U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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COMMENDATIONS

Assistant United States Attorneys STEPHEN S. COWEN and JUDY S. RICE, Middle District of Florida, have been commended by Mr. Charles O. DeWitt, District Director, IRS in Jacksonville, Florida, for their extraordinary efforts in the successful tax prosecution of the Fred C. Barksdale case.

Assistant United States Attorney MITCHELL EHRENBERG, Northern District of Ohio, has been commended by Mr. Everett Loury, District Director, IRS in Cleveland, Ohio, for the successful prosecution of Norman I. Simon who was found guilty of tax evasion in the case of United States v. Simon.

Assistant United States Attorney TERRY G. HARN, Central District of Illinois, has been commended by Mr. James D. Meyers, Chief of Criminal Investigation Division, IRS in Springfield, Illinois, for the successful prosecution of the Goldstein case which resulted in a jury verdict of Count III in a three count indictment concerning false income tax returns in violation of section 7206(1) of the Internal Revenue Code.

Assistant United States Attorney GERALD J. HOULIHAN, Western District of New York, has been commended by Mr. William H. Webster, Director of the Federal Bureau of Investigation, for his fine performance in the prosecution of the Phillip Eligh Ellis case which resulted in the conviction of the individuals involved in this Crime on the Sea - Murder.

Assistant United States Attorney KATHLEEN P. MARCH, Central District of California, has been commended by R.J. Skopek, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms in Los Angeles, California, for her outstanding job in handling United States v. Watt which involved the assault and robbery of two undercover ATF agents.

Assistant United States Attorney RICHARD MARMARO, Central District of California, has been commended by Mr. Ronald E. Saranow, Chief, Criminal Investigation Division, IRS in Los Angeles, California, for his outstanding trial preparation and prosecution of the Frankel case which involved the complex accounting issue of understatement of inventory, a substantial area of tax abuse.

Assistant United States Attorney DAVID L. ZUERCHER, District of South Dakota, has been commended by Mr. Robert Chasing Hawk, Chairman of the Cheyenne River Sioux Tribe in Eagle Butte, South Dakota, for his fine work in the escape case of United States v. Howard.

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

POINTS TO REMEMBER

Eighth Circuit Reverses Dismissal of Perjury Charge

The Eighth Circuit Court of Appeals has reversed a District Court's dismissal of perjury charges against former Arkansas, Greene County, Judge J. P. Reed. The charges had been dismissed when Federal Judge Elsijane T. Roy ruled that the 19 months which passed between Reed's Grand Jury appearance and his indictment by a different Grand Jury made a fair defense impossible. The Appeals Court disagreed, finding no violation of defendant's right to due process by the delay of 1 1/2 years, leaving 3 1/2 years of the 5 year statute of limitations left to run. The Court emphasized that the defendant was not being charged with taking bribes or kickbacks, which allegedly occurred in 1972, but with perjury, alleged to have occurred in 1978. United States v. J. P. Reed, 647 F. 2d 849 (8th Cir. 1981).

(Executive Office)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Radowich v. United States Attorney, 4th Circuit, No. 81-1608 (September 4, 1981) D.J. #145-12-4479R.

FOIA: Fourth Circuit Holds That Exemption 7(D) of the Freedom of Information Act Protects From Disclosure Notes Taken by an Assistant United States Attorney During A Discussion With A Potential Criminal Defendant/Witness, Even Though the Identity of the Interviewee Is Known.

In this Freedom of Information Act case, the plaintiff sought notes taken by an Assistant United States Attorney based on discussions with particular individuals regarding certain activities that had previously been under criminal investigation by the United States Attorney's office. The district court ordered disclosure of what it termed "factual" portions of the notes, rejecting the government's claim, inter alia, that Exemption 7(D) protected the materials at issue from disclosure. The Court reasoned that neither portion of Exemption 7(D) was applicable because the identities of the persons interviewed were known and the government had failed to establish that the information they provided was furnished only by confidential source.

On appeal, the Fourth Circuit reversed, ruling that Exemption 7(D) protected the notes from compulsory disclosure. In so doing, it held that any information furnished in confidence by a particular individual did not lose its protection under the first portion of Exemption 7(D) simply because that person's identity thereafter became known, unless he or she had waived disclosure. In addition, even though we had not urged this point, the majority concluded that the second half of Exemption 7(D) also protected the notes from disclosure. The court based its decision on this point on an extensive analysis of the exemption's legislative history, which it interpreted as demonstrating Congress' intent to "limit the protection to information furnished by a confidential source only and not to information furnished by others."

Attorney: Melissa Clark (Civil Division)
FTS 633-5459

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Permian Corporation, et al. v. United States, D.C. Circuit, No. 80-1817 (September 9, 1981) D.J. #146-57-933.

Discovery: D.C. Circuit Rules that Disclosure of Documents to the SEC is Waiver of Attorney-Client, But Not Attorney Work Product, Privilege Vis-a-Vis Department of Energy, Regardless of Intent to Preserve the Former Privilege.

The Occidental Corporation, the parent of Permian, attempted a take-over of Mead Corporation. Mead opposed the take-over and initiated litigation. Meanwhile, Occidental was involved with the SEC which was inquiring into the sufficiency of Occidental's registration statement for the proposed take-over. The SEC staff requested Occidental's permission to secure confidential Occidental information directly from Mead which had obtained documents in discovery and which had organized the documents around its adversarial issues. Occidental agreed to permit Mead to deliver documents it had received in discovery to the SEC, but all documents were to be stamped with a restrictive endorsement warning against disclosure by the SEC to "third parties." In separate correspondence with the SEC, Occidental stated that by "third parties" it meant non-governmental third parties. Mead then turned over to the SEC the 36 documents at issue which were then requested by DOE in its investigation of Permian's pricing policies. When the SEC announced it would turn over the 36 documents to Energy, Occidental and Permian sued.

The district court enjoined the transfer. It determined that 29 documents were protected by the attorney work product privilege, that 7 were covered by the attorney-client privilege, and that the privileges involved had not been waived vis-a-vis DOE.

On appeal, the D.C. Circuit noted that, although the record could be read to indicate that Occidental meant to limit its privilege claims to non-governmental third parties, the district court's interpretation of the Occidential-SEC agreement was not clearly erroneous. However, the court noted that while the agreement protected the attorney work product documents, it did

Civil Division
Assistant Attorney General J. Paul McGrath

not protect the attorney-client documents. Referring to United States v. A T & T, 642 F.2d 1285 (D.C. Cir. 1980), the court noted that the attorney-client privilege was destroyed at the moment these seven documents were voluntarily disclosed to the SEC. The court then remanded the case as to these seven documents to permit the district court to determine if any other privilege applied to the seven documents.

Attorney: Howard Scher (Civil Division)
FTS 633-3305

In re: Application of Lance Eisenberg, 5th Circuit, No. 80-5525, (decided September 4, 1981). D.J. #145-12-443.

Discovery: Fifth Circuit Affirms Denial of Pre-Litigation Civil Discovery to Subject of a Grand Jury Investigation.

The subject of a grand jury proceeding relating to tax and securities fraud sought civil discovery under Rule 27, F.R.Civ.P., contending that he needed to preserve the testimony of a Scotland Yard official located in the Caymen Islands in anticipation of an undefined civil suit. After complicated procedural maneuvers, including the submission of in camera affidavits by the government in opposition to the petitioner's request, the district court found that the information sought through civil discovery was intended for use in the criminal case. Relying on Campbell v. Eastland, 307 F.2d 478 (5th Cir.), cert. denied, 371 U.S. 955 (1963), the district court denied pre-litigation discovery on the ground that a potential civil litigant's need for discovery must be subordinated to the public's need for grand jury secrecy. The district court's decision was also based upon its concern that the deposition would invade a sensitive area of foreign relations.

The Fifth Circuit affirmed the denial of the petitioner's request for Rule 27 pre-litigation discovery. The court held that in the circumstances of this case where the government asserts a privilege, discoverability of the information sought was properly determined on the basis of ex parte consideration of in camera documents. Morever, the court agreed with the lower

court that the government's need for secrecy in matters such as grand jury proceedings and foreign relations outweighed the petitioner's need for discovery prior to civil litigation. Finally, the court upheld the district court's finding that the petitioner's civil discovery request was a disguised attempt at criminal discovery, holding that, at a minimum, a grant of the discovery request would render him the beneficiary of materials otherwise unavailable to him under criminal rules and thereby nullify the limitations of the criminal discovery rules.

Attorney: Katherine Gruenheck (Civil Division)
FTS 633-4825

State of Oklahoma, et al. v. Federal Energy Regulatory Commission and United States of America, 10th Circuit, Nos. 80-1748 and 80-1824 (September 22, 1981). D.J. #145-18-40.

Natural Gas Policy Act of 1978. Tenth Circuit Reconfirms the Constitutionality of the Pricing and Administration Provisions of the Natural Gas Policy Act of 1978.

The Natural Gas Act, passed during the Depression, regulated prices for the interstate sales of natural gas, but exempted sales of gas produced and consumed within a single state. By the 1970's, the distortions caused by the intrastate exemption became intolerable, but Congressional action was delayed by a fundamental debate between proponents of additional regulation and those favoring total decontrol. The NGPA was passed in 1978 as an interim compromise. The intrastate exemption was repealed, prices were raised, and a phased, partial decontrol program was established. The pricing scheme itself is remarkably complex and requires an administrative agency to determine the appropriate category for each well. The Act permits state agencies to make these determinations with limited federal review.

Four states and a natural gas production company brought this action challenging the NGPA on a variety of Constitutional grounds. The states contended the Act was designed to make intrastate sales interstate, exceeded the commerce powers, and

violated sovereign state policies with respect to the management of natural resources. They also contended the administrative provisions "conscripted" state personnel and economically "coerced" state participation.

The Tenth Circuit affirmed the district court's ruling in favor of the constitutionality of the Act. It held that the federal power under the commerce clause to regulate intrastate transactions which affect interstate commerce is undisputed and that the courts must accept Congressional preceptions on these matters unless Congress acts without a rational basis. Moreover, the Court found no offense to state sovereignty, so long as the states were not given a legal duty to perform the administrative function.

Attorney: Bruce G. Forrest (Civil Division)
FTS 633-5684

Calvin Rex v. Cia Pervana De Vapores, S.A., 3rd Circuit, Nos. 80-2335/6 (September 17, 1981). D.J. #118-982-206.

Jury Trial and Foreign Sovereign Immunitities Act: Third Circuit Rule 2-1 that the Foreign Sovereign Immunities Act Requires Trial of Civil Actions Against "Foreign States" Without A Jury And Is Consistent With the Seventh Amendment.

In this case an injured longshoreman sued his employer, a shipping corporation wholly owned by the Government of Peru, seeking damages under the Longshoreman's and Harbor Workers Act and demanding a jury trial. The defendant claimed that a jury trial was barred by the Foreign Sovereign Immunities Act, 28 U.S.C. 1330(a), which precludes jury trials in civil actions against "foreign states" as defined to embrace "agencies or instrumentalities of foreign states," including corporations whose stock is more than 51% owned by foreign governments. Plaintiff contended that alternative jurisdiction was available under either 28 U.S.C. 1331 (federal question) or 28 U.S.C. 1332

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Assistant Attorney General J. Paul McGrath

(diversity) which permit jury trials in common law actions for damages, and that to hold §1330(b) an exclusive source of jurisdiction to defend the constitutionality of the statute.

The district court agreed with the plaintiff, reasoning that to construe 28 U.S.C. 1330(a) as an exclusive jurisdictional grant where defendants were commercial enterprises of foreign states and where the actions brought were analagous to common law actions for damages would create constitutional infirmities. The Third Circuit has reversed in a 2-1 decision, relying on recent decisions of the Second and Fourth Circuits holding that the Act must be construed as exclusive where it applies, and that jury trials are not required in actions against "foreign states" since no comparable actions existed as common law.

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

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

United States v. Hiram Webb, ____ F.2d ____, No. 79-3484 (9th Cir., September 8, 1981) DJ 90-1-3-5099.

Federal Rules of Civil Procedure, Rule 15 Amendments should be liberally allowed.

In 1970, IBLA ruled that seven lode claims of Webb's covering 140 acres of public land within the city limits of Phoenix, Arizona, were void and rejected his patent applications. In 1973, Interior withdrew the land from mineral entry, in response to a petition by the City to purchase that land for a park. In March 1977, the United States filed suit to eject Webb, and in January 1978, it filed a motion for summary judgment. Then, in April 1978, more than a year after the action had been brought, Webb filed a motion under Rule 15(a), Fed. R. Civ. P., for leave to file an amended answer and counterclaim requesting judicial review of IBLA's 1970 decision and asserting that he had produced and sold granite from placer claims on these lands. Webb also raised several affirmative defenses. The district court denied Webb's motion for leave to amend his pleadings and granted summary judgment in favor of the government.

The Ninth Circuit, noting that Rule 15's policy favors amendments to pleadings with "extreme liberality," wrote that absent some statement of reasons or findings of fact showing bad faith or prejudice, it could not determine whether it was an abuse of discretion to deny Webb's motion for leave to amend his pleadings. Accordingly, without expressing any opinion on whether the record now, or as it may be developed, would support findings that Webb acted in bad faith or that prejudice would result from his desired amendments, vacated and remanded.

Attorneys: Jacques B. Gelin, Gail Osherenko and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2762/2813

Stratman v. Watt, ____ F.2d ____, No. 79-4780 (9th Cir., September 8, 1981) DJ 90-2-4-423.

Standing grounded on recreational interests.

The plaintiffs, who had grazing leases on, and used for recreational purposes, certain land selected by the Village of Leisnoi under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq., brought this action to enjoin the patenting of the selected land to the Village. The plaintiffs claimed that the Village had been improperly certified by the Secretary as being eligible to make the selection. After the action was commenced, the Village disclaimed any interest in all lands under lease to the plaintiffs, and moved for the dismissal of the suit, on the ground that there no longer existed any case or controversy. The district court granted the motion. The Ninth Circuit remanded, on the ground that although the plaintiffs' economic interests were no longer adversely affected, the district court must consider the effect of the Village's selection upon the plaintiffs' recreational interests.

The main conflict in this case is between the plaintiffs and the Village (which is a party to the case) and the decision has little or no impact upon any programs of the Department of the Interior. At one point in the litigation, the district court had held that all recreational users were entitled to personal notice (rather than notice through publication in the Federal Register) of the lands applied for by a Village, and this holding would have made the Department of the Interior's administration of the Act difficult, if not impossible. The district court later withdrew this holding, and the court of appeals, in this decision, agreed that publication in the Federal Register was sufficient to give notice to recreational users of proposed selections. However, the two plaintiffs in this case, because of their having had a grazing lease on the land, were held to be entitled to personal notice.

Attorneys: Martin Green and Jacques B. Gelin (Land and Natural Resources Division)
FTS 633-2827/2762

Holland Livestock Ranch v. United States, ____ F.2d ____, No. 79-4781 (9th Cir., September 8, 1981) DJ 90-1-23-2336.

Public lands; access trespass supports award of damages.

The court of appeals affirmed the district court's refusal to set aside an IBLA decision adverse to appellants. The BLM had reduced and revoked various grazing permits of the appellant livestock ranch for willful trespass. In addition to

evidence of actual trespass, the BLM relied on evidence of access trespass to find the violations and to compute damages. Access trespass is the presumption that cattle found on unfenced private land contiguous to restricted public land will enter and graze on the public land. The court of appeals upheld the administrative use of this presumption, both for finding violations and computing damages, at least where, as here, there was also evidence of actual trespass.

The court also held that the United States was not estopped from alleging the trespass by not fencing its lands or restraining its wild horses and burros.

Attorneys: Interior staff, James Tomkovicz and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2813

Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, No. 80-3211 (9th Cir., August 31, 1981) DJ 90-6-0-96.

Indians; nonsignatory parties not entitled to treaty-protected fishing rights.

The Wahkiakum Band, a group which was never organized as a federally-recognized tribe under the Indian Reorganization Act, brought an action against the States of Washington and Oregon (and various recognized tribes which intervened) seeking a declaration that it held treaty and aboriginal rights to fish in the Columbia River. The Wahkiakums were not a signatory tribe to the Treaty of Olympia, which confirmed federally-protected fishing rights to signatory tribes, but claimed that it was nonetheless entitled to share in the treaty fishing rights because it later became "affiliated" with the signatory tribes. Affirming the district court, the court of appeals held that the Treaty of Olympia protects only the fishing rights of signatory tribes and not "affiliated" tribes. The court also ruled that all of the Band's aboriginal fishing rights, if any, had been extinguished by a special claims settlement statute enacted in 1912. The Secretary of the Interior filed an amicus curiae brief, arguing only that, if the court found merit in the Band's arguments, the matter should be remanded to the Secretary for a determination of whether the Band is a bona fide Indian entity entitled to federal protection and recognition. In view of its disposition, the court found it unnecessary to reach the issue presented by the government's brief.

Attorneys: Robert L. Klarquist, Barbara Coen and Gail Osherenko (Land and Natural Resources Division) FTS 633-2731

Lamp v. Andrus, ____ F.2d ____, No. 81-1562 (10th Cir., September 3, 1981) DJ 90-10-2-36.

Jurisdiction; nonfinal order requires dismissal of appeal.

In a published order, the court of appeals dismissed, for lack of appellate jurisdiction, the appeal of an unsuccessful applicant for an oil and gas lease. The applicant had brought suit against several Interior Department officials and the individual determined to have first priority. The district court dismissed the complaint as to this individual but did not expressly dismiss the entire suit, even though it seemingly found this individual to be an indispensable party. The unsuccessful applicant then filed a notice of appeal of this court order.

The court of appeals dismissed the appeal based on Fed. R. Civ. P. 54(b), which provides that a judgment which "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" is not final, absent a Rule 54(b) certificate from the district court. Finding that the Rule does not contemplate "implicit adjudication of claims," the court rejected the applicant's assertion that, insofar as the party dismissed was found to be indispensable, the district court intended to dismiss the complaint as to all defendants. The court also held that appellate jurisdiction is to be determined as of the date the notice of appeal is filed, and, accordingly, found impersuasive the fact that, while the appeal was pending, the district court dismissed the complaint as to the remaining defendants. In dismissing the relevance of this fact, the court did not address FRAP 4(a)(2), which may call for a contrary conclusion.

Attorneys: Kay L. Richman and Jacques B. Gelin
(Land and Natural Resources Division)
FTS 633-2956/2762

New England Legal Foundation v. Costle, ____ F.2d ____, No. 79-6202 (2d Cir., August 24, 1981) DJ 90-5-2-3-1039.

Clean Air Act; challenge to EPA-granted variance must be under Act.

In an earlier decision the Second Circuit had dismissed NELF's action against EPA, 632 F.2d 936 (2d Cir. 1980). The issue remaining in the instant case was whether EPA's approval

of a LILCO variance to use high sulfur fuel constituted a common law nuisance. Without reaching the broad question of whether the Clean Air Act totally preempts federal common law nuisance actions based on the emission of chemicals into the air the court relying on City of Milwaukee v. Ill., 49 U.S.L.W. 4445 (April 29, 1981), held that (1) the district court properly refused to devise an equitable nuisance remedy which would proscribe conduct approved by EPA, and (2) equitable relief was inappropriate in that NELF had an adequate remedy at law, i.e., a challenge to the variance granted by EPA in the proper court of appeals.

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

Pacific Legal Foundation v. Andrus, ____ F.2d ____, No. 79-1451 (6th Cir., August 19, 1981) DJ 90-1-4-1742.

National Environmental Policy Act; Interior not required to file EIS before listing mussels as endangered species.

The court of appeals, affirmed the district court, determined that the U.S. Fish and Wildlife Service did not have to file an EIS before listing several species of mussels as endangered, under the Endangered Species Act (ESA). Relying on Flint Ridge Development Co. v. Scenic Rivers Assn. of Oklahoma, 426 U.S. 776-778 (1976), the court held that NEPA as a matter of law, conflicts with the ESA and thus an EIS is not required when a species is listed as endangered or threatened, the court held that: (1) the Secretary is required to list a species as endangered or threatened based solely on the five factors listed in the ESA and therefore does not have the discretion to consider the EIS factors required under NEPA; (2) an EIS would not serve the purposes for which an EIS is designed because NEPA is primarily a procedural statute whereas the ESA requires a substantive result and thus only judicial review of the substantive decision, i.e., the listing would be appropriate; (3) the listing furthers the purposes of NEPA even without an EIS because by listing a species the Secretary is working to preserve the environment; (4) an EIS is not necessary to evaluate the priority the Secretary is to give to listing because Congress has already done so in the ESA, and finally; (5) the court's position is supported by the legislative history of NEPA and the ESA.

Attorneys: Nancy B. Firestone and Edward J. Shawaker (Land and Natural Resources Division)
FTS 633-2757/2813

Riverside Irrigation District v. Colonel V.D. Stipo, ____ F.2d ____, Nos. 80-2142, 80-2241, 80-2242 (10th Cir., September 2, 1981) DJ 90-5-1-6-2242.

Clean Water Act; district court directed to consider whether Corps of Engineers has jurisdiction to consider water quality.

The court of appeals remanded to the district court for determination of the jurisdiction of the Corps of Engineers to consider water quality in the context of the Clean Water Act Section 404 permit program. In this case, the Corps advised companies planning to build a dam in waters of the United States, above headwaters, that the "nationwide permit" was not available and that an individual permit would be required. The "nationwide permit" was not available because the U.S. Fish and Wildlife Service issued a biological opinion stating that withdrawals of water from the South Platte River associated with the dam project would jeopardize the existence of the Whooping Crane and adversely affect its designated critical habitat downstream. Instead of applying for an individual permit, the companies filed suit for mandatory, injunctive monetary and declaratory relief. The district court dismissed most of the counts but held it had jurisdiction to review the "final agency action" of "denying the natiowide permit." On cross interlocutory appeals, the Tenth Circuit ruled that the issue between the parties was one of law--the jurisdiction of the Corps to consider water quantity--and held that the district court had jurisdiction over that issue despite the failure of the companies to exhaust their administrative remedies.

Attorneys: Anne S. Almy, Dirk D. Snel and John R. Hill Jr. (Land and Natural Resources Division) FTS 633-4427/4400; 327-2892

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

SEPTEMBER 16, 1981 - SEPTEMBER 29, 1981

H.R. 3637. The House Committee on Merchant Marine and Fisheries has postponed the mark-up of H.R. 3637. H.R. 3637 would extend jurisdiction to the Federal Maritime Commission over common carriers by water who engage in foreign commerce to ports in nations which are contiguous to the United States. The bill would mainly affect ocean carriers that carry cargo to or from the United States Midwest, by way of overland arrangements through a Canadian port. Because of its anticompetitive effects, the Department opposes this legislation.

S. 326. The Senate Committee on the Judiciary will probably hold hearings in late October on S. 326, the Small Business Motor Fuel Marketer Preservation Act of 1981. Among the provisions of the bill is one which would prohibit major refiners from operating retail gasoline stations. The provisions of the bill would substantially restructure the retail petroleum industry and would lead to higher gasoline prices to the consumer. The Department has previously testified against such legislation in the House.

Affirmative Action. On September 23, Assistant Attorney General Wm. Bradford Reynolds testified before the House Education and Labor Subcommittee on Employment Opportunities. His testimony was a restatement of Administration policy as set out by the Attorney General in his speech to the American Law Institute and a statement of the litigation policies put into effect pursuant to the Administration's policy. He testified that although we will not utilize quotas to remedy the effects of past discrimination, specific affirmative relief will continue to be sought for identifiable victims of discrimination.

Regulatory Reform. The Governmental Affairs Committee had ordered favorably reported S. 1080, the Regulatory Reform bill.

Identities Protection. The House passed the proposed Intelligence Identities Protection Act, H.R. 4, on September 23 by a vote of 354 to 56. Prior to final passage, the House

adopted an amendment by Mr. Ashbrook which was identical to the "objective intent" provision in the Senate version of the Act, S. 391. The Department has consistently expressed a preference for S. 391 in several statements and letters on the legislation. The House also adopted an Administration-approved amendment to extend the coverage of H.R. 4 to include former United States covert agents.

Refugee Consultation. On September 22, Attorney General William French Smith testified before the Senate Judiciary Committee. The Attorney General presented the Administration's recommended levels of refugees for FY 1982. On September 24, the Attorney General met in a closed session on Refugee Consultation with the House Judiciary Committee. The Refugee Act of 1980 requires annual consultation between the Executive Branch and the Congress to consider refugee admissions.

Non-Immigrant Visa Waivers. On September 22, Deputy Commissioner, Alan Nelson, Immigration and Naturalization Service, testified before the Committee on Commerce, Science and Transportation's Subcommittee on Business, Trade and Tourism. The members of the subcommittee discussed proposals to authorize a waiver of the non-immigrant visa requirement for short-term tourist and business visitors from designated "low risk" countries.

Justice Assistance Act (LEAA). The House Judiciary Committee reported out H.R. 4481, Congressman Hughes' LEAA bill, with relatively minor amendments at its business meeting on September 22.

Criminal Code. On September 22. Congressman Sawyer moved before the full House Judiciary Committee to have jurisdiction over the House Criminal Code Reform bill removed from Congressman Conyers' subcommittee. Congressman Conyers raised a point of order because the committee members did not receive 24 hours notice of Congresman Sayer's motion. The point of order was upheld 11-15 (two-thirds are necessary to override). Congressman Sawyer's motion is scheduled to be renewed at the next scheduled meeting of the committee set for next week. If the motion is on the regular calendar, only a majority vote is necessary to remove the Code from Congressman Conyers' subcommittee.

On September 28, the Attorney General testified before the Senate Judiciary Committee in favor of Criminal Code Reform. Former Attorney General Griffin B. Bell and former Senator Roman Hruska also testified.

On September 17, 1981, Senator Thurmond, Chairman, Senate Judiciary Committee, introduced S. 1630, a bill providing for a comprehensive reform of the Criminal Code. It is similar to the Senate Criminal Code reform bill which was introduced last Congress. Chairman Thurmond plans to move the bill rapidly since extensive hearings have been held in previous Congresses.

Crime and the Elderly. On September 22, the Senate Select Committee on Aging held a hearing on crime and the elderly. Jeffrey Harris, Deputy Associate Attorney General testified for the Department. Chairman Heinz was supportive of the Department's position on violent crime but wondered where the money would come from to continue to fund grass roots safety organizations for the elderly.

Parental Kidnapping. On September 24, the House Judiciary Subcommittee on Crime held a hearing on the Parental Kidnapping Prevention Act of 1980. Lawrence Lippe, Chief, General Litigation Section, testified for the Department. Chairman Hughes severely criticized the Department for not using the Uniform Flight to Avoid Prosecution statute more often in child snatching cases. Congressman Conyers, former chairman of the Subcommittee when the Act was passed, was more supportive of the Department's position, recognizing that there has been a 1,000 percent increase in cases brought by the Department since the Act was enacted, and he sympathized with declination policies that take into account resources that are available.

H.R. 2580 - GSA's Contracting Procedures. On September 14, 1981, Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, testified before the Subcommittee on Government Activities and Transportation of the House Committee on Government Operations concerning H.R. 2580. H.R. 2580 would establish administrative procedures within the General Services Administration to permit the government to recoup losses due to contract abuse. The Department opposes this legislation because of its limitation to GSA and because it is applicable to situations which call for the institution of civil litigation. The bill's penalty provisions also present problems.

Immigration and Nationality Act Amendments of 1981-H.R. 4327. On September 15, the House Judiciary Committee voted to report H.R. 4327. Two amendments were considered and adopted. The first amendment requires the annual registration of temporary aliens. The second amendment adds marijuana and other controlled substances to the definition of narcotics.

DOJ Authorization. On September 16 the Senate approved by a vote of 61 to 36 the fifth cloture petition to end the filibuster led by Senator Weicker against the Helms-Johnston anti-busing amendment to the DOJ Authorization bill, S. 951. After a brief debate the Senate then passed the amendment itself by a vote of 60 to 39. S. 951 was subsequently put back on the calendar to be brought up at a later date by the Majority Leader after consultation with the Minority Leader. Indications are that the bill will be brought up in late October.

DOJ Appropriations. On September 11, the Senate Appropriations Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies conducted a markup of our appropriations bill, H.R. 4169. The most noteworthy amendments were as follows: a 10% cut in general administration and a provision of $270,000 to terminate the U.S. Trustees functions(as opposed to $7,500,000 to continue the program in the House-passed version).

The subcommittee kept the $70 million for Juvenile Justice that the House Appropriations Committee provided; although Senator DeConcini vowed to work at the full Appropriations Committee level to raise the Juvenile Justice budget to $77 million. The subcommittee also kept the additional funds added by the House Appropriations Committee for U.S. Marshals service of private process and courtroom security. Finally, the Subcommittee matched the House figure of $6 million for multi-state intelligence projects.

Posse Comitatus. The Senate/House Conference on the posse comitatus provision of the DOD authorization bill continued in closed session on September 15, 1981. No final resolution between the House and Senate version has been worked out. The House version allows the military to provide more indirect assistance to law enforcement than does the Senate.

Foreign Corrupt Practices Act. On September 16, 1981, the Senate Banking Committee reported out S. 708, Senator Chaffee's bill to amend the Foreign Corrupt Practices Act. The bill passed 11-4 which included an amendment by Senator Heinz that would bar companies from authorizing bribes "expressly or by a course of conduct."

Voting Rights Act Extension. On September 17, the House Rules Committee granted H.R. 3112, the Voting Rights Act extension, a two hour open rule. General debate is tentatively set to begin September 29 or 30.

Coast Guard Interdiction in Haitian Immigration. The House Committee on Merchant Marine Fisheries' Subcommittee on Coast Guard and Navigation held a hearing on September 17, 1981, on the Presidential program to curb the flow of illegal immigrants from the Caribbean basin to the United States. The subcommittee members focused on the role of the Coast Guard in enforcing the immigration laws and preventing illegal entry to the United States. David Hiller, Special Assistant to the Attorney General, testified for the Department of Justice.

Nominations. On September 21, 1981, the United States Senate confirmed the nomination of Sandra D. O'Connor to be an Associate Justice of the Supreme Court.

On September 25, 1981, the United States Senate confirmed the following nominations:

Roger Miner to be U.S. District Judge for the District of Northern New York.

Joseph McLaughlin to be U.S. District Judge for the District of Eastern New York.

John Sprizzo to be U.S. District Judge for the District of Southern New York.

Henry Wilhoit to be U.S. District Judge for the District of Eastern Kentucky.

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

John Coughenour to be U.S. District Judge for the District of Western Washington.

J. Paul McGrath, to be Assistant Attorney General, Civil Division.

On September 22, 1981 the United States Senate received the following nominations:

Joe D. Whitley, to be U.S. Attorney for the Middle District of Georgia.

Dan K. Webb, to be U.S. Attorney for the Northern District of Illinois.

Ronald E. Meredith, to be U.S. Attorney for the Western District of Kentucky,

Stanford O. Bardwell, Jr., to be U.S. Attorney for the Middle District of Louisiana.

Leonard R. Gilman, to be U.S. Attorney for the Eastern District of Michigan.

Robert J. Wortham, to be U.S. Attorney for the Eastern District of Texas.

Federal Rules of Criminal Procedure

Rule 6(e)(2).	The Grand Jury. Recording and Disclosure of Proceedings. General Rule of Secrecy.
Rule 6(e)(3)(C)(i).	The Grand Jury. Recording and Disclosure of Proceedings. Exceptions.

Defendant appealed from the district court's order granting disclosure of certain grand jury materials to the Internal Revenue Service (IRS) to assist in determining defendant's civil tax liability. The court permitted disclosure under its "general supervisory powers," although it held that certain items were subject to the secrecy requirements of Rule 6(e)(2) and that the Rule 6(e)(3)(C)(i) exception did not apply since the items were intended to be used for administrative purposes rather than "preliminarily to or in connection with a judicial proceeding."

On appeal, the Court agreed that all of the materials, with the possible exception of limited portions of an IRS agent's report, were items "occurring before the grand jury" subject to Rule 6(e)(2). The Court further agreed that the civil tax collection efforts at this stage were administrative, resulting in judicial proceedings only if initiated by the taxpayer, and held that Rule 6(e)(3)(C)(i) did not apply. The Court stated that in rare situations a court may have some discretion to slip entirely around Rule 6(e) by exercising its "general supervisory powers" where there is some extraordinary and compelling need for disclosure in the interest of justice and little need for secrecy remains, but held that tax information, which could be obtained through other means available to the IRS, did not satisfy this standard.

(Reversed and remanded for reconsideration of portions of the agent's report. Dissent discussing Rule 6(e)(3)(C)(i) filed.)

In re The Special February, 1975 Grand Jury, In re The Special April, 1977 Grand Jury, (James E. Baggot), 652 F.2d 1302 (7th Cir. June 25, 1981).

(A petition for rehearing en banc is presently pending before the Court of Appeals for the Seventh Circuit.)

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Federal Rules of Evidence

Rule 801(d)(1)(A). Definitions. Statements Which are not Hearsay. Prior Statements by Witnesses.

At trial, the government called a witness who had previously given a sworn written statement to a Postal Inspector. When the witness denied or failed to remember certain conversations mentioned in the statement, the prosecutor read excerpts of that statement. The trial judge noted the confrontation with prior statements and gave a jury instruction based on rule 801(d)(1)(A) allowing it to consider the prior statements as substantive evidence. On appeal, defendants contended that the witness's prior statements did not meet the requirements of the rule and therefore should not have been considered as substantive evidence.

The Court noted that Rule 801(d)(1)(A) seems to contemplate situations in which an official verbatim record is routinely kept, whether stenographically or by electronic means, under legal authority, and no such official verbatim record was routinely kept by the Postal Inspectors in this case. Courts of Appeals have generally found that statements made to investigating officials fail to qualify as made at a proceeding under the rule. The Court concluded that the statements in this case did not satisfy Rule 801(d)(1)(A)'s requirement of a "trial, hearing, or other proceeding" and the statement should, therefore, have been admitted for impeachment purposes only, and not treated as having any potential substantive or independent testimonial value.

(Reversed and remanded.)

United States v. John T. Livingston and David Coyle, ___F.2d___, Nos. 80-2296 and 80-2346 (D.C.Cir. August 20, 1981)

List of U. S. Attorneys as of October 5, 1981

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