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VOL. 31 APRIL 1, 1983 NO. 6

TABLE OF CONTENTS

	Page
COMMENDATIONS	189
POINTS TO REMEMBER	
Subpoenas To Current Or Former Employees Of The United States Attorney's Office	191
New Office Of Immigration Litigation In The Civil Division	192
(Copy of Memorandum issued on March 3, 1983, to all United States Attorneys from J. Paul McGrath, Assistant Attorney General, Civil Division, is attached as Appendix)	211
Bid Protest Cases	192
(Copy of Memorandum issued on March 3, 1983, to all United States Attorneys from J. Paul McGrath, Assistant Attorney General, Civil Division, is attached as Appendix)	213
Establishment Of The Office Of Consumer Litigation In The Civil Division	193
(Copy Of 48 Fed. Reg. 9522 (March 7, 1983), is attached as Appendix)	215
Changing Federal Civil Postjudgment Interest Rates Under 28 U.S.C. §1961	193
(Copy of cumulative listing attached as Appendix)	219
Casenotes - New Section	193
CASENOTES	
OFFICE OF THE SOLICITOR GENERAL	
Cases Recently Filed In The Supreme Court By The Solicitor General	195
CIVIL DIVISION	
Standing: D.C. Circuit Rules Common Cause Organization Has No Standing To Challenge Alleged Inaction By Department Of Energy On Plan For Energy Conservation In Public Buildings Mandated By Energy Policy And Conservation Act	
Common Cause v. Department of Energy	197

Page

Bankruptcy Courts: Fifth Circuit Holds That Bankruptcy Jurisdiction Remains In The District Courts In The Aftermath Of The Supreme Court's Decision In Northern Pipeline Construction Co. v. Marathon Pipeline Co., And That The Emergency Rule Adopted By The Courts For Handling The Bankruptcy Crisis Is Valid
In Re Braniff Airways, Inc. 198

Judicial Review -- HUD Rent Reevaluations: Ninth Circuit Affirms District Court Ruling That HUD Rent Reevaluations Are Not Subject To Judicial Review
Frakes v. Pierce 199

LAND AND NATURAL RESOURCES DIVISION
Wetlands Loan Act: State Consent Once Given Is Irrevocable
North Dakota v. United States 201

California Public Trust Doctrine Applies To State Water Rights
National Audubon Society v. Superior Court of Alpine County 202

Indians: Tribal Consent Is A Condition Precedent To Right-Of-Way Grant Across Tribal Lands Under 25 U.S.C. 312-318
Southern Pacific Transportation Co. v. Watt 203

APPENDIX: FEDERAL RULES OF CRIMINAL PROCEDURE 205
This page should be placed on permanent file, by Rule, in each United States Attorney's office library.

FEDERAL RULES OF EVIDENCE 207
This page should be placed on permanent file, by Rule, in each United States Attorney's office library.

LIST OF U. S. ATTORNEYS 209

Page

Memorandum Dated March 3, 1983, To All United States Attorneys From J. Paul McGrath, Assistant Attorney General, Civil Division, Entitled "Office Of Immigration Litigation" 211

Memorandum Dated March 3, 1983, To All United States Attorneys From J. Paul McGrath, Assistant Attorney General, Civil Division, Entitled "Bid Protest Cases" 213

48 Fed. Reg. 9522 (March 7, 1983) Establishment Of The Office Of Consumer Litigation In the Civil Division 215

Cumulative List Of Changing Federal Civil Postjudgment Interest Rates Under 28 U.S.C. §1961 219

COMMENDATIONS

Assistant United States Attorneys MICHAEL EMMICK and WILLIAM LANDERS, Central District of California, have been commended by Mr. Robert J. Skopeck, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Los Angeles, California, for their diligent efforts in the firearms theft case of United States v. McZeal.

Assistant United States Attorney MIKE MCDONALD, Western District of Texas, has been commended by Mr. Hugh J. Rushton, Chief Patrol Agent, U.S. Border Patrol, Immigration and Naturalization Service, Marfa, Texas, for the successful prosecution of Mr. Levario-Quiroz, an illegal Mexican alien, who maliciously assaulted a Border Patrol Agent from ambush.

Assistant United States Attorney RICHARD MARMARO, Central District of California, has been commended by Mr. L.O. Poindexter, Inspector in Charge, United States Postal Service, Los Angeles, California, for his outstanding performance in the conviction of Jack Gurule for mail fraud in United States v. Jack Gurule.

Assistant United States Attorney PETER OSINOFF, Central District of California, has been commended by Mr. L. H. Benrubi, District Counsel, Veterans Administration, Los Angeles, California, for his exemplary performance in Evans Botteas v. United States, a medical malpractice action.

Assistant United States Attorney CAROLYN TURCHIN, Central District of California, has been commended by Mr. Robert J. Skopeck, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Los Angeles, California, for an excellent job in the prosecution of the Snapper case, dealing with possession of unregistered firearms.

Assistant United States Attorney WARREN WHITE, Central District of Illinois, has been commended by Mr. J.W. Winegar, Postal Inspector in Charge, Chicago, Illinois, for his fine representation of the Government in the prosecution of the Del Santo case, dealing with postal contract fraud.

VOL. 31 APRIL 1, 1983 NO. 6

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Subpoenas To Current Or Former Employees Of The United States Attorney's Office

All current and former employees of the Department of Justice must receive prior Department approval to produce any material or disclose information relating to or contained in Department files and acquired as a part of the performance of that employee's official duties in any Federal, state or local case. 28 C.F.R. 16.21, et seq. If the United States is not a party, the employee should immediately notify the United States Attorney for the district where the issuing authority is located. Where oral testimony is sought by demand, the United States Attorney should obtain an affidavit or statement by the party seeking the testimony summarizing the testimony sought and its relevance to the proceeding. The United States Attorney shall, in turn, immediately contact the official in charge of the bureau, division, office or agency of the Department that has jurisdiction over the records in question, or who, at the time he acquired the information, employed the individual.

If both the originating component and United States Attorney agree that the information should be disclosed, the United States Attorney may authorize the disclosure. If the United States Attorney and originating component disagree or feel disclosure should not be authorized, the United States Attorney must notify the Assistant Attorney General in charge of the Division responsible for the litigation who will determine what action should be taken. In situations where the United States is a party, generally the same procedures apply except that instead of contacting the United States Attorney, the employee should contact the attorney handling the case. In either situation, if it is determined that a denial is warranted, the matter must be referred to the Deputy Attorney General or Associate Attorney General, the only officials authorized to make such a denial.

The steps and procedures to be followed with regard to these matters are set forth in the United States Attorneys' Manual, Chapter 1-7.000. Any questions regarding the handling of denials or subpoenas in general should be directed to David Simonson of the Criminal Division (FTS 724-6672).

(Executive Office)

New Office Of Immigration Litigation In The Civil Division

On March 3, 1983, J. Paul McGrath, Assistant Attorney General, Civil Division, issued a memorandum to inform all United States Attorneys of the creation of a new Office of Immigration Litigation in the Civil Division. As of February 7, 1983, this new office assumed the normal responsibility for virtually all civil litigation arising under the immigration laws. A copy of this memorandum is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Civil Division)

Bid Protest Cases

On March 3, 1983, J. Paul McGrath, Assistant Attorney General, Civil Division, issued a memorandum to advise all United States Attorneys of the current status of bid protest litigation under the Federal Courts Improvements Act, 28 U.S.C. §1491(a), which became effective October 1, 1982, and to request assistance in obtaining copies of new decisions in this area on an expedited basis. A copy of this memorandum is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Civil Division)

Establishment Of The Office Of Consumer Litigation In The Civil Division

Pursuant to the Order of the Attorney General, dated February 23, 1983, all functions and responsibilities formerly assigned to the Antitrust Division's Consumer Affairs Section, including responsibility for criminal cases, have been transferred to the Civil Division, which has established the Office of Consumer Litigation to carry out those responsibilities. Responsibility for appellate court cases involving consumer litigation matters, formerly handled by the Antitrust Division's Appellate Section, has also been transferred to the Civil Division. The pertinent revisions reflecting this transfer will appear at 28 C.F.R. §0.45(j), reprinted in 48 Fed. Reg. 9522 (March 7, 1983). A copy of 48 Fed. Reg. 9522 (March 7, 1983) is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Civil Division)

Changing Federal Civil Postjudgment Interest Rates Under 28 U.S.C. &1961

Cumulative List Of Changing Federal Civil Postjudgment Rates is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Executive Office)

Casenotes - New Section

The Casenote section of the United States Attorneys' Bulletin (USAB) serves as an essential vehicle for keeping United States Attorneys and their Assistants abreast of the latest trends and developments in case law. This issue of the USAB introduces a new Casenote section under the heading "Office of the Solicitor General" and presents cases recently filed in the Supreme Court by the Solicitor General.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

On February 28, 1983, the Solicitor General filed a petition for a writ of certiorari with the Supreme Court in United States v. Stauffer Chemical Company. The issues are: (1) whether an adverse decision by the Tenth Circuit on an unmixed question of law collaterally estops the United States from relitigating the same question of law against the same party in the Six Circuit, where the Sixth Circuit suit arose from a different claim; (2) whether a contractor of the Environmental Protection Agency qualifies as an "authorized representative" of the Administrator of the EPA under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. 7414(a)(2), so as to enable EPA's contractor to enter and inspect stationary emission sources.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Common Cause v. Department of Energy, ____ F.2d ____
No. 80-2395 (Mar. 4, 1983). D.J. # 145-19-78.

STANDING: D.C. CIRCUIT RULES COMMON CAUSE ORGANIZATION HAS NO STANDING TO CHALLENGE ALLEGED INACTION BY DEPARTMENT OF ENERGY ON PLAN FOR ENERGY CONSERVATION IN PUBLIC BUILDINGS MANDATED BY ENERGY POLICY AND CONSERVATION ACT.

Common Cause filed this action for injunctive and declaratory relief directing the Department of Energy (DOE) and the Office of Management and Budget (OMB) to issue a ten-year plan for energy conservation in Federal buildings as required by Section 381(a)(2) of the Energy Policy and Conservation Act of 1975, 42 U.S.C. 6361(a)(2). In defending the district court's order dismissing the case for lack of Article III standing, we argued that plaintiffs had not shown, and could not show, that any relief obtainable by court order was "substantially likely" to redress the injuries which, according to the plaintiffs, had resulted from the Government's alleged failure to promulgate the plan -- namely, higher fuel prices and decreased energy supplies. This was so, we explained, because it was not only speculative, but highly improbable that a court order requiring the Government to issue a ten-year plan would force third-party fuel suppliers to make decisions favorable to consumers.

We also argued that the Government's promulgation of highly detailed conservation requirements for Federally owned and leased buildings, 10 C.F.R. 436 et seq., and of a preliminary ten-year plan, made any further relief otherwise obtainable in court even more speculative. As we pointed out, the Government had already succeeded in cutting energy usage in Federal buildings by 14.2% between the time the Act was passed in 1975 and the end of fiscal year 1981.

The D.C. Circuit agreed that, given "the current structure of the buildings program" "the question whether publication of the Final Plan will likely lead to further tangible savings is altogether too speculative to support invocation of the judicial power." It therefore affirmed the district court's order dismissing the case for lack of standing.

Attorneys: Leonard Schaitman (Civil Division)
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Marilyn Urwitz (Civil Division)
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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

In Re Braniff Airways, Inc., ____ F.2d ____ No. 83-1048 (Feb. 28, 1983). D.J. # 77-73-840.

BANKRUPTCY COURTS: FIFTH CIRCUIT HOLDS THAT BANKRUPTCY JURISDICTION REMAINS IN THE DISTRICT COURTS IN THE AFTERMATH OF THE SUPREME COURT'S DECISION IN NORTHERN PIPELINE CONSTRUCTION CO. v. MARATHON PIPELINE CO., AND THAT THE EMERGENCY RULE ADOPTED BY THE COURTS FOR HANDLING THE BANKRUPTCY CRISIS IS VALID.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S. Ct. 2858, decided June 28, 1982, the Supreme Court invalidated the broad grant of jurisdiction to United States Bankruptcy Judges under the 1978 Bankruptcy Reform Act, Pub. L. 95-598, on the ground that the assignment to non-Article III bankruptcy judges of power to adjudicate plenary disputes involving constitutionally recognized and state-created rights violates Article III of the Constitution. The Court announced, however, that its decision would apply only prospectively, and stayed its judgment until December 24, 1982, to afford Congress opportunity to enact remedial legislation.

In anticipation of the expiration of the stay without Congressional action, which has not been forthcoming, the Federal courts adopted an interim emergency rule, endorsed by the Judicial Conference, for the limited referral of bankruptcy matters to bankruptcy judges under the close supervision of the Article III district courts. The lower Federal courts have since been sharply divided as to whether any court may exercise bankruptcy jurisdiction post-Marathon, and whether the emergency rule is constitutional. Meanwhile there are over 700,000 bankruptcy estates and 100,000 adversary proceedings pending, and new bankruptcy estates are being commenced at the rate of more than 10,000 per week.

The U.S. District Court for the Northern District of Texas ruled in this case that bankruptcy jurisdiction remains in the district courts under 28 U.S.C. 1471(a) and (b), enacted by the 1978 Reform Act, because the Supreme Court struck down only the grant of plenary authority to bankruptcy judges codified in 28 U.S.C. 1471(c); or alternatively, that the original bankruptcy jurisdiction conferred on the district courts by 28 U.S.C. 1334 continues to exist under the Act's transition provisions until April 1, 1984. Additionally, the district court sustained the delegation to bankruptcy courts in the emergency rule.

We filed a Statement of Interest in the Fifth Circuit in support of the continuation of a viable bankruptcy system under

those alternative jurisdictional bases, and of the constitutionality of the emergency rule. Following an expedited hearing held on February 28, 1983, the Fifth Circuit affirmed the district court's decision, thus becoming the first court of appeals to rule on these important issues.

Attorneys: Michael F. Hertz (Civil Division)
FTS (633-3180)

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

Frakes v. Pierce, ___ F.2d ___ No. 81-4247 (Feb. 28, 1983).
D.J. # 145-17-2349.

JUDICIAL REVIEW -- HUD RENT REEVALUATIONS: NINTH CIRCUIT AFFIRMS DISTRICT COURT RULING THAT HUD RENT REEVALUATIONS ARE NOT SUBJECT TO JUDICIAL REVIEW.

The plaintiffs in this case are tenants of §221(d)(3) and §236 housing in California. Following the passage of Proposition 13, which lowered real property taxes in California, the tenants sued HUD to lower the rent schedules applicable to their housing by applying a straight across-the-board reduction in rents commensurate with the decrease in the landlords' operating expenses occasioned solely by the effect of Proposition 13. HUD had, prior to the tenants' suit, begun the process of reevaluating the rent schedules in light of the changes in all expenses, not just the change caused by Proposition 13.

After the tenants filed suit, HUD moved to dismiss, inter alia, on the ground that its rent reevaluations were not subject to judicial review because HUD's mandate under the National Housing Act was so broad that its reevaluations must be considered agency action committed to agency discretion by law. HUD cited decisions of the 1st, 2nd, 3rd, and 7th Circuits as precedent. The district court initially rejected this argument and ordered HUD to reevaluate the rents and to submit a report on the conduct of its reevaluation. HUD then completed its reevaluation and submitted its report in which it showed that, following its reevaluation of all operating expenses, it lowered some rent schedules, increased others, and left some alone. HUD then moved for summary judgment again arguing that its rent reevaluations were not subject to judicial review. This time the district court agreed with HUD and granted summary judgment. The tenants then appealed.

The Ninth Circuit affirmed the district court's decision. The court noted that the broad statutory language in §221(d)(3) and §236 contains no specific criteria with regard to the regulation of rents and thus requires "a balancing of a wide range of considerations and highly technical factors [which] can only be accomplished by informed calls of judgment." Accordingly, the court concluded that the regulation of rents was agency action committed to agency discretion by law and thus was nonreviewable.

Attorneys: Anthony Steinmeyer (Civil Division)
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Howard Scher (Civil Division)
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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

North Dakota v. United States, No. 81-773 (S.Ct.Mar. 7, 1983). D.J. # 90-1-5-1945.

WETLANDS LOAN ACT: STATE CONSENT ONCE GIVEN IS IRREVOCABLE.

The Wetlands Loan Act requires the Federal Government to obtain the consent of the Governor or appropriate state agency prior to acquiring lands within a state with moneys from the Migratory Bird Conservation Fund. The Secretary of the Interior requested and obtained the consent of the Governor of North Dakota to acquire easements covering approximately 1.5 million acres of wetlands in that State for use as waterfowl production areas. After the Federal Government had acquired a portion of the lands, the Governor purported to revoke the consent given by his predecessors. The State also enacted legislation purporting to restrict the nature of the interests which the Federal Government may acquire.

The Supreme Court, affirming the courts below, held that if a Governor has given consent to Federal wetlands acquisitions, that consent may not later be withdrawn or revoked. The Court further held that while a gubernatorial consent may expire if it is not acted upon within a reasonable time, the Federal Government had not so unreasonably delayed here. Finally, the Court held ineffective the state statutes purporting to limit Federal waterfowl easements. Justices Rehnquist and O'Conner dissented in part.

Attorney: Barbara E. Etkind (Office of the Solicitor General)

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

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS (724-5993)

National Audubon Society v. Superior Court of Alpine County, No. S.F. 24368 (Calif. S.Ct. Feb. 17, 1983). D.J. # 90-1-2-1144.

CALIFORNIA PUBLIC TRUST DOCTRINE APPLIES TO STATE WATER RIGHTS.

This case involved the relationship between the California Public Trust Doctrine and the California water rights system. Audubon Society alleged that the public trust doctrine prevented the City of Los Angeles from exercising its water rights to feeder streams of Mono Lake because those diversions were causing the level of the Lake to decrease and, consequently, substantial injuries to public trust values at the Lake. Los Angeles responded that the public trust doctrine could not limit its exercise of water rights it had obtained from the State of California. The State of California, however, advocated a broad theory of the doctrine, stating that it could, but that Audubon's remedy lay initially with the State Water Resource Control Board, not the courts, and the latter possessed considerable trust power to modify and revoke previously issued water rights to promote changing public interest values. The United States intervened in the judicial proceeding, concerned about Mono Lake, but concerned more broadly about the implications of the California court's ruling for United States water rights in California obtained under state law, especially if the State's view were adopted.

The California High Court's decision was adverse to our interest in that it ruled unanimously that the public trust doctrine did apply to water rights and could serve to limit their exercise, but favorable in that it rejected the broad public trust theory proferred by the State. Notably, the court favorably concluded that exercise of usufructuary rights to water was not only essential, but that it was inevitable that such uses must, on occasion, hurt public trust values. Still, the public trust doctrine required that prior to the issuance of water rights, public trust values be considered. Here, although the California Water Code presently requires consideration of public trust values, when Los Angeles received its rights to Mono Lake feeder streams, the Code did not. Accordingly, at the very least the doctrine required a re-examination of Los Angeles' water rights. The court did not attempt to say how that balance was to be struck. The court went on to hold, however, that Audubon need not exhaust any administrative remedies, but could proceed directly with its public trust suit in court.

Finally, the decision is significant in that in dicta, the court went on to say that even if a water right was obtained under the modern Water Code, which included consideration of public trust values, it nonetheless was subject to reexamination, albeit undoubtedly under a less exacting scrutiny than that owning to Los Angeles' water rights here.

Attorney: Richard J. Lazarus (Land and Natural Resources Division) FTS (633-1442)

Attorney: Jacques B. Gelin (Land and Natural Resources Division) FTS (633-2762)

Southern Pacific Transportation Co. v. Watt, Nos. 80-4505 and 80-4506 (9th Cir. Mar. 1, 1983). D.J. # 90-6-3-49.

INDIANS: TRIBAL CONSENT IS A CONDITION PRECEDENT TO RIGHT-OF-WAY GRANT ACROSS TRIBAL LANDS UNDER 25 U.S.C. 312-318.

The Secretary and Walker River Paiute Tribe of Nevada appealed from a district court judgment that tribal consent is not a condition precedent to the Company's securing a right-of-way across tribal lands under 25 U.S.C. 312-318 ("1899 Act") and 25 C.F.R. 161.3(a). The Ninth Circuit held that the "plain language" of 25 U.S.C. 312 (right-of-way "is granted" to any railroad company which complies with Sections 312-318 and "such rules and regulations as may be prescribed thereunder" by the Secretary) not only gave the company no delegated power of eminent domain, but gave the Secretary broad enough rule-making authority to require tribal consent. That requirement is, the court of appeals held, both "reasonable" and consistent with the express consent requirement in the 1948 General Rights-of-Way Act, 25 U.S.C. 324. The legislative history of the 1948 Act showed Congress' understanding that tribal consent (by IRA tribes) would thereafter be required for all such rights-of-way over tribal lands. The court of appeals found it unnecessary to decide whether the "is granted" language of the 1899 Act made an in praesenti grant good against later claimants who subsequently met the statutory requirements, for nothing in the statute made the grant good against the United States until all conditions were met. The Secretary's "delegation" of consent power to the Tribe was also sustained, on a U.S. v. Mazurie approach.

Attorney: Martin W. Matzen (Land and Natural Resources Division) FTS (633-4426)

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

VOL. 31 April 1, 1983 NO. 6

Federal Rules of Criminal Procedure

Rule 24(c). Alternate Jurors.

At the end of two and one half days of deliberations one of the jurors at defendant's trial became ill and was excused from further service. After discussions with counsel the judge elected to substitute one of the alternate jurors rather than proceed with eleven jurors under Rule 23(b), a course opposed by defendant, or declare a mistrial. Before proceeding with the substitution the judge interviewed the alternate, who acknowledged that he had discussed the case with the second alternate. The judge instructed the jury to restart their deliberations at the beginning and, satisfied that the alternate was able to deliberate fairly, effected the substitution. Defendant was subsequently convicted. He appealed, claiming that the decision to substitute a juror after commencement of deliberations was a violation of Rule 24(c), requiring reversal.

The court of appeals discussed at length the history of Rule 24(c) and concluded that violation does not require reversal per se absent a showing of prejudice. The danger that the case was actually decided by fourteen jurors (the views of the original twelve, plus the views of the alternate, and through him, the views of the second alternate) was obviated by the precautions taken by the judge. In complex trials such as this, juror substitution after the start of deliberations is permissible if thorough precautions are taken to ensure that defendants are not prejudiced.

(Affirmed.)

United States v. James Hillard, et al., Nos. 82-1312, 82-1313, 82-1322 (2d Cir. Mar. 1, 1983).

VOL. 31 April 1, 1983 NO. 6

Federal Rules of Evidence

Rule 501. Privileges. General Rule.

Movant requested that a subpoena ad testificandum be quashed or, alternatively, that the court issue a protective order prohibiting her from being interrogated as to any matter, which testimony might be included in evidence presented to the Special Grand Jury for use in any contemplated proceeding against her father.

The court, examining the motion in depth as to law and policy, held that the parent-child relationship must be protected and fostered by the courts, and thus fashioned a new parent-child privilege under Rule 501. The court based the privilege not only on the confidential nature of the specific communications between parent and child, but also upon the privacy which is a constitutionally protectable interest of the family in American society. The court stated that the Government's goal in presenting all relevant evidence to the court does not outweigh an individual's right of privacy within a family unit. Discussing other privileges, the court likened the parent-child relationship to the spousal relationship, which is based on love and affection, and to the psychotherapist-patient relationship, which is based upon the guidance and "listening ear" which one party provides to the other.

(Motion to quash grand jury subpoena ad testificandum granted.)

In re Grand Jury Proceedings Witness: Mary Agosto, et al., 553 F. Supp. 1298 (D. Nev. Jan. 4, 1983).

U.S. ATTORNEYS' LIST EFFECTIVE APRIL 1, 1983

UNITED STATES ATTORNEYS

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Alabama, N	Frank W. Donaldson
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Alabama, S	J. B. Sessions, III
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Arkansas, W	W. Asa Hutchinson
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Indiana, S	Sarah Evans Barker
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Iowa, S	Richard C. Turner
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Kentucky, W	Ronald E. Meredith
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Louisiana, M	Stanford O. Bardwell, Jr.
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Maryland	J. Frederick Motz
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New Jersey	W. Hunt Dumont
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New York, S	John S. Martin, Jr.
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
North Carolina, E	Samuel T. Currin
North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
North Dakota	Rodney S. Webb
Ohio, N	J. William Petro
Ohio, S	Christopher K. Barnes
Oklahoma, N	Francis A. Keating, II
Oklahoma, E	Gary L. Richardson
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
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Pennsylvania, M	David D. Queen
Pennsylvania, W	J. Alan Johnson
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Rhode Island	Lincoln C. Almond
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South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
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Texas, S	Daniel K. Hedges
Texas, E	Robert J. Wortham
Texas, W	Edward C. Prado
Utah	Brent D. Ward
Vermont	George W. F. Cook
Virgin Islands	Hugh P. Mabe, III
Virginia, E	Elsie L. Munsell
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	David A. Faber
Wisconsin, E	Joseph P. Stadtmueller
Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood

U.S. Department of Justice

Civil Division

211

VOL. 31 APRIL 1, 1983 NO. 6

Office of the Assistant Attorney General *Washington, D.C. 20530*

3 MAR 1983

MEMORANDUM

TO: All United States Attorneys

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: Office of Immigration Litigation

This is to inform you of the creation of a new Office of Immigration Litigation in the Civil Division. The new office is under the supervision of Robert N. Ford, Deputy Assistant Attorney General. Robert L. Bombaugh (FTS 724-5705) is the Director of the office and Lauri Steven Filppu (FTS 724-7843) is the Deputy Director. As of February 7, 1983, this new office assumed the normal Departmental responsibility for virtually all civil litigation arising under the immigration laws.

The Criminal Division, which previously had responsibility for both civil and criminal immigration matters, will retain jurisdiction over criminal cases, denaturalization cases concerning persons believed to have been involved in Nazi war crimes, civil INS forfeiture actions and remission petitions, and certain other civil matters bearing on criminal law enforcement.

With the transfer of functions, additional resources will be devoted to immigration cases, and it will thus be possible for attorneys in the Office of Immigration Litigation to handle personally some of the district court cases previously handled by the United States Attorneys. In keeping with normal Civil Division practice, the Office of Immigration Litigation will review each new case to determine whether it will be delegated to the appropriate United States Attorney's Office, with or without supervision, or personally handled by Office of Immigration

Litigation attorneys. There will be no change, however, in the handling of cases currently pending unless you are specifically notified of a change. The Office of Immigration Litigation will handle those court of appeals petitions for review of final deportation orders which previously fell within the jurisdiction of the Criminal Division.

It is important that new civil immigration cases be brought to the attention of the Office of Immigration Litigation as quickly as possible. This is especially true in habeas corpus cases, where the Rules do not require service on the Attorney General, and in cases with requests for temporary restraining orders or preliminary injunctions where significant developments may occur before the Civil Division receives routine service of the summons and complaint.

The United States Attorneys retain the responsibility for protecting the government's interest on all emergency matters until such time as a final decision on delegation can be made. [Cf. United States Attorneys' Manual, §4-1.300] Under a memorandum of understanding with INS, the General Counsel of INS has the right to advise the Civil Division on staffing of significant cases. Correspondence and copies of relevant papers should be sent to the following address:

Office of Immigration Litigation
Civil Division
P.O. Box 878 Ben Franklin Station
Washington, D.C. 20044

Any questions concerning the reorganization or the new office itself may be directed to Mr. Bombaugh or Mr. Filppu. Questions with respect to legal issues should be addressed to the Circuit Counselor for your circuit. Circuit Counselors are:

Circuit	Circuit Counselor	Phone Number (FTS)
1st	James A. Hunolt	724-6284
2nd	Joseph F. Ciolino	724-6284
3rd	Joseph F. Ciolino	724-6284
4th	Marshall Golding	724-6284
5th	Joan Smiley	724-7843
6th	Robert Kendall, Jr.	724-7843
7th	Richard M. Evans	724-7843
8th	Robert Kendall, Jr.	724-7843
9th	Margaret Perry	724-6284
10th	Robert Kendall, Jr.	724-7843
11th	Joan Smiley	724-7843
D.C.	Sylvia Royce	724-7843

Please arrange to distribute a copy of this letter to each of your Assistant United States Attorneys who handle civil cases.

U.S. Department of Justice 213

Civil Division

VOL. 31 APRIL 1, 1983 NO. 6

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 3 1983

MEMORANDUM

TO: All United States Attorneys

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: Bid Protest Cases

By memorandum of September 16, 1982, we sent you materials to assist in the handling of bid protest cases under the Federal Courts Improvements Act, 28 U.S.C. § 1491(a), which became effective October 1, 1982. This is to advise you of the current status of bid protest litigation and to request your assistance in obtaining copies of new decisions in this area on an expedited basis.

The transition to handling bid protest cases under the Federal Courts Improvements Act appears to have gone smoothly. The positions set forth in the United States Attorneys Bulletin of September 16, 1982, regarding the jurisdiction of the Claims Court and district courts over bid protest cases have been well-presented and, in large part, well-received by the courts. The Claims Court has accepted our view that its jurisdiction is confined to cases arising prior to contract award. John C. Grimberg Co., Inc. v. United States, No. 510-82C (Cl. Ct. October 7, 1982) (appeal pending). The United States District Court for the District of Columbia has accepted our view that the Act divests the district courts of jurisdiction over such pre-award cases. Opal Manufacturing Co., Ltd. v. UMC Industries, Inc., C-82-2699 (D.D.C. November 17, 1982), and at least one other court has suggested that this jurisdictional argument has merit. London Fog Company v. Defense Logistics Agency, C-4-82-1334 (D. Minn. October 18, 1982). However, it appears that courts which have considered the matter have not agreed with our position that the Act also divests the district courts of jurisdiction over bid protest suits filed after contract award. E.g., Goex, Inc. v. Weinberger, CA3-82-1645-F (N.D. Tex. Nov. 19, 1982).

The law in this new area still remains far from settled, obviously, and courts confronted with issues under the Act are most interested to know what other courts have decided. We are endeavoring to maintain a current central file of all decisions interpreting the Federal Courts Improvements Act, but that task is difficult because many of these decisions are not published promptly, if at all. We urge you to advise us immediately as decisions are entered in your district so that we may, in turn, be able to advise you of recent decisions in other districts. Any inquiries in this regard should be directed to David M. Cohen, Director, Commercial Litigation Branch, who may be reached at FTS 724-7691.

VOL. 31 APRIL 1, 1983 NO. 6

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March 7, 1983

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to use the term "investment counsel" as descriptive of its business. Item 13(b) asked whether a substantial part of the applicant's investment advisory business consists of rendering "investment supervisory services." Section 208(c) of the Advisers Act prohibits an adviser from using the term "investment counsel" unless his or its principal business consists of acting as investment adviser and a substantial part of his or its business consists of rendering "investment supervisory services." It is true that Item 13(b) was intended to elicit a response that would have a bearing on whether an investment adviser could properly use the term "investment counsel." However, as stated in Release No. IA-805, Item 13(b) partially duplicated another item of Form ADV. Moreover, whether or not an adviser may properly use the term "investment counsel" is dependent on the actual facts and may not be determined solely on the basis of responses to a form. Accordingly, the Commission does not believe that its ability to make such determinations will be impaired by deletion of Item 13(b).

For the reasons discussed in Release No. IA-805, the Commission has determined to adopt the amendments on a permanent basis. The Commission has determined that the information contained in the deleted items, although generally useful to the Commission in its understanding of the investment advisory industry, is not sufficiently important to justify the costs of continued use of the items.

List of Subjects in 17 CFR Part 279

Investment advisers, Reporting requirements, Securities.

Text of Amendment

The Commission hereby amends Part 279 of Chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

By amending Part I of Form ADV required by § 279.1 as follows:

(i) Item 5 of Part I is amended by deleting part (b) in its entirety and by deleting the designation "(a)".

(ii) Item 7 of Part I is amended by deleting part (b) in its entirety and by deleting the designation "(a)".

(iii) Item 13 of Part I is amended by deleting part (b) in its entirety and by deleting the designation "(a)".

(iv) Item 15 of Part I is amended by deleting parts (i) and (iii) in their entirety and by deleting the designation "(ii)".

(v) Item 16 of Part I is amended by deleting parts (i) and (iii) in their entirety and by deleting the designation "(ii)".

Statutory Authority

The Commission amends Form ADV pursuant to the authority contained in Sections 203, 204 and 211(a) of the Act [15 U.S.C. 80b-3, 80b-4 and 80b-11(a)].

Dated: February 28, 1983.

By the Commission.

George A. Fitzsimmons,

Secretary.

[FR Doc. 83-5703 Filed 3-4-83; 8:45 am]
BILLING CODE 8010-01-M

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

[Order No. 1002-83]

Organization of the Department of Justice

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: Revisions to Subparts H, I and K of Part 0 of 28 CFR, Organization of the Department of Justice, to reflect the transfer of the Consumer Affairs Section from the Antitrust Division to the Civil Division and the transfer of certain civil litigation arising under the Immigration and Nationality Act and related laws from the Criminal Division to the Civil Division.

EFFECTIVE DATE: February 23, 1983.

FOR FURTHER INFORMATION CONTACT: J. Paul McGrath, Assistant Attorney General, Civil Division, U.S. Department of Justice, 10th and Constitution Avenue, N.W., Room 3143, Washington, D.C. 20530. Telephone: (202) 633-3301.

SUPPLEMENTARY INFORMATION: This order is not a rule within the meaning of either Executive Order 12291 section 1(a) or the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

List of Subjects in 28 CFR Part 0

Government employees, Organization of functions (Government agencies) and Authority delegations (Government agencies).

PART 0—[AMENDED]

By virtue of the authority vested in me as Attorney General by 5 U.S.C. 301 and 28 U.S.C. 509 and 510, Part 0 of Title 28 of the Code of Federal Regulations is hereby amended as follows:

§0.40 [Amended]

1. In § 0.40 of Subpart H, Antitrust Division, paragraph (j) is removed.

§0.41 [Amended]

2. In § 0.41 of Subpart H, Antitrust Division, paragraph (b) is removed.

3. In § 0.41 of Subpart H, Antitrust Division, paragraphs (c), (d), (e), (f) and (g) are redesignated as paragraphs (b), (c), (d), (e) and (f) respectively.

4. In § 0.41, paragraph (g), redesignated as paragraph (f) is amended by changing "paragraphs (a) through (f)" to "paragraphs (a) through (e)" and by removing the words "and judgments rendered upon review of Federal Trade Commission orders by courts of appeals."

5. In § 0.41 of Subpart H, Antitrust Division, paragraph (h) is removed.

6. In § 0.41 of Subpart H, Antitrust Division, paragraph (i) is redesignated as paragraph (g).

§0.45 [Amended]

7. A new § 0.45(j) is added to Subpart I, Civil Division, to read as follows:

* * * * *

(j) Consumer Litigation—All civil and criminal litigation and grand jury proceedings arising under the Federal Food, Drug and Cosmetic Act (21 U.S. 301 et seq.), the Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*), the Fair Packaging and Labeling Act (15 U.S.C. 1451 *et seq.*), the Automobile Information Disclosure Act (15 U.S.C. 1231 *et seq.*), the odometer requirements section and the fuel economy labeling section of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 1981 *et seq.*), the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1331 *et seq.*), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 *et seq.*), the Federal Caustic Poison Act (15 U.S.C. 401 note), the Consumer Credit Protection Act (15 U.S.C. 1611, 1681q and 1681r), the Wool Products Labeling Act of 1939 (15 U.S.C. 68), the Fur Products Labeling Act (15 U.S.C. 69), the Textile Fiber Products Identification Act (15 U.S.C. 70 *et seq.*), the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*), the Flammable Fabrics Act (15 U.S.C. 1191 *et seq.*), the Refrigerator Safety Device Act (15 U.S.C. 1211 *et seq.*), Title I of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*), the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and Section 11(1) of the Clayton Act (15 U.S.C. 21(1)) relating to violations of orders issued by the Federal Trade Commission. Upon appropriate certification by the Federal Trade Commission, the institution of criminal

proceedings, under the Federal Trade Commission Act (15 U.S.C. 56(b)), the determination whether the Attorney General will commence, defend or intervene in civil proceedings under the Federal Trade Commission Act (15 U.S.C. 56(a)), and the determination under the Consumer Product Safety Act (15 U.S.C. 2076(b)(7)), whether the Attorney General will initiate, prosecute, defend or appeal an action relating to the Consumer Product Safety Commission.

To effect the transfer of certain civil litigation arising under the Immigration and Nationality Act and related laws from Assistant Attorney General, Criminal Division, to the Assistant Attorney General, Civil Division, by virtue of the authority vested in me as Attorney General by 5 U.S.C. 301 and 28 U.S.C. 509 and 510, Part 0 of Title 28 of the Code of Federal Regulations is hereby amended as follows:

§ 0.45 [Amended]

1. Add a new paragraph (k) to 28 CFR 0.45 to read:

* * * * *

(k) All civil litigation arising under the passport, visa and immigration and nationality laws and related investigations and other appropriate inquiries pursuant to all the power and authority of the Attorney General to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens except all civil litigation, investigations, and advice with respect to forfeitures, return of property actions, Nazi war criminals identified in 8 U.S.C. 1182(a)(33), 1251(a)(19) and civil actions seeking exclusively equitable relief which relate to national security within the jurisdiction of the Criminal Division under § 0.55 (d), (f), (i) and § 0.61(d).

§ 0.55 [Amended]

2. Revise § 0.55(d) to clarify the initial clause and to qualify the words "the Immigration and Nationality Act."

* * * * *

(d) Forfeiture or civil penalty actions (including petitions for remission or mitigation of forfeitures and civil penalties, offer in compromise and related proceedings) under the Federal Aviation Act of 1958, the Contraband Transportation Act, the Copyrights Act, the customs laws (except those assigned to the Civil Division which involve sections 592, 704(i)(2) or 734(i)(2) of the Tariff Act of 1930), the Export Control Act of 1949, the Federal Alcohol Administration Act, the Federal Seed Act, the Gold Reserve Act of 1934, the Hours of Service Act, the Animal Welfare Act, the Immigration and Nationality Act (except civil penalty actions and petitions and offers related thereto) the neutrality laws, laws relating to cigarettes, liquor, narcotics and dangerous drugs, other controlled substances, gambling, war materials, pre-Columbian artifacts, coinage, and firearms, locomotive inspection (45 U.S.C. 22, 23, 28–34), the Organized Crime Control Act of 1970, prison-made goods (18 U.S.C. 1761–1762), the Safety Appliance Act, standard barrels (15 U.S.C. 231–242), the Sugar Act of 1948, and the Twenty-Eight Hour Law.

* * * * *

3. Revise § 0.55(f) to read:

* * * * *

(f) All criminal litigation and related investigations and inquiries pursuant to all the power and authority of the Attorney General to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens; all advice to the Attorney General with respect to the exercise of his parole authority under 8 U.S.C. 1182(d)(5) concerning aliens who are excludable under 8 U.S.C. 1182(a)(23), (28), (29), or (33); and all civil litigation with respect to the individuals identified in 8 U.S.C. 1182(a)(33), 1251(a)(19).

* * * * *

4. Revise § 0.55(i) to read:

* * * * *

(i) All civil proceedings seeking exclusively equitable relief against Criminal Division activities including criminal investigations, prosecutions and other criminal justice activities (including without limitation, applications for writs of habeas corpus not challenging exclusion, deportation or detention under the immigration laws and coram nobis), except that any proceeding may be conducted, handled, or supervised by another division by agreement between the head of such division and the Assistant Attorney General in charge of the Criminal Division.

* * * * *

Dated: February 23, 1983.

William French Smith,

Attorney General.

[FR Doc. 83-5699 Filed 3-4-83; 8:45 am]

BILLING CODE 4410-01-M

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28 CFR Part 0

[Order No. 1003-83]

Delegation of the Attorney General's Authority With Respect to Export Trade Certificates of Review

AGENCY: Department of Justice.

ACTION: Final Rule.

SUMMARY: This rule delegates all of the Attorney General's functions with respect to determinations concerning export trade certificates of review to the Assistant Attorney General for Antitrust. It also delegates to the Assistant Attorney General for Antitrust the authority to defend the Secretary of Commerce and the Attorney General, or their delegates, in actions brought before federal district courts and courts of appeals to set aside a determination with respect to export trade certificates of review.

EFFECTIVE DATE: February 23, 1983.

FOR FURTHER INFORMATION CONTACT: Stuart M. Chemtob, Attorney, Foreign Commerce Section, Antitrust Division, Department of Justice, Washington, D.C. 20530. Tel. (202) 633-3718.

SUPPLEMENTARY INFORMATION: This order deals with agency management. It is not required to be and has not been published in proposed form for comment under 5 U.S.C. 553(b). It is not a rule within the meaning of or subject to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Likewise, it is not a rule within the meaning of or subject to Executive Order No. 12291 ("Federal Regulation").

List of Subjects in 28 CFR Part 0

Government employees, Organization and functions (Government Agencies), Authority delegations (Government Agencies).

PART 0—[AMENDED]

Accordingly, by virtue of the authority vested in me as Attorney General by 28 U.S.C. 510, it is hereby ordered as follows:

1. A new paragraph (k) is added to 28 CFR 0.40 to read as follows:

§ 0.40 General functions.

* * * * *

(k) As the delegate of the Attorney General, performance of all functions which the Attorney General is required or authorized to perform by Title III of Pub. L. 97-290 (15 U.S.C. 4011-4021) with respect to export trade certificates of review.

2. A new paragraph (j) is added to 28 CFR 0.41 to read as follows:

§ 0.41 Special functions.

* * * * *

(j) Defending the Secretary of Commerce and the Attorney General, or their delegates, in actions to set aside a determination with respect to export trade certificates of review under Section 305(a) of Pub. L. 97-290 (15 U.S.C. 4015(a)).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate
10-01-82	10.41%
10-29-82	9.29%
11-25-82	9.07%
12-24-82	8.75%
01-20-83	8.65%
02-17-83	8.99%
03-17-83	9.16%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.