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COMMENDATIONS

Assistant United States Attorney KENNETH C. BAUMAN, District of Oregon, has been commended by Attorney General Dave Frohnmayer, State of Oregon, for his fine work in the first civil case in Oregon brought under the new Racketeer Influenced and Corrupt Organizations (RICO) statute which was brought by the State of Oregon Department of Justice and Marion County District Attorney against Kristich and The Home Team, Inc., a home repair referral service.

Assistant United States Attorney DAVID C. JONES, Western District of Missouri, has been commended by Mr. Lyle W. Wiggs, Inspector in Charge, United States Postal Service, St. Louis, Missouri, for his work and cooperation in obtaining a temporary restraining order and injunction against the Liberty Amendment Committee of Missouri for a lottery law violation.

Assistant United States Attorney BARBARA KOSIK and former Assistant United States Attorney J. ANDREW SMYSER, Middle District of Pennsylvania, have been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for their excellent work in the reconstruction of facts without witnesses and outstanding jury work which led to the prosecution of two men, Robert Rulf and Frank Johnson, accused of kidnapping.

Assistant United States Attorney RICHARD H. LLOYD, Southern District of Illinois, has been commended by Mr. G.A. Ralston, Jr., Regional Director, Bureau of Prisons, North Central Regional Office, Kansas City, Missouri, for his capable representation in a wide variety of cases arising from prisoner petitions in the United States Penitentiary, Marion, Illinois.

Assistant United States Attorney HARRY NAGLE, Middle District of Pennsylvania, has been commended by Mr. William Kollins, Acting Chief, Land Acquisition Section, Land and Natural Resources Division, for the successful handling of a complex railroad condemnation trial in the case of United States v. 40.70 Acres of Land in Tioga County, Commonwealth of Pennsylvania.

Assistant United States Attorney FRANK TRAPP, Middle District of Florida, has been commended by Mr. Roy B. Klager, Jr., Special Agent in Charge, Federal Bureau of Investigation, Tampa, Florida, for the successful prosecution of the hostage-kidnapping case of Tamara Kay Goshern.

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

POINTS TO REMEMBER

Requests to Engage in Outside Employment: Teaching

Department of Justice regulations regarding private professional practice and outside employment were amended on October 27, 1981. 46 Fed. Reg. 52358, October 27, 1981. Under the previous regulations, teaching by AUSAs was viewed as the private practice of the profession, and required prior authorization of the Associate Attorney General. Teaching is no longer considered "professional practice" requiring prior authorization. 28 C.F.R. 45.735-9(a). Employees who wish to undertake teaching engagements are directed to consult 28 C.F.R. 45.735-12, which generally requires prior approval by the Deputy Attorney General only when the use of non-public information is contemplated. Employees should be cautious to avoid any conflict of interest with their position and to insure that no interference with the performance of their official duties occurs.

(Executive Office)

Debt Collection Commendation

The following letter of commendation by Associate Attorney General Giuliani has been reprinted to give recognition to United States Attorney Henry Dargan McMaster for his success and enthusiasm in the area of debt collections, and to emphasize the serious matter of United States Attorneys' roles in the collection efforts of their respective districts.

(Executive Office)

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

June 4, 1982

Henry Dargan McMaster, Esquire
United States Attorney
Columbia, South Carolina 29202

Dear Henry:

The favorable publicity you received when you joined efforts with the Veterans Administration to file 173 suits to enforce collection of defaulted student loans and unearned veterans' education benefits in your district will keep your community alert to the seriousness with which this Administration views its obligation to collect debts owed the government.

This "massing of forces" for a joint effort is the first example of its kind which has been brought to my attention and I intend to cite it to your fellow United States Attorneys as another creative technique which they can use to keep the government's debtors' attention focused on their obligation to repay what they owe.

I am particularly pleased to learn that your actions have generated such a high level of enthusiasm in your Collections Division. I know that much of the day-to-day work done by collections personnel is routine and goes unnoticed, and their successes are seldom given public recognition. That you had the foresight to include these personnel in "the excitement" is a measure of your leadership abilities. In the Department, we are convinced that assumption by United States Attorneys of a leadership role in the collection efforts of their respective districts is critical to the success of the Department's Debt Collection Plan.

Please keep up the good work.

Sincerely,

Rudolph W. Giuliani
Associate Attorney General

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CERTIFICATES OF THE CUSTODIAN OF THE NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD

In addition to establishing that a firearm is unregistered to the defendant, certificates of the National Firearms Registration and Transfer Record (NFRTR) can also be used to establish that no approved application for transfer or making of the firearm is on file as required by 26 U.S.C. 5812(a)(6) and 5822(e), respectively. Note, however, that only approved applications to make and transfer firearms are recorded in the NFRTR. Neither pending applications nor payments of tax are recorded or are required to be recorded in the NFRTR. The custodian of the NFRTR is, therefore, incompetent to testify that the NFRTR does or does not reflect that an application has been filed or that tax has been paid. By the same token, an NFRTR certificate of non-record is incompetent on those two issues. See United States v. Stout, 667 F.2d 1347 (11th Cir. 1982). Certificates presently in use may contain representations that no record was found with respect to those two items, but are not to be relied upon. Allegations that no application has been filed or that no tax has been paid should not be included in indictments - and should be withdrawn in pending cases - unless other evidence is available to support them.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Northern Pipeline Construction Co. v. Marathon Pipeline Co., et al., Supreme Court Nos. 81-150 and 81-546 (June 28, 1982). D.J. #77-39-679.

BANKRUPTCY ACT: SUPREME COURT HOLDS THAT BROAD GRANT OF JUDICIAL POWER TO NON-TENURED BANKRUPTCY JUDGES VIOLATES ARTICLE III OF THE CONSTITUTION.

In 1978, after almost 10 years of study, Congress enacted a comprehensive revision of the bankruptcy laws. Among the most significant changes was the replacement of the old referee system with a new court known as the United States Bankruptcy Court. Although nominally constituted as an adjunct to the existing district court, the new bankruptcy court was given exclusive jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (1976 ed., Supp. III).

After Northern filed a petition for reorganization, it initiated its state-created breach of contract action against Marathon in the bankruptcy court. The bankruptcy judge sustained the constitutionality of his jurisdiction over Northern's plenary proceeding, but the district court on appeal concluded that this broad grant of jurisdiction violated Article III of the Constitution.

The Supreme Court affirmed the judgment of the district court. Four Justices concluded that the exercise of judicial power by non-tenured judges had been allowed in only three areas (territorial courts, military courts and courts adjudicating public rights), and that in each of these narrow areas "the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." Slip Op. at 13. The plurality also found that the new bankruptcy courts were not true adjuncts to the existing district courts, because the new Act "impermissibly removed most, if not all, of 'the attributes of the judicial power' from the Art. III district court * * *." Two additional Justices concurred in the affirmance of the judgment, reasoning that the non-Article III bankruptcy court could not hear this state-created cause of action, but explicitly leaving open what questions might be heard by a non-Article III bankruptcy court. Three Justices dissented.

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At least five Justices concluded that the jurisdictional grant to the new bankruptcy court of both the underlying bankruptcy and plenary proceedings was non-severable, thus striking down the entire congressional grant of bankruptcy jurisdiction. A majority indicated that the Court's ruling was not retroactive, was to be applied prospectively only, and that the Court's judgment should be stayed until October 4, 1982, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." If Congress does not act by October 4, 1982, there may be no judges or courts with jurisdiction to conduct bankruptcy proceedings.

Attorney: Michael Hertz (Civil Division)
FTS (633-3180)

Devine V. Goodstein, D.C. Cir. No. 81-1230 (June 4, 1982).
D.J. # 35-277.

CIVIL SERVICE REFORM ACT: D.C. CIRCUIT REVERSES ARBITRATOR AND RULES THAT FEDERAL AGENCY HAS A RIGHT TO SANCTION EMPLOYEE WHO REFUSES TO ANSWER JOB-RELATED QUESTION.

This was the first case brought by the Director of the Office of Personnel Management (OPM) under a provision of the Civil Service Reform Act which, for the first time, allows the government to seek judicial review when an administrative tribunal overturns a disciplinary sanction against a federal employee. See 5 U.S.C. §§7121(f) and 7703(d). Here an arbitrator determined that the Immigration and Naturalization Service could not suspend an employee for refusing to answer questions about his conduct which gave rise to a complaint from a member of the public. The arbitrator ruled that since criminal prosecution could conceivably result from his answer, the employee had a Fifth Amendment right to remain silent.

The Director of OPM petitioned the D.C. Circuit for review. Under the review provisions, the court of appeals has discretion to refuse to hear a petition brought by OPM unless the court agrees there is a legal error which will have a substantial impact on civil service law. In a published preliminary decision, the court of appeals stated that arbitrators have an obligation to create a reviewable record and to file the record with the court when OPM petitions for review.

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Assistant Attorney General J. Paul McGrath

Subsequently, the court of appeals agreed to review the arbitrator's decision. In its final decision, the court of appeals reversed the arbitrator. The court agreed with OPM that the arbitrator's decision would have a substantial impact on civil service law. On the merits, the court ruled that because the employee did not have a reasonable fear of criminal prosecution as a result of his conduct, he could be suspended for refusing to answer job-related questions.

Attorney: Susan Sleater (Civil Division)
FTS (633-4331)

PATCO v. FLRA and FAA, D.C. Cir. No. 81-2135 (June 11, 1982). D.J. #145-8-974.

FEDERAL LABOR RELATIONS ACT/DECERTIFICATION OF PATCO: D.C. CIRCUIT AGREES THAT FLRA DECISION WAS NOT FUNDAMENTALLY TAINTED BY IMPROPER EX PARTE CONTACTS, AND AFFIRMS FLRA's DECISION TO REVOKE EXCLUSIVE BARGAINING REPRESENTATIVE STATUS OF PATCO.

This case arose on PATCO's petition to review the October 1981 decision of the Federal Labor Relations Authority (FLRA) to revoke PATCO's status as the exclusive bargaining representative of federal air traffic controllers based on its conduct of a nationwide strike last August. Following an expedited briefing schedule, argument on the merits of PATCO's appeal was held on December 3, 1981. Just prior to the oral argument, we had learned that a criminal investigation had been conducted (and concluded) following allegations that a New York labor leader may have attempted improperly to influence the vote of one of the FLRA Members. We apprised the Court of the fact and substance of the investigation in a declaration of the Assistant Attorney General. Thereafter, following a round of motions under seal and ex parte examination of the FBI reports, the Court ordered that a special examiner be appointed to conduct a vigorous and thorough probe of all extra-record contacts that any of the three Members might have had involving the PATCO case. This proceeding was concluded on March 26, 1982, when the special examiner issued extensive recommended findings which suggested that several ex parte contacts had occurred but concluded that none had influenced the final votes of any of the FLRA Members in the case. Briefs were then filed in the Court of Appeals by the parties to the special hearing concerning the legal impact of the extra-record contacts that had been disclosed. Oral argument on this facet of the case was held on April 13, 1982.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

McCoy v. Schweiker, 8th Cir. No. 81-1629 (June 21, 1982).
D.J. # 137-10-286.

SSA DISABILITY "GRID" REGULATIONS: UNANIMOUS EN BANC EIGHTH CIRCUIT UPHOLDS SOCIAL SECURITY ADMINISTRATION'S MEDICAL-VOCATIONAL "GRID" REGULATIONS GOVERNING DISABILITY DETERMINATIONS.

Several district courts in the Eighth Circuit invalidated the use of the Secretary of Health and Human Services medical-vocational regulations designed for determining disability. Under the so-called "grid" regulations, individualized findings as to a claimant's residual functional capacity, his age, education and work experience are made and then plugged into one of three tables to determine whether a claimant is disabled. Underlying the tables are administrative notice of scores of jobs which a claimant with the given mix of the individual factors can perform despite his disability. The tables replaced the former requirement that a vocational expert testify to name specific jobs that a claimant could perform. In contrast to the procedure under the new regulations, formerly a claimant was afforded the opportunity to rebut the expert's testimony. Each of the district courts held that the regulations were counter to the requirement that disability be determined as an individual matter and were counter to the Eighth Circuit's strong pre-regulation case law requiring the naming of specific jobs by a vocational expert which a claimant could attempt to rebut.

We obtained certification of three consolidated district court decisions for review to the Eighth Circuit pursuant to 28 U.S.C. §1292(b). The Eighth Circuit sua sponte decided to hear the matter en banc and has just reversed in an unanimous decision. The decision, authored by Judge Arnold, removes an administrative log jam caused by the district court's rulings, freeing the use of the new regulations in the Eighth Circuit. The decision should prove useful in our attempt to have the Supreme Court reverse the Second Circuit's decision (Campbell v. Schweiker, cert. granted, No. 81-1983, June 21, 1982) invalidating the regulations and to have the en banc Eleventh Circuit review and reverse a ruling of a panel of that court also invalidating the regulations (Broz v. Schweiker, 11th Cir. No. 81-7140, June 7, 1982).

Attorneys: Robert S. Greenspan (Civil Division)
FTS (633-5428)

Fred Geilfuss (Civil Division)
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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

United States v. Lutheran Medical Center, 8th Cir. No. 81-2183 (June 22, 1982). D.J. # 145-16-1706.

COMMUNITY MENTAL HEALTH CENTERS ACT/STATUTE OF LIMITATIONS: EIGHTH CIRCUIT HOLDS THAT THE SIX-YEAR STATUTE OF LIMITATIONS DOES NOT APPLY TO ACTIONS BY THE UNITED STATES TO RECOUP FUNDS GRANTED UNDER THE COMMUNITY MENTAL HEALTH CENTERS ACT.

In United States v. City of Palm Beach Gardens, 635 F.2d 337 (5th Cir. 1981), cert. denied, 102 S. Ct. 635 (1981), the Fifth Circuit held that 28 U.S.C. §2415 -- the general statute of limitations applicable to the actions by the United States grounded in tort, contract and quasi-contract -- does not apply to actions by the Government to recover funds provided under the Hill-Burton Act, 42 U.S.C. §§291i et seq. The Eighth Circuit now joins the Fifth Circuit on this issue, holding that 28 U.S.C. §2415 is inapplicable to actions by the Government to recover funds granted under the Community Mental Health Centers Act (CMHCA), 42 U.S.C. §§2681 et seq. The recovery provisions of the Hill-Burton Act and the CMHCA are virtually identical.

The Fifth and Eighth Circuit holdings remove a significant obstacle to recoupment of funds from public hospitals and community mental health facilities which fail to fulfill the terms of their federal grants. Furthermore, these decisions provide a useful reaffirmation of the general principle of sovereign immunity from statutes of limitation.

Attorney: John S. Koppel (Civil Division)
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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

On June 11, 1982, the D.C. Circuit issued its decision, holding that the ex parte contacts did not require vacation of the decision of the FLRA, and that the FLRA's decision to decertify the union on its merits was procedurally sound, well supported by the record, and an appropriate exercise of discretion. On the ex parte contact question, the Court adopted fully our novel theory that, where a full "probe of the administrative processes" is conducted, a subjective analysis of whether extra record contacts have actually tainted the results of the proceeding, rather than an "appearance of impropriety" test, should control. Having determined that the many ex parte contacts at issue rendered the decision below "voidable" rather than "void," the Court agreed with us that none of the contacts fundamentally impaired the integrity of the administrative proceeding below. On the merits, the Court rejected PATCO's argument that the FLRA had improperly denied PATCO an opportunity to present evidence concerning the alleged bad faith conduct of the FAA in its consideration of what penalty to impose. The Court agreed with us that PATCO's proffer was not sufficiently specific or probative to justify the delay that taking such evidence would entail, especially in light of PATCO's "repeat offender" status under the federal anti-strike laws, and the union's open defiance of cease and desist orders issued by several federal courts during the August 1981 strike.

The 93-page opinion for the Court was authored by Circuit Judge Edwards. Judge MacKinnon concurred in the result and in the majority opinion, writing a very brief separate opinion to underscore the extremity of PATCO's violation of the law, and additionally to review some of the ex parte contacts. Chief Judge Robinson concurred in the result and in much of the majority opinion, and wrote a separate opinion to discuss the gravity of the responsibilities entrusted to those sitting as quasi-adjudicators, and to stress the importance of avoiding ex parte contacts.

Attorneys: William Kanter (Civil Division)
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Mark Gallant (Civil Division)
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Fred Geilfuss (Civil Division)
FTS (633-5684)

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

Zimmer v. Watt, No. 81-4244, 9th Circuit (May 19, 1982). D.J. # 90-1-18-1604.

MINING: INTERIOR'S DETERMINATION THAT CLAIMS ARE INVALID SUSTAINED.

The Ninth Circuit affirmed the district court judgment upholding the decision of the Secretary of the Interior that Zimmers' mining claims were invalid. The court found that Zimmers presented no evidence that there was sufficient clay of high quality on his claim that could be marketed; held that the government's expert witness established a prima facie case that Zimmers' claims were invalid; and held that the Secretary's decision was supported by substantial evidence.

Attorney: Louis A. Demas (Assistant United States Attorney, E.D. Cal.)
FTS (448-2331)

Attorney: Kay L. Richman (Land and Natural Resources Division)
FTS (633-2772)

Attorney: Anne S. Almy (Land and Natural Resources Division)
FTS (633-4427)

United States v. 169.86 Acres, Summit County Ohio (Bishop, et al.), No. 81-3309, 6th Circuit (May 26, 1982). D.J. # 33-36-683-45.

CONDEMNATION: STATES' ATTEMPT TO TAX LAND AFTER CONDEMNATION BY THE UNITED STATES IS INVALID.

When the title to land passed to the United States with the entry of a consent judgment after a condemnation proceeding, the county attempted to assess a tax on the property called for under Ohio tax statutes. The statute provides that when land assessed at its agricultural value is converted to a non-agricultural use, the State can recoup the tax savings to the property owner for the four years prior to the conversion. However, since the court found that the lien attached after title passed to the United States, the county's claim for real estate taxes was denied.

Attorney: Richard French (Assistant United States Attorney, S.D. Ohio)
FTS (293-4389)

Attorney: Maria A. Iizuka (Land and Natural Resources Division)
FTS (633-2753)

Attorney: Dirk D. Snel (Land and Natural Resources Division)
FTS (633-4400)

Tom Brown v. U.S. Department of Interior, No. 81-2064, 8th Circuit (June 3, 1982). D.J. # 90-1-18-2143.

MINING: CLAIMS ON LAND WITHDRAWN FOR NATIONAL PARK ARE INVALID.

Brown appealed from the district court's order dismissing with prejudice his complaint seeking review of an IBLA decision. The IBLA had found Brown's 101 mining claims located on land acquired for the Buffalo National River.

The Eighth Circuit affirmed the order on the basis that the mining claims on land located within the Buffalo National River were invalid since the Act establishing the River as part of the National Park System implicitly withdrew the lands from mineral entry and location.

Attorney: Albert M. Ferlo, Jr. (Land and Natural Resources Division)
FTS (633-2774)

Attorney: Robert L. Klarquist (Land and Natural Resources Division)
FTS (633-2731)

Eva Rehner v. Baxter Rice, No. 77-2409, 9th Circuit (en banc) (June 8, 1982). D.J. # 90-6-4-8.

INDIANS: INDIANS NOT REQUIRED TO OBTAIN STATE LIQUOR LICENSE TO SELL LIQUOR IN STORES ON RESERVATIONS.

The question presented was whether 18 U.S.C. 1161 subjects Indians to state licensing requirements for liquor transactions on Reservations. The Ninth Circuit ruled that the statute requires such transactions to be in accordance with state substantive standards, but did not grant licensing or distribution jurisdiction to the State. The court also ruled that the twenty-first Amendment to the Constitution

did not grant the states regulatory jurisdiction over liquor transactions on Indian reservations. Accordingly, the Circuit Court reversed the district court decision which held that Mrs. Rehner, a member of the Pala Band of the Mission Indians, was required to obtain a state liquor license to sell distilled spirits at her store on the Pala Reservation in California. It remanded two companion cases, involving the Muckleshoot Indian Tribe and the Tulalip Tribes of Washington, for further consideration of the application of state taxes to liquor sales by tribal retailers.

Attorneys: Anne S. Almy (Land and Natural Resources Division)
FTS (633-2774)

Attorneys: Robert L. Klarquist (Land and Natural Resources Division)
FTS (633-2731)

Ashcroft v. Department of the Interior, No. 81-5381, 9th Circuit (June 9, 1982). D.J. # 90-6-0-68.

INDIANS: INDIAN TRADER STATUTE AUTHORIZES FEDERAL GOVERNMENT TO ENFORCE REGULATIONS ON NON-INDIAN BUSINESSES ON NON-INDIAN FEE LAND WITHIN A RESERVATION.

The court of appeals reversed the district court which had enjoined the government from enforcing regulations enacted pursuant to 25 U.S.C. 261-264 ("Indian Trader Statutes") to non-Indian businesses located on non-Indian fee land within the exterior boundaries of the Navajo Reservation.

The operators of the businesses had argued that the tracts of land in question were not "on the reservation" within the meaning of 25 C.F.R. 252.2. While noting that the regulations were "arguably ambiguous," the court nevertheless held that the Department of the Interior's construction of the regulations as being applicable in this case was not erroneous. The court of appeals rejected the district court's finding that the regulations were limited to business on lands subject to the sovereign rights of the tribe. Citing Montana v. United States, 450 U.S. 544 (1981), the court concluded that the tribe "retains sovereign power to the extent necessary to protect tribal self-government or control internal relations, including regulating commerce within reservation boundaries. Too, the court held the statutes applicable to avoid the problem of "checkerboard jurisdiction," citing Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976). Finally, the court also refused to attach any significance to the fact

that only a small portion of the appellees' sales were made to reservation Indians.

Attorney: Maria A. Iizuka (Land and Natural Resources Division)
FTS (633-2753)

Attorney: Dirk D. Snel (Land and Natural Resources Division)
FTS (633-2753)

Texas Oil & Gas Corp. v. Watt, Nos. 80-2297 and 80-2302, D.C. Circuit (June 11, 1982). D.J. # 90-1-18-1596.

MINERAL LEASING ACT: INTERIOR'S INTERPRETATION OF ITS REGULATIONS OVERRULED AND CANCELLATION OF OIL AND GAS LEASES REINSTATED.

The court of appeals reversed the district court and ordered Interior to reinstate 20 oil and gas leases at Fort Chaffee, Ark., previously cancelled by Secretary Andrus. The court of appeals refused to pay deference to the Secretary's interpretation of Interior regulations, and the Mineral Leasing Act for Acquired Lands, as amended, which provided the ostensible basis for the cancellation. The court concluded the interpretation was plainly erroneous and was inconsistent with previous Interior interpretations of the same regulations and statute. One bright spot was the D.C. Circuit's refusal to extend the "undue political influence" line of cases, e.g., D.C. Federation of Civic Associations v. Volpe, to an agency decision that involved political pressure by congressmen but not threats of the type in D.C. Federation.

Attorney: Jerry Jackson (Land and Natural Resources Division)
FTS (724-7369)

Attorney: Kay Richman (Land and Natural Resources Division)
FTS (633-2772)

Attorney: Edward J. Shawaker (Land and Natural Resources Division)
FTS (633-2813)

Natural Resources Defense Council v. United States Nuclear Regulatory Commission and the United States, Nos. 80-1863 and 80-1864, D.C. Circuit (June 11, 1982). D.J. # 90-1-4-2213.

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ADMINISTRATIVE LAW: CHALLENGES NRC RULE DISMISSED ON GROUND OF MOOTNESS AND RIPENESS.

NRDC sought a full adjudicatory hearing on proposed amendments to the license of Nuclear Fuel Services, Inc., in Erwin, Tennessee, a facility producing special nuclear fuel used by the Navy. NRC shortly thereafter promulgated, without notice and comment, an immediately effective rule authorizing the use of alternative hearing procedures for matters involving "military and foreign affairs functions." (See 5 U.S.C. 554 (a)(4).) Pursuant to this rule, NRC granted NRDC's request for a hearing, limiting it to a legislative rather than adjudicatory hearing. NRDC asserted that: (1) the "military functions" rule was invalid; (2) that the rule was inapplicable to the Erwin licensing proceeding because of prejudice to NRDC's procedural rights; and (3) the rule was further inapplicable because no military or foreign affairs functions were involved. The court of appeals found that none of the issues was properly before the court, the first on the ground of mootness, the other two issues on the ground that the orders were not final agency action.

Attorney: Margery Nordlinger (NRC Staff)
FTS (634-1493)

Attorney: Peter R. Steenland, Jr. (Land and Natural Resources Division)
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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JULY 9, 1982 - JULY 23, 1982

Diversity Jurisdiction. On July 14, Assistant Attorney General Jonathan Rose of the Office of Legal Policy testified before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice concerning H.R. 6691, a bill to eliminate general diversity of citizenship jurisdiction in the federal courts. Mr. Rose characterized H.R. 6691 as an important court administration reform measure that deserves the support of the Congress. Congressman Sawyer, the most outspoken opponent of the bill, argued that the retention of diversity jurisdiction was necessary to avoid state court prejudice against out-of-state litigants.

Intelligence on International Drug Trafficking. On July 14, Acting DEA Administrator Mullen testified before the Senate Intelligence Committee concerning cooperation between U.S. intelligence agencies and DEA. Mr. Mullen participated as a member of a panel which also included the Deputy Director of the CIA and the Director of the National Security Agency. Senator Biden, who chaired the hearing, was particularly interested in any legal or bureaucratic impediments to optimal collection of intelligence agencies that they would strive to improve their cooperation with DEA in the effort against international drug trafficking. Finally, Senator Biden questioned the ability of DEA to exploit adequately the additional intelligence the CIA and NSA may be able to provide, given the budget constraints under which DEA is operating.

FY '82 Supplemental Appropriations. On July 14, Assistant Attorney General Kevin Rooney appeared before the House Appropriations Subcommittee on Commerce, Justice, State, and Judiciary in support of the FY 1982 supplemental appropriations request. The Subcommittee refused to include the Administration's request to use $35 million to build two new detention centers for illegal aliens in El Reno, Oklahoma, and Petersburg, Virginia. Representative Daniel (R-Va.) and an ACLU spokesman spoke against the centers. Although the subcommittee discussion was primarily against the centers, the request was set aside without prejudice. The other Department requests were approved, including funding for the South Florida Task Force, general legal activities (Civil Division), U.S. Attorneys and Marshals Service, U.S. prisoners support deficit, and the Drug Enforcement Administration. Representative Kastenmeier has scheduled a further hearing on detention

centers for early August.

Bank Secrecy Act. On July 13, the Oversight Subcommittee of the House Banking Committee held hearings on the use of the Bank Secrecy Act of 1970 in connection with law enforcement efforts against major narcotics traffickers. Deputy Assistant Attorney General John Keeney of the Criminal Division represented the Department and described "Operation Greenback" and other related investigations which have resulted in convictions of major narcotics traffickers and their money launderers. Currency reports filed pursuant to the Bank Secrecy Act have been crucial to these investigations and the Act has been an essential enforcement tool in narcotics, organized crime,and tax matters.

Debt Collection. On July 15, Robert N. Ford, Deputy Assistant Attorney General, Civil Division, appeared before the Subcommittee on Administrative Law and Governmental Relations to discuss the Department's debt collection efforts. Mr. Ford emphasized the Attorney General's high priority on these efforts.

Witness Protection Program Hearings. On July 6, a Senate Appropriations Subcommittee held hearings in Jackson, Mississippi, chaired by Senator Thad Cochran which focused upon the Federal Witness Protection Program. The hearing was occasioned by three incidents which have occurred in Mississippi in which persons in the witness protection program have committed crimes, one involving death. Department witnesses were Associate Director Howard Safir of the U.S. Marshals Service and Gerald Shur of the Criminal Division who described the witness protection program in general and the three criminal acts in particular. Department spokesman pointed out that more careful controls have been placed on the program in recent years and that the number of witnesses brought into the program each year has decreased by more than one half over the past five years.

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Federal Rules of Criminal Procedure

Rule 44(c). Right to and Assignment of Counsel. Joint Representation.

In two cases arising under Rule 44(c), the Second and Third Circuits reached different conclusions on the question of the power of federal courts to disqualify counsel who will be jointly representing multiple defendants notwithstanding defendants' waivers of the right to conflict-free representation.

In the Third Circuit case, four defendants chose to present a common defense and all retained the same law firm. Pursuant to a government request, the district court conducted a Rule 44(c) hearing to determine the defendants' awareness of the risks of joint representation and their rights to separate representation. The district court found that each defendant was completely aware of the potential conflicts of joint representation and that each defendant had voluntarily and intelligently chosen to waive any claim of conflict of interest in electing to be represented by one counsel. But, because the district court also found that a conflict of interests was very likely to arise in the course of the proceedings, it held that the waivers need not be accepted, and ordered that the firm should be disqualified from representing any of the defendants. The defendants appealed, contending that their valid waiver entitled them to joint representation and that the district court could not interfere with their choice.

Noting that the Sixth Amendment guarantee of effective assistance of counsel does not provide defendants with an absolute right to the lawyer of their choice, the Third Circuit concluded that they similarly have no absolute right to have their waivers of the right to separate representation accepted. Accordingly, the court held that since the materialization of actual conflict was likely, disqualification of counsel was appropriate under Rule 44(c).

The Second Circuit case involved two codefendants (brothers) who sought to be represented by the same attorney. Pursuant to the government's motion, the district court held a Rule 44(c) hearing at which each codefendant indicated he understood the risks of joint representation and waived his right to separate representation. After the hearing, the district court ruled that neither defendant had made a knowing and intelligent waiver of his rights, and that such a knowing and

intelligent waiver would rarely be possible unless a conflict was outside the realm of reasonable foreseeability. On the basis of this conclusion, the district court ruled that the attorney could not represent either of the codefendants, and the defendants appealed.

The Second Circuit held that Rule 44(c) does not eliminate the defendant's power to waive his right to be represented by a conflict-free attorney, and that, "[g]iven the constitutional dimension of the defendant's right to counsel of his own choosing, if the defendant makes a knowing and intelligent election to pursue that right in preference to his right to an attorney of undivided loyalty, disqualification would not protect the Sixth Amendment right that the defendant asserts and would not be 'appropriate'." Concluding that the record was ambiguous as to whether there was, in fact, a knowing and intelligent waiver, the court remanded the case to the district court for a determination on this point, with instructions to honor the decision of the defendants if it determines such decision to be knowing and intelligent.

United States v. Robert Flanagan, et al., ___F.2d___, No. 81-3116 (3d Cir. June 2, 1982).

United States v. Francis Curcio and Gus Curcio, ___F.2d___, No. 82-1066 (2d Cir. May 26, 1982).

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