covered by an alibi. He argues that evidence of criminal acts occurring during other times should not have been admitted since the prosecution abused the requirements of Rule 12.1 by alleging in its initial demand for notice of alibi that the offense was "ultimately consummated on June 20, 1980 . . . from approximately 5:30 P.M. to 8:30 P.M. . . ." He further argues that the Government did not advise him of the witnesses who would be called to rebut his alibi.

On appeal, the Court held that Rule 12.1 permits the prosecution to seek notice of alibi with respect to a discrete temporal aspect of the crime charged so long as it is made clear to defendant that the Rule is being invoked in that manner, since many crimes are accomplished over a long period of time and the Rule would be rendered unworkable otherwise. The Court further held that although there was no evidence indicating that the defendant was provided with notice of the witnesses the Government would call to rebut his alibi, he waived his right to such notice because at the time the witnesses testified he did not object and he did not allege that the rebuttal witnesses' names did not appear on the list of the Government's witnesses with which he was provided before trial.

(Affirmed.)

United States v. Ricardo "Ricky" Vela, 673 F.2d 86 (5th Cir. April 2, 1982)

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Federal Rules of Evidence

Rule 615. Exclusion of Witnesses.

After conviction, defendants moved for a new trial, contending, inter alia, that the trial court should have instructed prospective witnesses who were excluded from the courtroom pursuant to Rule 615 not to discuss the case with each other.

The court first noted that Rule 615, by its terms, applies to excluding witnesses "so that they cannot hear the testimony of other witnesses", and that the question posed here is whether, on request of a party, a standard more stringent then that required by the rule itself is mandatory. The court noted the existence of a conflict of authority on the issue, with some courts holding that the more stringent instruction should be given in order for the rule to be effective and others holding that the matter is within the discretion of the court. The court concluded that there was no reason to go beyond the requirements of the rule, and that the drafters of the rule had intended to give the trial court discretion as to the exact means of the rule's implementation over and above its express requirements. Accordingly, the court had acted within its discretion in declining to instruct the witnesses not to discuss the case with each other when the circumstances did not warrant such action.

(Motions denied.)

United States v. Victor Forest Scharstein, et al., 531 F.Supp. 460 (E.D. Ky. January 22, 1982)

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Federal Rules of Evidence

Rule 501. Privileges. General Rule.

A witness appearing before a grand jury asserted the privilege against adverse spousal testimony, claiming that any testimony by her directed to the activity of a third party would directly implicate her husband, who the government conceded was a target of the same investigation. The district court denied the government's motion to compel testimony, and the government appealed.

Interpreting the privilege in the light of reason and experience, in accordance with Rule 501, the court held that when the government openly seeks one spouse's testimony concerning the activity of a third party who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the government thereby hopes also to reach the non-witness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony. The court went on to note that the government's promise not to bring an indictment against the non-witness spouse before the same grand jury before which the witness spouse testifies does not adequately protect the spouse from the effect of the testimony. Protection equivalent to use immunity would be required to overcome the privilege.

(Affirmed.)

In Re Grand Jury Matter, 673 F.2d 688 (3rd Cir. March 9, 1982)

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