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Executive Office for United States Attorneys
William P. Tyson, Acting Director

Points to Remember

Comptroller of Currency Coordination with U.S. Attorneys

The Director of the Enforcement and Compliance Division, Office of Comptroller of Currency has reiterated a desire and willingness to assist U.S. Attorneys in banking matters. The Comptroller's Office is responsible for examining and supervising approximately 4,700 national banks and their branches, both domestic and foreign. National banks, by statute, must contain the words "national" or "national association" in their titles. Consequently, they are easily distinguishable from other financial institutions.

Over the past several years, the Comptroller of Currency Office has been actively involved in assisting various United States Attorneys' Offices in the handling of criminal cases concerning national banks. In this context the office has been able to supply personnel to review documents and evidence and to testify both as percipient and expert witnesses.

In order to improve the ability of the office to detect and report fraud within national banks, six to ten national bank examiners in fourteen regions have been trained and designated as "fraud examiners." Although their exposure to criminal law and courtroom procedure is not extensive, their general awareness of this area, as well as their expertise of banking practices and procedures, may be of considerable value to U.S. Attorneys in handling complicated, white-collar banking cases.

The Comptroller of Currency Office is committed to assisting the criminal law enforcement effort and would like to work with the U.S. Attorneys' Offices to the extent permissible by statute and the availability of time and manpower.

If you could use the assistance of an examiner from this office, contact the Regional Counsel, in the following listing of the Comptroller of Currency Offices or, Mr. Robert B. Serino, Director of Enforcement and Compliance Division. (FTS 447-1847)

Region I - Boston, Massachusetts	
Regional Counsel - Charles E. White	FTS 223-2274
Region II - New York, New York	
Regional Counsel - Wallace S. Nathan	FTS 662-3495
Region III - Philadelphia, Pennsylvania	
Regional Counsel - Phoebe N. Matthews	FTS 597-7105
Regiona IV - Cleveland, Ohio	
Regional Counsel - vacant	FTS 293-7141

Region V - Richmond, Virginia	
Regional Counsel - David H. Baris	FTS 925-2406
Region VI - Atlanta, Georgia	
Regional Counsel - Henry G. Pannell	FTS 242-4926
Region VII - Chicago, Illinois	
Regional Counsel - John P. Sherry	FTS 353-0300
Region VIII - Memphis, Tennessee	
Regional Counsel - Bruce A. Hertz	FTS 222-3376
Region IX - Minneapolis, Minnesota	
Regional Counsel - Harold J. Hansen	FTS 725-2684
Region X - Kansas City, Missouri	
Regional Counsel - Michael J. O'Keefe	FTS 758-6431
Region XI - Dallas, Texas	
Regional Counsel - R. Patrick Parise	FTS 729-4400
Region XII - Denver, Colorado	
Regional Counsel - Dennis M. Gingold	FTS 327-4883
Region XIII - Portland, Oregon	
Regional Counsel - Martin Goodman	FTS 423-3091
Region XIV - San Francisco, California	
Regional Counsel - Joe Pogar, Jr.	FTS 556-4307

(Executive Office)

Criminal Division Position Vacancies

SES Announcement #80-SES-39

1 Chief, Internal Security Section, Criminal Division, Washington, D.C. Pay Range: ES-1 through ES-6 ($47,889. - $50,112.50) DUTIES: Supervises approximately 35 attorneys and nonattorneys. Administers the enforcement of all criminal statutes affecting national defense and foreign relations, including the Espionage Act. Organizes, coordinates, manages, and supervises complex and sensitive national security investigations and prosecutions; from inception through pre-trial, post trial, and appellate actions. Participates in coordination of Federal law enforcement agency efforts in detecting, investigating, and, when appropriate, prosecuting national security offenses such as espionage. Makes recommendations when necessary for legislative and policy revisions. Provides advice on policies, laws, and cases affecting enforcement of national security statutes. MANDATORY QUALIFICATIONS: 1) Bar membership; 2) Demonstrated ability or potential to manage a legal staff and make effective decisions; 3) Significant experience in the Federal system of investigation and prosecution of complex criminal cases; 4) Extensive knowledge of structure and procedures of Federal investigative agencies and agencies of the intelligence community; 5) Extensive knowledge of Federal practice, including grand jury and trial procedures; 6) Familiarity with criminal laws affecting national defense and foreign relations; and 7) Demonstrated experience or potential to manage the resources of an organization. DESIRABLE QUALIFICATIONS: 1) Demonstrated experience in supervising the investigation and prosecution of complex national security cases; 2) Experience in working with United States Attorneys, Federal Bureau of Investigation, and national security agencies; and 3) Significant experience in dealing with complex legal and policy issues affecting national defense and foreign relations. EVALUATION METHODS: Applicants will be evaluated according to the extent and quality of experience and supervisory appraisal of performance. HOW TO APPLY: Applicants must submit an SF-171 (Personal Qualifications Statement) and a current supervisory appraisal to: Dept. of Justice, Exec. Personnel Unit, Rm. 1118, 10th and Constitution Ave., N.W., Washington, D.C. 20530, ATTN: Catherine Kaputa. Resumes will not be accepted. (202) 633-4006

SES Announcement #80-SES-38

1 Deputy Chief, Organized Crime and Racketeering Section, Criminal Division, Kansas City, MO Pay Range: ES-1 through ES-6 ($47,889. - $50,112.50) DUTIES: Supervises approximately 45 attorneys and 25 nonlegals in field offices and Strike Forces within the Midwest Region. Provides technical direction to the Asst. U.S. Attorneys handling organized crime matters; coordinates the above personnel; makes recommendations for or against prosecution; reviews declinations; supervises the progress of important cases through the Courts and advises the U.S. Attorneys of theories or prosecution; counsels and assists the Asst. Attorney General, when called upon, on legal and policy issues arising from statutes administered by the Section; prepares testimony for congressional committees; establishes and maintains close liaison with both Federal and State agencies. MANDATORY QUALIFICATIONS: 1) Bar membership; 2) Extensive experience in Federal criminal law evidence, procedure, and litigation, including a thorough knowledge of Titles 18 and 29, U.S.C.; 3) Experience in and knowledge of Department procedures, with emphasis on case initiation, grand jury prosecution approval, innumity, consensual electronic surveillance, court-authorized electronic surveillance, & witness protection; 4) A demonstrated ability to recognize legal issues not necessarily raised by subordinates; 5) Demonstrated ability to write licitly; 6) Extensive experience with Federal investigative agencies & their structures & procedures; 7) Willingness to relocate to the Midwest; 8) Demonstrated ability or potential to supervise & instruct subordinates; and 9) Demonstrated experience or potential to manage the resources of an organization. DESIRABLE QUALIFICATIONS: 1) Membership in a bar of a state falling under his supervision; 2) Extensive legal experience in the geographic area falling under his supervision; 3) A reasonably thorough knowledge of the legislative process & the interaction among Government branches & agencies in organized crime matters; and 4) Experience in interviewing & hiring legal personnel. EVALUATION METHODS: Applicants will be evaluated according to the extent & quality of experience & supervisory appraisal of performance. HOW TO APPLY: Applicants must submit an SF-171 (Personal Qualifications Statement) & a current supervisory appraisal to: Dept. of Justice, Exec. Personnel Unit, Rm. 1118, 10th & Constitution Ave., N.W.. Washington, D.C. 20530, ATTN: Catherine Kaputa. Resumes will not be accepted. 633-4006

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General Alice Daniel

Snepp v. United States, Nos. 78-1871, 79-265 (Supreme Court, February 19, 1980) DJ 145-1-573

FIRST AMENDMENT: SUPREME COURT UPHOLDS VALIDITY OF CIA SECRECY AGREEMENT, AND OF GOVERNMENT'S RIGHT TO A CONSTRUCTIVE TRUST OVER THE PROFITS OF A BOOK WHICH, IN VIOLATION OF THE AGREEMENT, HAS NOT BEEN SUBMITTED FOR PRE-PUBLICATION REVIEW

This case arose out of the publication of a book entitled Decent Interval by Frank Snepp, a former CIA employee. Contrary to his secrecy agreement with the agency, Mr. Snepp published the book without seeking prior Agency approval. The United States filed an action in the district court seeking an injunction against future violations of the Agreement, and also seeking imposition of a constructive trust over all profits derived from sale of the book. The complaint did not allege that Snepp had published classified information but sought only to enforce the Agency's contractual right to review manuscripts in advance of publication to determine if they contained such information.

The district court sustained the validity of the secrecy agreement, enjoined its future violation, and imposed a constructive trust, for the benefit of the United States, over all revenues derived by Snepp from the publication and sale of the book. The Fourth Circuit affirmed the ruling of the district court with respect to the validity of the agreement and the award of injunctive relief, but ruled that a constructive trust could not be placed on Snepp's earnings absent proof that the book contained classified material.

The Supreme Court, however, completely accepted the government's position. The Court upheld both the validity of the Secrecy Agreement, and the government's right to seek compensation for breaches of the agreement through the remedy of a constructive trust. With respect to the validity of the agreement, the Court ruled that such agreements were an appropriate exercise of the Secretary's statutory authority to "protec[t] intelligence sources and methods from unauthorized disclosure," 5 U.S.C. 403 (d)(3). On the issue of damages, the Court ruled that Snepp's employment with the CIA involved a high degree of trust, including the obligation not to publish any information, including non-classified information, without prior Agency approval. The Court noted that a constructive trust "is the natural and customary consequences of a breach of trust", and that the remedy

should apply to the circumstances of this case. The availability of a constructive trust remedy, the Court observed, was the best means available for deterring future violations of the pre-publication review agreement.

Attorney: Frederic Cohen (Civil Division)
FTS 633-4054

Wilmington United Neighborhoods, et al. v. HEW, et al., Nos. 78-2633, 78-2634 (3rd Cir., February 6, 1980) DJ 137-15-64

MEDICARE: THIRD CIRCUIT HOLDS THAT COURTS ARE PRECLUDED FROM REVIEWING NON-CONSTITUTIONAL DETERMINATIONS MADE BY HEW AND STATE AGENCIES UNDER 42 U.S.C. 1320a-1.

This case concerned an attempt by several individuals and organizations to force the Department of Health, Education and Welfare to effectively halt the construction of a $90,000,000 hospital complex. Plaintiffs argued that HEW and state health planning agencies had violated the provisions of section 1122 of the Social Security Act, 42 U.S.C. 1320a-1. This statute makes a hospital's eligibility for Medicare reimbursement dependent upon certification by state health planning agencies. 1122(f) states that judicial review of HEW determinations under this statute are precluded.

The court accepted our position that 1122(f) precludes review of HEW determinations of any sort, procedural or substantive. A majority of the court also accepted our position that review of the state agencies' determinations, although not expressly precluded by the statute, was implicitly precluded. The majority agreed that it would be incongruous to assume that Congress intended review of the state determinations under this program but not of the federal determinations. The court also agreed that to permit review would be inconsistent with the streamlined proceedings envisaged by the statute. On this latter point particularly, this case should provide a valuable precedent because few cases have held that judicial review is implicitly precluded by a statutory scheme.

Attorney: Alfred Mollin (Civil Division)
FTS 633-4792

Nakshian v. Claytor, No. 79-1672 (D.C. Cir., February 19, 1980) DJ 35-16-1187

JURY TRIALS: D.C. CIRCUIT RULES THAT FEDERAL EMPLOYEES SUING THE GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT HAVE A RIGHT TO A JURY TRIAL

Plaintiff was a 63-year-old civilian employee of the United States Department of the Navy at the time she brought this action against her federal employer under section 15(c) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a(c). She demanded a jury trial, and the Government moved to strike her demand on the ground that no right to a jury trial exists in federal sector ADEA actions. The district court denied our motion and upheld plaintiff's right to a jury, but certified the jury trial issue for interlocutory appeal.

On appeal, the D.C. Circuit affirmed the district court's ruling. The court of appeals rejected our argument that there is sovereign immunity from jury trials that can only be waived by explicit statutory language or clear legislative history. Rather, since the Government had waived its sovereign immunity by consenting to be sued but had not specified the trial procedure to be used in such suits, the question of whether or not a jury trial is available simply presents "an ordinary question of statutory interpretation". The court of appeals found sufficient indication in the legislative history that Congress intended that jury trial be available in ADEA actions against the Government, just as it has been held by the Supreme Court to be available in ADEA suits against private employers under section 7(c), 29 U.S.C. 626(c). See Lorillard v. Pons, 434 U.S. 575 (1978).

Attorney: Michael Jay Singer (Civil Division)
FTS 633-3159

Bostick v. Boorstin, No. 78-2194 (D.C. Cir., February 22, 1980) DJ 170-16-53

TITLE VII: D.C. CIRCUIT UPHOLDS LIBRARY OF CONGRESS IN TITLE VII CASE

Plaintiff instituted this Title VII suit asserting that the Library of Congress refused to promote him because of racial animus. Plaintiff included class action allegations of racially discriminatory practices at the Library relating to recruitment, hiring, promotion, job classification and firing.

Adopting our arguments, the court of appeals held (1) that the Library refused to promote plaintiff because of Civil Service Commission restraints, not because of racial animus and (2) the district court did not abuse its discretion in refusing to certify a class action under Rule 23(a)(3) because plaintiff's claim was not typical of the claims of the class he sought to represent.

Attorneys: Mark N. Mutterperl and Katherine Gruenheck
(Civil Division)
FTS 633-3424
FTS 633-3381

Jaffee v. United States, No. 79-1543 (3rd Cir., February 20, 1980)
DJ 145-15-1110

TORTS; FERES DOCTRINE: THIRD CIRCUIT RULES THAT FERES DOCTRINE DOES NOT BAR SERVICEMEN'S SUITS AGAINST THEIR SUPERIORS FOR INTENTIONAL CONSTITUTIONAL TORTS

Plaintiff, a former serviceman, sued various military and civilian officials for money damages. Plaintiff claimed that those officials had deliberately exposed him to excessive radiation at a 1953 atmospheric nuclear test and caused him to contract cancer. Plaintiff did not sue the government under the Federal Tort Claims Act, but sued the individual officials for alleged due process and other constitutional violations. The district court dismissed the lawsuit on the ground that the doctrine of Feres v. United States, 340 U.S. 135 (1950), barred tort suits against individuals as well as suits against the government. The court of appeals has just reversed. The court held that the Feres immunity, while available to individual defendants, applied only to negligent torts, not to intentional constitutional torts. In reaching this result the court relied extensively on an 1851 Supreme Court opinion. The court of appeals also rejected our arguments that the district court lacked in personam jurisdiction and was the improper venue for this lawsuit.

Attorney: John F. Cordes (Civil Division)
FTS 633-3426

Hoover v. Department of the Interior, No. 79-1122 (5th Cir., February 15, 1980) DJ 145-7-630

FOIA: FIFTH CIRCUIT SUSTAINS WITHHOLDING OF INTERIOR DEPARTMENT'S LAND APPRAISAL REPORT UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT TO PROTECT LAND ACQUISITION PROCESS

A landowner brought suit under the FOIA to compel the Department of the Interior to make available for inspection and copying an appraisal report concerning his cave and surrounding lands which the Department was attempting to acquire. The district court dismissed the suit without prejudice because of the pendency of a subsequently filed condemnation proceeding against the property, in which the availability of the report to the landowner would be determined in discovery.

The court of appeals ruled that dismissal on that ground was erroneous because the landowner's interest in the FOIA action, being no more than that of a member of the general public, was different from his interest as a private litigant in the condemnation suit. Reaching the merits, however, the court of appeals affirmed the dismissal of this action, holding that exemption 5 of the FOIA protects the appraisal from disclosure during the land acquisition process. The court agreed with the government's arguments that the report would not be routinely available by law (under the civil discovery rules) during that time to a party in litigation with the agency, and that premature disclosure of the report would harm the government's bargaining position. The court also agreed with our alternative argument that exemption 5 executive privilege protects the report because it is still being used by the Department in its decision-making in the condemnation litigation.

Attorney: Wendy M. Keats (Civil Division)
FTS 633-3259

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

United States v. Otherson, No. 79-682-T. (S. D. Calif.)
DJ 144-12-1364

18 U.S.C. Section 242

Four border patrol agents were prosecuted for violaing 18 U.S. C. Section 242. The victims were Mexican citizens who were apprehended by the defendants shortly after they entered the United States illegally. The defendants contended that the victims were not "inhabitants" within the meaning of Section 242. The District Court held that the word "inhabitant" in Section 242 means any "person" within the jurisdiction of the United States, regardless of the length of time such a person had been in the United States and regardless of the legality of the entry into the United States.

Referring to a treaty between the United States and Mexico in force when Section 242 was enacted and an agreement between the United States and Latin American countries presently in force, the court concluded that newly arrived aliens were protected under Section 242. Moreover, since there were no immigration laws when Section 242 was passed, Congress could not have intended to exclude illegal entrant aliens from the protection of Section 242.

The court also determined that the legislative history of Section 242 indicated that "inhabitant" was intended to be synonymous with "person." That finding was further supported with references to 42 U.S.C. Section 1983, the civil analogue of Section 242, which explicitly protects all "persons", and to the Fourteenth Amendment, which guarantees equal protection and due process to all "persons". The court also set forth several policy considerations in reaching its decision.

Attorneys: Michael Wash (United States Attorney
S. D. California)
FTS 895-5610
David Doyle (Assistant United States
Attorney, S. D. California)
FTS 895-5610
Brian McDonald (Civil Rights Division)
FTS 633-4071

United States v. Steven Sloan, et al, No. (M.D. Fla.)
DJ 175-17M-241

Fair Housing Act

On February 22, 1980 a complaint was filed in the Federal District Court in Tampa, Florida. This housing discrimination lawsuit alleges that the general partners, general manager and rental manager of a 216 unit apartment complex have violated the Fair Housing Act by instructing employees to avoid and discourage rentals by blacks, Hispanics and Cubans, and have misrepresented to members of these minority groups that apartments were not available for inspection or rental. This case was originally brought to our attention by the MacDill Air Force Base housing office. The United States Attorney in Tampa has agreed to assume the major litigative role in this case.

Attorney: Ira Pollack (Civil Rights Division)
FTS 633-3807

United States v. County of Waukesha, re: Klink, Sheriff
CA No. 80-C-140 (E.D. Wisc.) DJ 170-85-27

Employment Discrimination on the Basis of Sex

Suit was filed on February 19, 1980 against Waukesha County, Wisconsin, alleging that the Sheriff's Department has engaged in employment discrimination on the basis of sex. We simultaneously filed a "Settlement Agreement and Order" which provides for interim hiring goals for women as deputy sheriffs (25% for the first two years, 30% thereafter) and $34,000 in back pay for four women who were employed as jail matrons and received less pay than male deputy sheriffs who perform the same work. The court entered the settlement agreement and order after a hearing at which counsel for three of the four former jail matrons informed the court that her clients would reject the offer and pursue their private rights.

Attorney: Steven Rosenbaum (Civil Rights Division)
FTS 633-3749

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

United States v. Standard Oil Company of California, _____ F.2d _____, No. 78-1565 (9th Cir. January 24, 1980)
DJ 90-1-18-1053

Oil and gas

This case involves rights of the parties under a 1944 contract unitizing the oil and gas properties of each within Elk Hills Naval Petroleum Reserve No. 1 in California. In late 1973, Standard began producing oil from its own land (Section 7R) outside the Reserve. The Tule Elk Oil Field underlay 7R and extended into the Reserve. The 1944 contract and the 1944 legislation (10 U.S.C. 7426) authorizing that contract empowered Navy to unitize Standard's oil and gas outside the Reserve lying on the "same geologic structure" that also underlies the Reserve. In 1974, the government obtained a preliminary injunction against Standard's producing 7R, and the Acting Secretary determined that it was desirable to include 7R under the controls of the 1944 contract. Subsequently, the Acting Secretary, professing to follow contractual procedures, established a set of terms and conditions whereby Standard, in consideration of 7R's inclusion, would receive one-third of the estimated oil under 7R at 20,000 barrels per day. Standard contested both 7R's inclusion and the terms and conditions for inclusion on the ground that the Tule Elk Field underlying both 7R and the Reserve was not encompassed by the phrase "same geologic structure" in the 1944 contract or in 10 U.S.C. 7426. That phrase, Standard contended, was confined to the Elk Hills anticline, as known in 1944. But the district court ruled, and the Ninth Circuit affirmed, that the purpose of the statute and contract was to protect all oil beneath Navy's Reserve lands, not just the oil within a particular anticline and, therefore, 7R was properly included under the controls of the 1944 unit contract. Summary judgment on this point was affirmed.

On its own motion, however, the district court awarded the government summary judgment on the validity of the terms and conditions as well. This award was reversed by the Ninth Circuit as premature and remanded.

Attorneys: Larry A. Boggs and Dirk D. Snel
(Land and Natural Resources Division)
FTS 633-2956/4400

United States v. 32.80 Acres in Leelanau County, Michigan and Crystal River Associates, _____ F.2d _____, No. 79-1190 (6th Cir. January 12, 1980) DJ 33-23-759-1073

United States; Unauthorized Settlement Does Not Bind the Federal Government

To acquire a 32.40-acre tract for the Sleeping Bear Dunes National Lakeshore, the government filed a declaration of taking and deposited $50,000 as estimated compensation. On the eve of trial, the Assistant United States Attorney received an appraisal report estimating the tract's fair market value at $1,197.500, which he conveyed to the landowner's counsel. The landowner's counsel agreed to settle at that figure and in open court read a "stipulation of settlement" into the record which the Assistant United States Attorney accepted, without having received authorization to do so from the Attorney General or the Assistant Attorney General. The district court signed a judgment in that sum, which recited that it was based on the condemnation commission's finding but which was based wholly on the settlement stipulation. Nearly two months after entry of judgment, the United States filed a motion to set aside the judgment under Rule 60(b)(1), (2), (4) and (6), contending that a judgment based on an unauthorized settlement, could not bind the United States. The district court denied the motion. It accepted the condemnee's argument that the judgment was not a settlement, but on a stipulation of fact, binding.

The Sixth Circuit reversed, vacated the judgment and remanded. The court held first, that the stipulation was indeed a partial settlement which was unauthorized either by the National Park Service or by the written consent of the Assistant United States Attorney's supervisors in the Department of Justice as required by government regulations. Second, the court ruled the settlement should not be enforced against the United States where it was unauthorized under federal law.

Attorneys: Jacques B. Gelin, Dirk D. Snel and Philip M. Zeidner (Land and Natural Resources Division) FTS 633-2762/4400/4351

United States v. 429.57 Acres in Cities of Imperial Beach and San Diego, Calif. (Davidson), _____ F.2d _____, No. 76-3739 (9th Cir. January 25, 1980) DJ 33-5-2827

Condemnation; Highest and Best Use Unit Rule; Interest

The Ninth Circuit affirmed a $6.9 million judgment confirming the just compensation established by a commission appointed pursuant to Rule 71A(h), F. R. Civ. P. The court of appeals held: (1) the commission finding that on the date of taking the property's highest and best use was for a marina was not clearly erroneous. To accomplish the planned development, the Corps of Engineers would have to issue a series of permits and the State of California would have had to give agreements. Environmental considerations would have presented problems, but a credible witness testified that they could have been obtained, and a reasonable and willing buyer could consider it reasonably probable that the permits and agreements could be obtained. (2) The commission properly valued the parcels owned and managed by interlocking corporations as a unit and allowed over $2.7 million in severance damages since the record showed it was "reasonably probable that the properties would be used in combination." That the properties were owned by different entities did not destroy the unity concept, since they were to be used as a unit. (3) The commission's computation of interest, a factual deterermination as to what a prudent person investing funds to provide a reasonable rate of return while maintaining safety of principal on the government's deficiency deposit, was not erroneous. The commission found a rate of 6.635 percent compounded annually, or 7.4 percent per annum.

Attorneys: Regina L. Sleator, Philip M. Zeidner and George R. Hyde (Land and Natural Resources Division) FTS 633-3575/4351; 724-6798

Defenders of Wildlife v. Andrus, _____ F.2d _____, No. 79-1910 (D.C. Cir. February 5, 1980) DJ 90-2-4-473

National Environmental Policy Act

Reversing the decision of the district court, the court of appeals held that the Secretary of the Interior was not required by NEPA to prepare an EIS when he declined a request by an environmental organization that he close federal lands in Alaska to a state wildlife management program which included the killing of wolves. The court of appeals found that the district court had improperly directed the Secretary to restrain State personnel from killing wolves on public lands until an EIS is prepared.

Attorneys: Robert L. Klarquist and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2731/4400

United States and Standing Fork Sioux Tribe of North Dakota and South Dakota v. Morgan and Carson County, _____ F.2d _____, No. 79-1427 (8th Cir. January 23, 1980) DJ 90-6-0-1

Indians; Indian County

The district court had held that certain non-Indian individuals were selling liquor in "Indian country" without a license from the Tribe, and were thus in violation of 18 U.S.C. 1154 and 1156. The court of appeals reversed, holding that the areas where the individuals were selling liquor were in fact "non-Indian communities" and that no tribal license was therefore required.

Attorneys: Martin Green and Raymond N. Zagone (Land and Natural Resources Division) FTS 633-2827/2748

Oil and Gas Fixtures, Inc. of Texas v. Andrus, _____ F.2d _____, No. 78-1281 (5th Cir. January 23, 1980)
DJ 90-1-18-1105

Oil and gas leasing; Royalty computation

Reversing the decision of the district court for the Southern District of Texas, the court of appeals held that the Secretary correctly decided that an oil and gas lease royalty bid of .82165 was a bid of 82.165%. The court of appeals stated that "we find it incredible that not only was this suit ever brought, but that the apellee convinced the district court that the Secretary abused his discretion by construing .82165 to be the equivalent of 82.165%."

Attorneys: Martin Green and Carl Strass (Land and Natural Resources Division) FTS 633-2827/3332

Save the Bay, Inc. v. United States Army Corps of Engineers, _____ F.2d _____, No. 79-1432 (5th Cir. January 24, 1980)
DJ 90-5-1-7-471

National Environmental Policy Act

The court of appeals affirmed a judgment of the district court holding that the Corps' decision to permit construction of an effluent pipeline to carry wastes from a DuPont chemical plant into the Bay of St. Louis without preparing an EIS was reasonable. The court held that the Corps' decision to grant the pipeline permit to discharge an effluent authorized under a valid NPDES permit was not, absent additional facts, a "major federal action." The court rejected the appellants' contention that because the pipeline "enables" the DuPont plant to operate, the Corps should have considered the environmental impacts of the entire DuPont plant before authorizing a permit to construct the pipeline.

Attorneys: Nancy B. Firestone and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2757/4400

United States v. Curtis-Nevada Mines, Inc., _____ F.2d _____, No. 76-3093 (9th Cir. January 17, 1980)
DJ 90-1-18-1112

Mining; Right of Public Access on Surface of Unpatented Mining Claims with Specific Written Permits of Licenses

The court of appeals reversed a judgment which required members of the general public to have specific written licenses or permits from a state or federal agency in order to gain access to unpatented mining claims for recreational purposes or for entrance to adjacent National Forest lands. The United States initiated this action to enjoin Curtis-Nevada Mines, Inc., and its president from prohibiting public access through their unpatented mining claims and public recreational use of the surface of their claims. The district court ruled that under Section 4(b) of the Multiple Use Act, 30 U.S.C. 612(b), the United States and its permittees and licensees have a right to use and access, but the district court limited such use and access to those who hold specific written recreational licenses or permits. The United States appealed from the part of the decision restricting public use and access to permit holders. The court of appeals discussed cases of implied licenses and the historic use of public lands for recreation without requirement of written formal permits. In light of this historical background, the court did not find in the legislative history of the Multiple Use Act of 1955 an intent to limit the meaning of "permittees and licensees" and, therefore, held that while the BLM or Forest Service may require permits for public use of federal lands, they need not do so as a prerequisite to public use of surface resources of unpatented mining claims. The court remanded the case to district court for entry of an injunction consistent with the opinion.

Attorneys: Carl Strass and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-3332/2762

Board of Supervisors of Fairfax County v. Bond, _____ F.2d _____, No. 78-1813 (D.C. Cir. January 23, 1980) DJ 90-5-3-38

Regulations for Supersonic Aircraft Sustained

In a short order, the court dismissed the petition for review which challenged the FAA's recently promulgated noise rule for supersonic aircraft. The County had sought to invalidate the noise standard on the ground that the EIS prepared for that decision inadequately discussed the relationship between Concorde noise at Dulles Airport and the County's land use plans for nearby areas. The County also contended that the EIS had failed to adequately consider alternatives to the proposed action that had been suggested by EPA. The effect of the decision is to permanently authorize Concorde flights at Dulles, to make possible Concorde operations at 12 other sites (where permitted by the airport proprietor), and to establish a noise standard that will require future SST's to operate as quietly as the next generation of subsonic commercial transport aircraft.

Attorneys: Peter R. Steenland, Jr., Anne S. Almy, and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2748/2855/2731

Susan Dawson v. Cecil Andrus, _____ F.2d _____, No. 79-1407 (10th Cir. January 15, 1980) DJ 90-1-18-1345

Oil and Gas Lease; Administrative Interpretation of Regulation Controls

The court of appeals affirmed the district court's judgment that the Secretary of the Interior had not acted arbitrarily and capriciously in disqualifying Dawson's application for a noncompetitive oil and gas lease. As the successful drawee, Dawson was required by regulation to make payment of the first year's rental within 15 days of receipt of notice that the payment was due. Dawson submitted a

check within the 15 days that had the correct figure amount, but the incorrect written amount. Subsequent to the expiration of the 15 days, she submitted two other checks which also contained incorrect amounts. BLM then notified Dawson her application was disqualified for failure to pay the first year's rental within the 15 days. The court noted that where there is a discrepancy between words and figures expressing the amounts to be paid on a check, the words control. It rejected Dawson's argument that BLM should have presented the first check to the bank to let it determine the amount for which the check was negotiable. The court concluded that the administrative interpretation of regulations which have been in effect for many years and consistently construed is controlling unless plainly erroneous or inconsistent with the regulation.

Attorneys: James C. Kilbourne and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-4426/2731

Bosco v. Beck, _____ F.2d _____, No. 79-2300 (3rd Cir. January 18, 1980) DJ 90-1-0-1586

National Environmental Policy Act; Negative Declaration Sustained

The court of appeals affirmed, without opinion, the district court's determination that EPA properly issued negative declarations in connection with its funding of a New Jersey sewerage project. The pro se appellant and amicus curiae New Jersey Public Interest Research Group claimed that an EIS should have been prepared on this sewage treatment and collection project for Belvidere, N.J. The district court's opinion had used the "arbitrary and capricious" standard of review in judging the propriety of EPA's action, although it also noted that the "reasonableness" standard was satisfied here. To date, the Third Circuit has not committed itself to either standard in NEPA suits challenging agency action.

Attorneys: Thomas H. Pacheco and Edward J. Shawaker (Land and Natural Resoures Division) FTS 633-2767/2813

In re Harmon, _____ F.2d _____, No. 79-3402 (5th Cir. January 25, 1980) DJ 33-10-773-2500

Mandamus Directing Recusal of Judge

Owners of several tracts condemned for the Big Cypress National Preserve sought recusal of the trial judge on grounds of environmental bias. After a hearing, the district judge denied the motion and the Fifth Circuit denied a writ of mandamus for disqualification. However, the court of appeals suggested the landowners try again on the ground of remarks made by the trial judge to one of the landowners at the hearing. The landowners did so and this time the Fifth Circuit issued the writ, not because of any actual bias but because the trial judge's remarks could lead a reasonable person to question his impartiality.

Attorneys: Judith W. Wegner, Jerry Jackson and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2772/2762

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

FEBRUARY 19 - MARCH 4, 1980

Freedom of Information Act Amendments. Meetings continue in the Office of the Associate Attorney General to refine the proposed package of amendments which the Department will suggest. Meanwhile, Congress is moving ahead on hearings on limitations of the Act as it applies to the CIA.

Venue. On February 20, James Moorman (Assistant Attorney General, Lands) testified before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on S. 739 (Laxalt) and S. 1472 (DeConcini), two bills on Venue. The Department opposed those bills as vague and overbroad. We did, however, recognize that there have been some venue abuses in the past and suggested a more narrow compromise: a notice requirement for cases filed in the District of Columbia with local impact elsewhere, coupled with an amendment to the general transfer provision (28 U.S.C. 1404(a)) to create a presumption that such cases should be transferred to the local court.

We anticipate that a venue amendment will be attached by Senator Laxalt or Senator DeConcini when S. 2147 (the Culver-Laxalt regulatory reform bill) is marked up in the Senate Judiciary Committee later this session.

Refugees. On February 21 House and Senate conferees completed action on the Administration's proposed Refugee Act, S. 643. With respect to the portion of the bill of primary interest to the Department, i.e., the provisions governing refugee immigration quotas and procedures, almost all of the provisions agreed to by the conferees were consonant with the Department's position. The one exception was the section the section of the bill relating to the immigration status of refugees. The Senate version of the bill would grant incoming refugees permanent resident alien status. The House version would place refugees in a "conditional entry" status for two years followed by an adjustment to permanent resident alien status. The House conferees felt that their plan was preferable because thorough background checks are not always possible before refugees are admitted into the United States and undesirables could be kicked out of the country more expeditiously while they were still in a conditional entrant status. The Senate conferees argued that it was unfair and unnecessary to place refugees in a "limbo" status for two years. During the probationary period the I&NS almost never uncovers information justifying exclusion of a refugee, yet the amount of paper work is doubled by the use of the conditional entry status. Moreover,

the refugees find it more difficult to find employment in the United States without a permanent resident alien card. The conferees compromised on this issue by simply reducing the probationary period from two years to one year. Presumably this will alleviate the refugees' employment problems to some extent but it only exacerbates I&NS' paper work difficulties.

I&NS Authorization. David Crosland testified before the House Subcommittee on Immigration, Refugees, and International Law on February 27, with Chairwoman Holtzman extending the hearing through the next day. Committee members were receptive toward Crosland, but concerned at Justice's failure to hire the 495 border patrol authorized for this year and questioned the fact that the 1981 budget does not include a request for the 495 border patrol. Holtzman made several requests for additional information, including asking Connery of the Office of Professional Responsibility for a report of the investigative techniques they will be using.

Statute of Limitations on Indian Claims. The House Administrative Law Subcommittee held hearings on February 27 as to whether the statute of limitations should be extended on Indian Claims. The Senate passed an extension on February 20 to December 31, 1984, but added an amendment by Bellmon that all claims had to be identified and published in the Federal Register by December 31, 1981. The Department did not testify before the House Subcommittee but wrote Chairman Danielson a letter opposing the Bellmon amendment as presenting unnecessary litigation problems. Danielson agrees with our view and will go for simply a shorter deadline, probably December 31, 1982.

Trucking Deregulation. On February 26 John Shenefield, Associate Attorney General, testified before the Senate Commerce Committee in favor of S. 2245, the trucking deregulation bill sponsored by Senators Cannon and Packwood. While generally in favor, Shenefield suggested two ways in which the antitrust immunity provision contained in S. 2245 could be made more effective: Accelerating the date for removal of immunity and withdrawal of the immunity for joint-line, as well as single-line, rates. He also urged that S. 2245 include a rigorous antitrust standard for judging mergers.

DOJ Authorization - Antitrust Division. On February 27 Sanford Litvack, Assistant Attorney General for the Antitrust Division testified before the Monopolies Subcommittee of the House Judiciary Committee concerning the Division's authorization for fiscal year 1981. Litvack outlined among his goals for the Division: (1) Streamlined litigation management; (2) Stepped-up criminal enforcement; (3) The prevention of anticompetitive mergers; and (4) continued strong competition advocacy in regulated industries and legislative areas. He was very well

received.

Tort Claims Act - National Guard. A hearing had been scheduled for February 27 before the Senate Judiciary Subcommittee on the Constitution on S. 1858, a bill to immunize Army and Air National Guardsmen for their torts by making the United States liable for them under the Federal Tort Claims Act. John Farley, Assistant Director, Torts Branch of the Civil Division, was to have testified in opposition because Guardsmen are not federal employees. The hearing was cancelled at the last moment because of Senator Bayh's involvement in the floor debate on S. 10 and will be rescheduled in the near future.

Balanced Budget. The Department of Justice will shortly go on record on behalf of the Administration in opposition to S. J. Res. 126, the proposed constitutional amendment to require a balanced budget. The resolution recently cleared the Senate Judiciary Subcommittee on the Constitution by a vote of 5-2, and could be considered by the full Judiciary Committee this week.

Regulatory Reform. On February 20 the Senate Governmental Affairs Committee, by a vote of 10 to 6, endorsed the "public participation" provision in S. 262, the regulatory reform bill. The Department of Justice has long favored providing funds for participation by the public in agency proceedings. At least two issues remain to be resolved by the Committee, which could meet this week.

The House Judiciary Subcommittee on Administrative Law and Governmental Relations slowly continues markup of H.R. 3263.

On a related issue, on February 26, the House Government Operations Subcommittee on Legislation favorably reported to the full Committee H.R. 6410, a paper work reduction bill. H.R. 6410 would propose that all agency regulations for collecting information be cleared through a new office in OMB, which would also maintain a computer system designed to prevent duplication of reporting requirements. The full Committee will consider the bill on March 4 and it may well pass the House later that month.

Fair Housing. On February 27 the House Judiciary Committee began markup of H.R. 5200, the fair housing amendments. Three critical amendments were debated and voted upon: (1) Congressman Sensenbrenner's amendment in the nature of a substitute to strike the provisions which would establish an administrative proceeding in HUD failed on a vote of 20 to 10; (2) Congressman Railsback's compromise amendment to retain the administrative procedures but permit a limited form of de novo review of the issues passed by voice vote; and (3) Congressman Ashbrook's amendment to strike coverage of discrimination in the issuance of home insurance failed on a vote of 19 to 9.

Stanford Daily. Courts Subcommittee (House Judiciary) completed markup on this bill February 26 with the following results. The bill was expanded to cover all innocent third parties holding documentary evidence, requiring subpoena of such documents first before proceeding with a search warrant if the subpoena is not complied with. Some limited exceptions exist where the holder of the documents is a subject of the investigation, where there is danger of injury or death to an individual, where the holder of the records is likely to destroy them if given advance notice in the form of a subpoena, and where official proceedings would be unduly delayed. Exceptions also exist if the material sought is contraband, the fruits of a crime or the instrumentality of a crime. Representative Railsback who has been one of the stronger supporters of expanding the bill to all third parties also suggested that there be an exception for searches for the evidence of a crime so that present authority would not be changed. It was pointed out to him that this additional exception would effectively gut the bill and he withdrew his suggestion.

Senate Judiciary Committee will be holding full Committee hearings on this subject in mid March.

Medical Records Privacy. House Government Operations full Committee is scheduled to markup this bill on March 4. Negotiations are continuing with the staff to resolve some remaining problems, but some amendments will probably still be desirable at the markup. One last effort is being made to persuade Preyer, but we are also preparing to make the fight before the full Committee.

Currency Transactions Reporting. On February 27 the House Banking Committee voted to report this bill with three minor amendments: (1) Increasing the amount below which a report is not required from $5,000 to $10,000; (2) Delaying the effective date to October 1, 1980; (3) Requiring a report to the Congress on the effectiveness of the Act 18 months after the effective date. An effort to limit the application of the Act to currency derived from illegal drug activities only was defeated 5-32.

Federal Election Campaign Act. We are working with staffers for the Committee on House Administration to correct defects in the Federal Election Campaign Act (H.R. 5010) which were noted in a statement by the President when he signed the measure January 8. The primary problem with the Act is a severe infringement of federal employees' First Amendment rights that is caused by section 201(a)(4) of H.R. 5010. Under prior law a person in government service was permitted to make voluntary campaign contributions to the authorized campaign committee of any candidate for elective office in the federal system. This is a protected freedom that all citizens enjoy, and it is of vital importance.

Section 201(a)(4) would restrict that right significantly by undermining the ability of persons in federal service to make even totally voluntary contirbutions to the campaigns of their employing authority.

The chairmen of the Senate Committee on Rules and Administration and the Committee on House Administration have publicly pledged to seek legislation which would either simply repeal section 201(a)(4), or amend that section to insure that it will be read narrowly so that, for example, only the employees of the White House Office, as that term is used in 3 U.S.C. 105, would be barred from contributing to the reelection campaign of an incumbent President. A simple repeal of the offending section would be preferable for a number of reasons related to the practical and constitution difficulties involved in trying to "draw a line" at some point in the Executive Branch hierarchy.

House staffers have indicated that a bill will be introduced soon, followed by prompt Committee approval and placement on the suspension calendar.

Preyer Resolution of Inquiry. The House of Representatives followed the recommendation of the House Committee on the Judiciary and moved to table Preyer's Resolution of Inquiry 404-4. This resolution would have directed the Department to turn over all evidence relating to Abscam to the House of Representatives. Debate during its deliberation made it clear however, the House was reserving the right to bring the issue up again.

Institutions. The Department's Institutions Bill, S. 10, passed by a vote of 55-36 with only one amendment adopted. The conference, if there is one, should be easy and the bill should be enacted into law shortly.

NOMINATIONS:

On February 20, 1980, the Senate confirmed the following nominations:

Harry T. Edwards, of Michigan, to be U.S. Circuit Judge for the District of Columbia;

Richard S. Arnold, of Arkansas, to be U.S. Circuit Judge for the Eighth Circuit;

Diana E. Murphy and Robert G. Renner, each to be a U.S. District Judge for the District of Minnesota;

Gilberto Gierbolini-Ortiz, to be U.S. District Judge for the District of Puerto Rico;

Helen J. Frye, James A. Redden, Jr., and Owen M. Panner, each to be a U.S. District Judge for the District of Oregon;

Barbara J. Rothstein, to be U.S. District Judge for the Western District of Washington;

Henry Woods, to be U.S. District Judge for the Eastern District of Arkansas;

John H. Shenefield, of Virginia, to be Associate Attorney General; and

Charles B. Renfrew, of California, to be Deputy Attorney General.

On February 22, 1980, the Senate received the following nomination during its recess:

Thomas E. Delahanty II, to be U.S. Attorney for the District of Maine.

On February 27, 1980, the Senate received the following nominations:

William A. Norris, of California, to be U.S. Circuit Judge for the Ninth Circuit;

Walter M. Heen to be U.S. District Judge for the District of Hawaii;

Odell Horton, to be U.S. District Judge for the Western District of Tennessee; and

John T. Nixon, to be U.S. District Judge for the Middle District of Tennessee.

Federal Rules of Criminal Procedure

Rule 12.2(c). Notice of Defense Based upon Mental Condition. Psychiatric Examination.

Defendant was convicted of conspiracy to murder a fellow prisoner, of first degree murder, and of conveying a weapon inside the prison. Prior to trial, defendant filed a Rule 12.2(b) notice of intent to rely on a defense of insanity. In response to the Government's subsequent motion under Rule 12.2(c), the district court ordered defendant to undergo an examination by a psychiatrist. After the examination, but before trial, defendant stipulated to his mental competency at the time of the alleged offenses, and waived the issue. At trial, the Government cross-examined defendant as to statements made by him to the psychiatrist for impeachment purposes. On appeal, defendant contends that Rule 12.2(c) prohibits the use of such statements.

The Government urged the adoption of case law developed under 18 U.S.C. §4244 as binding on the interpretation of Rule 12.2, primarily U.S. v. Castenada, 555 F.2d 605, (7th Cir., 1977), which held statements made by an accused under 18 U.S.C. §4244 to prove lack of competence to stand trial to be admissible for impeachment purposes, relying upon the impeachment exception for admissibility under Miranda. The Court found this reasoning unpersuasive, since Castenada involved the construction of a distinct statute and not a Rule. Legislative history does not indicate that case law developed under Section 4244 was enacted into Rule 12.2, but rather emphasizes that the two provisions are to be treated separately. To hold otherwise would be contrary to the clear congressional intent that such statements not be used in a proceeding on the issue of guilt, but solely on the issue of insanity. Accordingly, the Court adopted a firm rule preventing the prosecution from relying on statements of a defendant given during the course of a Rule 12.2(c) compelled psychiatric examination for impeachment purposes, both to protect the integrity and reliability of the psychiatric interview and to prevent infringement on the defendant's Fifth Amendment rights.

(Reversed and remanded.)

United States v. Richard A. Leonard, 609 F.2d 1163 (5th Cir., January 15, 1980).

Federal Rules of Criminal Procedure

Rule 11(e)(4). Pleas. Plea Agreement Procedure. Rejection of a Plea Agreement.

After indictment on a charge of distribution of heroin, defendant and the government entered into a plea agreement whereby he would plead guilty to a superseding information charging him with possession. The district judge agreed to accept the plea temporarily until she had studied the probation report. Later, the judge rejected the plea agreement. Defendant persisted in the plea of guilty to the lesser charge of possession and moved to dismiss the indictment for distribution on double jeopardy grounds, which was denied. Defendant was tried and convicted on the distribution charge. On appeal, defendant contended that his attempt to plead guilty to a lesser included offense barred the government's prosecution of the original offense.

The Court noted that jeopardy would attach with acceptance of a guilty plea to the lesser included offense of possession and bar later prosecution for distribution. Here, however, the trial judge made it clear she was taking the agreement under advisement and then rejected the plea under Rule 11(e)(4), which was within the bounds of her discretion. The Fifth Amendment's prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit which was not offended in this case: no final judgment was entered on the lesser included offense, the defendant was not subjected to the harassment of successive prosecutions, and there is no question of multiple trials or punishment. Because the trial judge made it clear that she was taking the agreement under advisement, jeopardy did not attach.

(Affirmed.)

United States v. Joe Sanchez, 609 F.2d 761 (5th Cir., January 9, 1980)