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OUR NATION'S ENERGY AND RESOURCES—DECISION MAKING IN CONFLICT

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Two hundred years ago, on September 26, 1789, Edmund Randolph Jennings became the first Attorney General of the United States under an appointment by President Washington. It was not until nearly a century later, however, in the administration of Ulysses S. Grant, that the Department of Justice was established. At that time, Amos T. Ackerman became the first Attorney General to head what was destined to become the world's largest law office.

Over our history, some seventy-six men have served their President and nation in the role of the American equivalent of England's Minister of Justice. Together with the Secretaries of State, Defense, and Treasury, these men have formed the inner circle of official counselors to the country's Chief Executive. Some of these men earned a lasting place in America's legal history: men like Roger Taney, Edwin M. Stanton, George Wickersham, and Harlan Stone. Others are remarkably forgotten. The significant fact is that no matter whether a particular Attorney General was acclaimed by his contemporaries or denounced, the Department has emerged with an honest, able, and compassionate reputation as an administer of justice.

While I have not made a precise calculation, a casual review of the cabinets of the forty-one American Presidents seems to show clearly that there has been a greater turnover among Attorneys General than in any other cabinent position. For example, President Grant had no fewer than five occupants of the position. There are, of course, a number of reasons for this phenomenon. President Washington, in 1794, "promoted" Edmund Randolph to succeed Thomas Jefferson as Secretary of State. Other incumbent Attorneys General left under less auspicious circumstances, including some of those of recent and unhappy memory.

During my own tenure with the Department, I was privileged to serve under seven Attorneys General. When I joined the Depart-

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ment in 1965, Nicholas Katzenbach was the Attorney General. When I left the Department, ten years later, the Attorney General was Edward Levi. Of course, I am not counting the acting Attorneys General who, during my tenure, held the office for brief periods of time.

Decision Making

When I was a Criminal Division prosecutor, decisions seemed easier and more clear cut. We represented Justice with both a large and a small "j." We were the "good guys," and those we prosecuted were the "bad guys." I learned quickly that this view was too naive and comfortably simplistic. There were no easy decisions that were absolutely clear cut when I served as Assistant Attorney General.

As you review the case study included in Part II of this article, you will note that underlying these cases were many policy decisions which involved the complex problems inherent with difficult issues. Most of these decisions were controversial, and each had its own advocates. Each presented a difficult decision. How did the Justice Department make decisions concerning its role in these matters?

No decision was made in a vacuum nor exclusively by any one individual. Whether the client was the Department of Interior as fiduciary for an Indian tribe, the Army Corp of Engineers, or the Environmental Protection Agency, the Justice Department's procedure was the same: we would seek the recommendation of our client, ordinarily presented in writing from the General Counsel of that Department or agency. Of course, there were regular meetings and conversations on a daily basis between the litigating attorney in the Justice Department and the attorney in the Office of General Counsel for the agency. As questions became ripe for decision, the matter would first be elevated to the Deputy Assistant Attorney General and then to the Assistant Attorney General.

In addition, there were weekly briefings from each of the division's section chiefs where case status was discussed. The Deputy Assistant Attorney General and I met daily to review important matters. Virtually everything was done in writing, and every attorney had the opportunity to present his views and be heard. On each of these matters, I met regularly with departmental attorneys and with attorneys from our client agencies. Occasionally, we would meet with nonlegal officials of the client agencies, and, in one particular case, we met regularly with the Administrator of the Environmental Protection Agency. Each week, I would personally brief the Attorney General, discuss the status of important litigation and divisional matters within my discretion, and seek his counsel and direction on how to proceed. In the case of the Wetlands Policy, Attorney Gen-

eral Saxbe, the former United States Senator from Ohio, took an active interest in developing this policy and met with interested officials in various parts of the United States to promote its adoption.

We have all learned that litigators are, by definition, contentious and tend to become emotionally involved in matters they handle. They believe in what they do. In large measure, this attitude and characteristic qualify them as good advocates. When decisions are made with which they disagree or which are contrary to the positions they argue for, there is sometimes a charge that "politics" played a part in the decision. The more visible the issue, the more likely the charge. It is not easy to accept when one's arguments do not prevail. I understood this because I often felt the same way, particularly when I was a trial lawyer in the Criminal Division of the Justice Department. It was hard to accept that my superiors did not completely agree with the position I wanted the Department to take. There are those even today who believe politics played a part in the aggressiveness of the Department of Justice in pursuing environmental enforcement actions against particular litigants.

Of course, in one sense, politics are involved. Politics in a partisan sense is relevant given the relationship among the Department, the President, and the Congress. Every Attorney General, Deputy Attorney General, Solicitor General, and Assistant Attorney General — the legal officers of the United States — is appointed by the President and confirmed by the Senate.[1] Each appointee usually appears before the Senate Judiciary Committee for a confirmation hearing. Regularly, Senators are principal sponsors of candidates for high-level positions in the Justice Department. Having personally worked on the staff of the Senate Judiciary Committee and with the Chairman and the Committee's ranking member closely for many years, I have seen first hand the politics in the appointment process.

Nonetheless, partisan politics never played a part in any decision that I personally made or have heard about subsequent to my departure from the Justice Department. That is not to say, of course, that members of Congress do not express opinions to Justice officials. There are regular channels and procedures established to be sure that all views are heard and taken into consideration. Having all available information before you makes for much better decisions.

Partisan politics aside, however, litigation decisions and policy pronouncements *are* political in a philosophical sense. For example,

1. *See generally* Biden, *Balancing Law and Politics: Senate Oversight of the Attorney General Office*, 23 J. MARSHALL L. REV. 151 (1990) (discusses the motivating political factors of the appointment process and considers the Senate's oversight role at the confirmation stage).

politics play a role in decisions concerning expanding the authority of federal agencies into land use control regularly reserved for the states. These philosophic questions are quite properly the responsibility of the Congress and other administration officials, particularly domestic policy makers in the White House and at the Office of Management and Budget. These issues are clearly "political."

There is yet another important distinction concerning the Justice Department. Clearly, one major difference between the United States Justice Department attorneys and attorneys in private law firms is in the area of representing clients. I mentioned earlier that in Lands and Natural Resources we received instructions from our clients on how to handle litigation. In private practice, of course, if a client is unhappy with his lawyer and his actions, the client gets a new lawyer. Conversely, sometimes it's the lawyer who withdraws from the representation. The Justice Department's authority, however, originates from the Congress and a historic relationship with the courts. In the government, if a client agency does not like its lawyer, redress can only come from the Congress. This permanent relationship can create a real problem for the client agency and its constitutents because the Judiciary Committees in both houses have historically been zealous in their protection of the Justice Department's authority. I regularly confronted challenges to the Department's authority on environmental matters and Indian affairs.

Occasionally, charges were made that the Justice Department was not aggressive enough or that the questions were technical and required an agency's unique skills and expertise to litigate. The response, of course, was that the litigation matters affected the Judiciary and required uniform policy decisions. The United States must speak with one voice to the courts. The real question, however, was who would exercise authority over the development of policy and enforcement of congressionally established laws and policies. In addition, client agency lawyers were often professionally unfulfilled, being limited to taking recommendations. Understandably, they wanted the power and opportunity to follow a litigation matter through to its conclusion. These issues—client relation issues— were regulary on my desk and occupied much of my time. These questions were certainly political but not in a partisan sense. What now follows is a case study which sets forth a few specific examples of the Justice Department's policy decision making from the context of the division I served in: the Land and Natural Resources Division.

II. Decision Making in Context

A. The Reserve Mining Case

The Reserve Mining Company mined low-grade iron ore, called

taconite.[2] In 1947, the company received a permit from the State of Minnesota to discharge the wastes from its processing operations into Lake Superior. By the early 1970s, 67,000 tons of waste were discharged daily.[3]

In 1969, the State of Minnesota and the United States tried unsuccessfully to procure abatement of the discharges through the Minnesota state courts. In 1972, the United States filed a complaint in federal court alleging that Reserve Mining's discharge of waste into Lake Superior violated various sections of the United States Code as well as the federal common law of public nuisance. The United States focused on the public health impacts of the discharge and Reserve Mining's emissions into the ambient air. The United States maintained that the processing of the taconite resulted in the discharge into the air and water of mineral fibers substanially identical to asbestos. On the other side of the coin was the fact that the processing operation employed about 3,000 workers and was central to the economic livelihood of Silver Bay, Minnesota, and surrounding communities.

Judge Miles Lord was controversial. Our efforts at the Justice Department focused as much on tempering the Judge's aggressiveness as on "winning" the case, a unique and interesting policy decision. Nevertheless, Judge Lord found that the discharge violated the federal acts and caused a common-law nuisance.[4] Taking into account the threat to public health and the defendant's "intransigent" refusal to dispose of the waste by safer alternative means, Judge Lord enjoined further discharge of the waste, which in effect would close down the plant.[5]

In a strongly worded opinion, Judge Lord found that Reserve Mining's discharge created "a serious health hazard to the people exposed to it."[6] Among those people were the entire city of Duluth, Minnesota, whose residents got their drinking water from Lake Superior. The problem Judge Lord had to overcome was that tests on deceased Duluth residents showed no asbestosis. Judge Lord was not willing to wait until contamination "reached alarming proportions."[7] The court was "faced with a situation where a commercial industry [was] daily exposing thousands of people to substantial quantities of a known human carcinogen."[8]

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2. For a more complete discussion of the facts underlying this matter, see Reserve Mining Co. v. Minnesota Pollution Control Agency, 294 Mich. 300, 200 N.W.2d 142 (1972).
3. *Id.* at 303, 200 N.W.2d at 144.
4. Minnesota v. Reserve Mining Co., 380 F. Supp. 11 (D. Minn. 1974).
5. *Id.* at 20.
6. *Id.* at 17.
7. *Id.*
8. *Id.*

The case was appealed to the Eighth Circuit, and the district court's injunction was stayed pending appeal.[9] On appeal, the Eighth Circuit affirmed the injunction but directed modification of its terms. Five judges, *en banc*, found that Reserve Mining's discharges gave rise to a "potential threat" to the public health which called for an abatement order on "reasonable terms."[10] The court also found that the discharges violated federal and state laws. Because no harm to the public health had been shown, however, the danger was not "imminent."[11] Consequently, the court found that "no reason exists which requires that Reserve Mining terminate its operations at once."[12]

But this was not the end of the case, as Judge Lord took further action, including ordering Reserve Mining to pay $100,000 to the City of Duluth to help the city filter its drinking water.[13] The question of who should supervise the water filtration arose upon a motion by the State of Minnesota, joined by Reserve Mining, to require the Corps of Engineers to continue to provide residents of Duluth and surrounding communities with supplies of clean drinking water. The Corps wanted to shift primary responsibility for the filtration program to the local officials.[14] The Eighth Circuit directed the Corps to furnish safe drinking water for the Minnesota communities.[15] Additionally, the court wanted continued federal supervision.[16]

The Eighth Circuit in this same proceeding also entertained a request to recuse Judge Lord. His most recent abuses had been to order Reserve Mining to pay $100,000 to the City of Duluth without due process. The court found that Judge Lord was biased against Reserve Mining and removed him from the case.[17] As this case illustrates, often the Justice Department must engage in decision making and find itself confronted with events which involve unique decisions.

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9. Minnesota v. Reserve Mining Co., 498 F.2d 1073 (8th Cir. 1974).
10. Minnesota v. Reserve Mining Co., 514 F.2d 492, 500 (8th Cir. 1975).
11. *Id.* at 515.
12. *Id.*
13. Minnesota v. Reserve Mining Co., 529 F.2d 181, 182 (8th Cir. 1976).
14. *Id.*
15. Minnesota v. Reserve Mining Co., 380 F. Supp. 11, 21 n.1 (1974).
16. The court wanted continued federal jurisdiction because:
(1) Lake Superior is a body of water under federal jurisdiction;
(2) The pollution affects several states and the health of their inhabitants;
(3) The United States originally entered the controversy to petition for abatement of the nuisance;
(4) The Corps and the EPA's National Water Control Laboratory possess sufficient technical knowledge and equipment; and,
(5) The local government units may lack expertise, personnel and equipment.
Reserve Mining, 529 F.7d at 184.
17. *Id.* at 188.

B. Wetlands Protection

The wetlands protection policy that has been developed in the last two decades is a prime example of the reach government agencies can have in affecting laws and policies in this country. The public interest in long-term ecological and economic productivity often conflicts with short-term economic gain. The wetlands have been the subject of this bitter conflict for many years, and the wetlands policy is continually subject to change.

The policy of environmental protection for wetlands was established with the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972.[18] The dispute, which initially involved the Army Corps of Engineers on the one hand, and the Environmental Protection Agency, the Department of Justice, and numerous environmental groups on the other, concerned the proper scope of federal regulatory jurisdiction over dredge and fill activities throughout the nation.

The Corps' position was that section 404 of the FWPCA Amendments did not significantly expand the Corps' traditionally limited jurisdiction over the depositing of dredged or fill material in "navigable waters." The Corps' original authority to regulate dredging and filling in navigable waters originated under the River and Harbors Act of 1899,[19] enacted under Congress' powers to regulate interstate commerce. The Corps' regulatory jurisdiction under this Act was limited to activities which took place in "navigable waters." "Navigable waters" was defined at this time as those waters which have been in the past, or may be in the future, susceptible to interstate or foreign commerce.

Section 404 of the FWPCA Amendments defines the Corps' fill jurisdiction so as to cover such projects in "waters of the United States."[20] This new definition seemed to include a broader category of water resources including environmentally critical, nontidal, inland wetlands. However, the Corps was reluctant to accept such a broad definition.

It was not until the decision in *National Resources Defense Council v. Callaway*[21] that the court resolved the issue by requiring the Corps to publish new regulations that would better effectuate the full statutory mandate of the FWPCA. The result was a compilation of the Corps' final interim regulations which were a dramatic expansion of the regulatory power of the Corps.

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18. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1368 (1982)).
19. 30 Stat. 1151 (codified at 33 U.S.C. § 401 (1899)).
20. 33 U.S.C. § 403 (1899).
21. 392 F. Supp. 685 (D.D.C. 1975).

The scope of the Corps' expanded jurisdiction under the FWCPA has not been fully defined, but is certainly broader than ever envisioned. Both the evolution of the expanded regulations and the case law on this subject seem to suggest that there is not much room for limiting the Corps' jurisdiction over wetlands in the future.[22]

The section 404 regulations of the FWPCA Amendments have expanded the Corps' jurisdiction throughout the years and can be categorized in three separate areas. The three categories are: (1) regulations before July 22, 1982; (2) regulations between July 22, 1982 and October 5, 1984; and, (3) regulations after October 5, 1984.

The regulations before July 22, 1982 were not as broad as regulations that later developed. Discharges of fill were permitted in such waters as: nontidal rivers, streams and their impoundments, including adjacent wetlands that are located above the headwaters; and natural lakes, including their adjacent wetlands that are less than ten acres in surface area that are fed or drained above the headwaters or that are isolated and not a part of a surface river or stream.

These discharges were subject to four conditions,[23] and were also subject to certain "management practices," which set forth administrative criteria.[24] The regulations before July 22, 1982 also permitted certain categories of fill discharges.[25] However, these permit-

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22. *See* Hanson, *Damming Agricultural Drainage: The Effect of Wetland Preservation and Federal Regulation on Agricultural Drainage in Minnesota*, 13 WM. MITCHELL L. REV. 135 (1987); Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KAN. L. REV. 539 (1986).

23. These conditions were:
(1) that they not threaten an endangered species or its habitat;
(2) that they be free from toxic pollutants (except trace quantities);
(3) that the fill be maintained to prevent erosion; and
(4) that the discharge not occur in a state or federal wild or scenic river system.
33 C.F.R. § 330.5.

24. The regulations before July 22, 1982 contained the following "management practices":
(1) other practical alternatives should be used to avoid or minimize discharges;
(2) discharges in spawning season should be avoided;
(3) discharges should not impede movement of indigenous aquatic species or passage of normal high flows;
(4) adverse impacts of flow restriction should be avoided;
(5) discharges in wetlands should be avoided;
(6) heavy equipment working in wetlands should be placed on mats;
(7) discharges into waterfowl nesting areas should be avoided; and
(8) temporary fills should be removed.
33 C.F.R. § 330.6.

25. The permitted fill discharges were:
(1) backfill for utility line crossings;
(2) bank stabilization material, within certain specified limits (less than 500 feet of bank, less than one cubic yard of fill per running foot, not placed in wetlands or so as to impair water flow into or out of wetlands);

ted discharges were also subject to certain conditions.[26] The District Engineer of the Corps also had discretionary power to require other permits not included in the above requirements where there would be cumulative adverse impacts to the affected waters. If a discharge was not allowed under the categories above, a permit was required.

The Corps regulations were modified July 22, 1982, and the new regulations were in effect until October 5, 1984. The significant changes in the new regulations included the establishment of two "nationwide permits." The nationwide permits allowed discharges into "non-tidal rivers, streams and their lakes and impoundments, including adjacent wetlands that are located above the headwaters," and "other non-tidal waters of the United States . . . that are not part of a surface tributary system to interstate waters or navigable waters of the United States."[27] These two provisions were known as the "headwaters" provisions and the "isolated waters" provisions. The remaining regulation did not change substantially but one condition was added to the allowed discharges. The new condition required that the discharge not be located near a public water supply intake.

The Corps explained the limitation on its jurisdiction by stating the discharges that eliminated the ten-acre size limit were not usually a threat to water quality on the surface tributary system. In addition, case-by-case regulation of such areas would be a more appropriate role for the states.

Thus, after July 22, 1982 and before the next change in the regulations (October 5, 1984), fills were permitted in streams, lakes and wetlands above the headwaters of tributary streams and in isolated (nontributary) waters, regardless of the open water area involved. The only exception was that the Corps had more discretionary authority in determining which open waters required regulation. In addition, a new list was added of discharges not requiring permits.[28]

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(3) minor road crossing fills, culverted;
(4) fill incidental to bridges over tidal waters; and
(5) repair of previous fills.

33 C.F.R. § 330.5.

26. These requirements are:
(1) that the discharge not be near a public water supply intake;
(2) that it not occur in areas of concentrated shellfish production;
(3) that it not threaten an endangered species or its habitat;
(4) that it not disrupt the movement of aquatic life indigenous to the water body;
(5) that it be free of toxic pollutants (except trace quantities);
(6) that the fill be maintained to prevent erosion; and
(7) that the discharge not occur in a state or federal wild and scenic river system.

33 C.F.R. 323.4-3.

27. 33 C.F.R. § 330.4(a).

28. This list included:

Any dredging or filling must have a permit if it is part of an activity where the purpose is to convert an area of the waters of the United States into a use to which it was not previously subject. A permit is also needed when the flow for circulation of waters of the United States may be impaired or the reach of such waters reduced. "Waters of the United States" was broadly defined in the 1982 regulations to include any waters or wetlands "the use, degradation or destruction of which could affect interstate or foreign commerce."[29]

The 1982 "nationwide permits" appear to have permitted many more activities than the regulations before July 22, 1982. During that period of time, the Corps had adopted a much more flexible approach in regulating the discharge of fill materials in waters of the United States.

The Corps' regulations were further modified on October 5, 1984 and are still in effect today. This modification was made as a result of an agreement settling a lawsuit in which various environmental groups alleged that the Corps' regulations did not sufficiently protect the environment.[30] In the settlement, the Corps agreed to promulgate new regulations acknowledging the EPA guidelines as mandatory. The regulations also added general policy provisions emphasizing the importance of wetlands.[31]

The July 22, 1982 provisions permitting discharges into certain waters and certain categories of discharges were modified. The two types of discharges authorized in the July 22, 1982 regulations (the "headwaters" and "isolated waters" provisions) continued but with some significant changes. First, the phrase "including adjacent wetlands" was added to the isolated waters provision. Second, they were modified by excepting from the nationwide permit any discharges "which cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands." These nationwide permits were also made subject to the eight conditions and the "best management practices" which already applied to all other nationwide permits under the July 22, 1982 regulations.

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(1) normal farming and ranching but only if part of an "established" operation;
(2) maintenance of existing dikes, etc.;
(3) construction or maintenance of stock ponds or irrigation ditches, or maintenance (but not construction) of drainage ditches;
(4) construction of temporary sedimentation basins without placement of fill into "waters of the U.S.";
(5) state-approved activities; and
(6) construction or maintenance of farm roads in accordance with Best Management Practices (of which 15 are listed).

33 C.F.R. § 323.4(a).

29. 33 C.F.R. § 323.2(a)(3).

30. National Wildlife Federation v. Marsh, 568 F. Supp. 985 (D.D.C. (1983).

31. *See Comprehensive Wetlands Protection: One Step Closer to Full Implementation of § 404 of the FWPCA*, 5 ENVTL. L. REP. 10099 (1975).

The list of activities not requiring permits continued basically unchanged from the July 22, 1982 regulations. Normal farming and ranching continues to be exempted. Conversion of wetlands to farming or ranching continues not to be exempted.

The courts have also generally construed the jurisdiction of the Corps over navigable waters very broadly.[32] For example in *United States v. Byrd*,[33] a landowner had engaged in fill projects in an effort to convert the wetlands bordering a lake on his land into land suitable for residential development. The discharge of fill into this lake was performed without a state water quality certification or a permit from the Corps.

After a detailed explanation of the definition of the waters covered in the FWPCA Amendment, the court reviewed congressional legislative history and determined that Congress intended the term "navigable waters" to have the broadest possible constitutional interpretation.[34] Thus, the court concluded that wetlands were within Congress' regulatory control of navigable waters under the Commerce Clause.[35] Therefore, the regulatory definitions of navigable waters, promulgated by the Corps, were reasonably related to Congress' purpose under the FWPCA.[36]

The scope of the waters which fall within the Corps' authority is not fully defined by the above regulations. In *United States v. Riverside Bayview Homes, Inc.*,[37] the court upheld the Corps' authority to regulate the placing of fill material in wetlands. The court also upheld the regulations which the Corps promulgated to define "wetlands" (essentially, lands that normally support vegetation adapted for life in saturated soil conditions) at least where those wetlands are adjacent to open waters.[38] After reviewing the legislative history, the court expressly held "Congress evidently intended . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[39] In addition, the court held that wetlands adjacent to such waters were indeed intended to be regulated and that "there is an adequate basis for a legal judgment that adjacent wetlands may be defined as waters

32. *See, e.g.*, United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979).

33. 609 F.2d 1204 (7th Cir. 1979).

34. *Id.* at 1209. The term "navigable waters" is defined at 33 U.S.C. § 1362(7)(1982) (the waters of the United States, including the territorial seas).

35. *Byrd*, 609 F.2d at 1210.

36. *Id.* at 1210-11. *See* 33 U.S.C. § 1251(a) (purpose of water pollution prevention and control is to maintain the chemical, physical, and biological integrity of the nation's waters).

37. 474 U.S. 121 (1985).

38. *Id.* at 131. For a definition of wetlands, see 33 C.F.R. § 328.3(7)(b) (1986).

39. *Riverside*, 474 U.S. at 133.

under the Act."[40] Nevertheless, the court in *Bayview* was careful to state that its ruling applies only to "wetlands adjacent to other bodies of water over which the Corps has jurisdiction." The court noted, "The regulations also cover certain wetlands not necessarily adjacent to other waters."[41]

Without belaboring the point, it should be obvious that Congress intended a broad definition of "navigable waters," possibly to insure that waters potentially capable of carrying pollutants into the stream of commerce be regulated. The problem with the Corps' regulations are that they simply sweep in too much area and go well beyond the scope of waters which could even remotely be considered aspects of the chain of commerce.[42]

An example of the far reaching implications of the Corps' extended jurisdiction is in cases dealing with the discharge of fill for farming practices. In *United States v. Huebner*,[43] defendants had purchased a 5,000-acre tract, mostly wetland, that had been farmed intermittently for various crops since the turn of the century. Defendants began to plow and ditch parts of the farm in 1977 and were ordered by the Corps to cease and desist. Defendants argued that they were exempt under the provisions of 33 U.S.C. § 1344(f)(1) exempting farming operations. The court ruled, however, that the farming exemption was intended to permit only "narrowly defined activities . . . that cause little or no adverse effects . . . [and which do not] convert more extensive areas of water into dry land . . . ."[44] The court also found that defendant's activities did not comply with the "best management practices" of the regulations and that the exemptions therefore did not apply.[45]

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40. *Id.* at 134.

41. *Id.* at 135.

42. *See* Boxer, *Every Pond and Puddle-or How Far Can the Army Corps Stretch the Intent of Congress*, 9 NAT. RESOURCES LAW. 467, 474 (1985).

43. 752 F.2d 1235 (7th Cir. 1985).

44. *Id.* at 1241 (citing legislative history of the Water Pollution Control Act Amendments of 1972).

45. Another case illustrating the point is Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983). In this case, landowners owned about 20,000 acres of forested land in Louisiana. They began to clear it for soybean production. The Corps issued a cease and desist order and declared part of the area to be wetlands. Private plaintiffs brought suit against the landowner, Corps and the Environmental Protection Agency seeking a judgment that the entire area was a wetlands area. The district court ordered the Corps to reevaluate its wetlands determination.

One of the arguments from the landowner in *Avoyelles* was that Congress did not intend to exercise its power to regulate all discharges affecting interstate commerce. *Id.* at 922. The landowner also argued that the activities were exempt as "normal agricultural activities." *Id.* at 925. The court rejected both arguments. Specifically, the court commented on the exemption argument holding that where forest is being converted to farmland, the exemption is precluded because the exemption only applies to "ongoing agricultural activities." *Id. But see* Louisiana Wildlife Fed'n, Inc. v. York, 603 F. Supp. 518 (W.D. La. 1978) (holding the Corps' issuance of a permit to

These cases illustrate the expansion of our wetlands protection policy. At no time did we at the Department of Justice envision the Corps' power to be so broad. In the early stages of the dispute over the definition of waters covered under the FWCPA Amendments, the Department of Justice pushed for an expanded definition. However, in setting policy at the time, the long-term effects were not taken into consideration.

The problems with the expanded jurisdiction of waters regulated by the Corps are most evident in the impact it has on agricultural activities. Although there are exemptions in the statute for some agricultural activities, the courts seem to have construed the exemptions very narrowly.

There are numerous indications that it was not the intention of those of us involved in the decision making process to give the Corps so much power over wetland areas. First, the legislative history of the FWPCA indicates that a number of Congressmen feared that undesirable and extensive federal regulation of agriculture would result from the passage of the FWPCA Amendments.[46]

Secondly, because most agricultural activities are not regulated by other provisions of the FWPCA,[47] there does not seem to be a reason for them to be included for the discharge of fill material. A final factor is the cost for the Corps to administer such a broad program for regulating the discharge of fill material for such areas as wetlands.

With such a broad and undefined interpretation of waters covered in the FWPCA Amendments, it is very difficult for the Corps to know when to enforce the provisions. In addition, a landowner really has no way of knowing when he is required to apply for a permit to discharge fill material in a wetland area.

It seems like a policy that was initially meant to dispense with harmful discharge of fill material into our environment has also turned into a policy of zoning of land by the federal government. Instead of zoning determinations made by the states, the federal government now has an avenue in which it can make ultimate land use decisions. For example, if there is construction of certain facilities on a wetlands area, the federal government, through decisions made by the Corps, has the power to deny such construction by denying a permit for discharge of fill material in the wetlands area. Is this the result we wanted from our wetlands protection policy? Pol-

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clear 5,000 acres of forested bottomland to convert to soybean production was valid because keeping the area as a wetland is not a "practicable alternative" to increasing the return on the land by growing soybeans).

46. 1972 U.S. CODE CONG. & ADMIN. NEWS 3668.

47. 33 U.S.C. § 1344(f) (1948).

icy decisions made by government agencies have just as great an impact as court rulings. A major example being the wetlands protection policy that has developed in the last two decades.

C. *Indian Litigation Policy*

The United States' Native American policy originated from the European treatment of Indian tribes. The British government dealt directly with tribes to avoid tumultuous interactions between citizens of the Crown and Native Americans. Similarly, the United States government, rather than individuals or states, has controlled relations between Native Americans and other citizens.

The United States gets involved in litigation with Native Americans for two reasons. First, a duty to protect Native American interests exists partly as a result of past unjust actions by the federal government. The Department of Justice has provided protection of tribes' land rights since 1879.[48] Second, although tribes use and occupy reservation lands, ultimate title to the lands vests in the United States.

As a member of the Justice Department, dealing with American Indian matters was particularly difficult because the policy of the United States was changed regularly. Moreover, conflicts arose among the divisions within the Interior Department because each might be pursuing a conflicting policy objective.

When I began my tenure as Assistant Attorney General, all of these Interior-resource-Indian matters were handled by our attorneys in the same section. On any one day, the same attorney might be representing the Bureau of Indian Affairs in its role as trustee and the Bureau of Reclamation at the same time. This was a critical problem, and the tribes were arguing aggressively for independent representation outside the Department of Justice or at least representation by the Civil Rights Division. I resolved this conflict by creating an Indian Rights section and isolating the attorneys dealing with Indian issues from those handling the Department of Interior's other business. The section has operated efficiently and fairly for the past fifteen years. Its first chief, Myles Flynt, now serves as Deputy Assistant Attorney General and remains a distinguished civil servant and government lawyer. What follows is a case study which illustrates how policy decisions come alive during the course of just one

48. Joint Resolution of March 3, 1879, 20 Stat. 488, superseded by Act of March 1, 1889, 25 Stat. 768 (instructing Attorney General to bring suit to quiet tribal title); *see also* 25 U.S.C. §175 (1893). However, courts recognize United States representation of Native Americans as entirely discretionary. Siniscal v. United States, 208 F.2d 406 (9th Cir. 1953), *cert. denied*, 348 U.S. 818 (1954); Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co., 353 F. Supp. 1098 (D. Ariz. 1972).

piece of litigation.

In 1854, the United States reserved land on the west side of the Missouri River for the Omaha Indian Tribe.[49] Since then, river movements caused 2,900 acres of the reservation land to shift from the west side in Nebraska to the east side in Iowa. For at least forty years, people other than tribal members possessed the land. In 1975, the Omaha Indian Tribe filed a complaint claiming title to the land.

The first Omaha Indian Tribe ruling was made in May 1977.[50] Finally, the case appears resolved, because the Supreme Court denied certiorari in May of 1989.[51] The initial issue was whether accretion or avulsion caused the land changes. According to Nebraska law, if the changes were avulsive rather than accretive, the Omaha Indian Tribe could properly claim the land. The district court's decision was adverse to the tribe and the United States. The district court determined that the tribe and the United States failed in their burden to prove they possessed title to the land.[52]

On appeal, the Eighth Circuit vacated the district court's decision.[53] The court decided that §194 of Title 25 of the United States Code should be applied to the case. Section 194 placed the burden of proof on the white landowners, because the trial involved a Native American and property rights. The Supreme Court subsequently vacated the Eighth Circuit's decision.[54] The Court decided that, although section 194 applies to individual landowners, section 194 did not apply to the state of Iowa as a defendant.[55]

On remand, the Eighth Circuit decided that the tribe succeeded in its claims for all land except land claimed by the State of Iowa.[56] The court remanded the case so the district court could consider whether the tribe sustained its burden of proof for the lands claimed by the State of Iowa.

The district court ordered the entire 2,900 acres quieted in the Omaha Indian Tribe and the United States.[57] The court also ruled that the tribe could bring an action to recover accretions to tribal land, even though the United States refused to add that complaint.[58] The court stated that Congress intended by the enactment of 28 U.S.C. §1362 to enable the tribe to sue in federal court to protect its

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49. Omaha Indian Tribe v. Wilson, 575 F.2d 620, 621 (8th Cir. 1978), *vacated and remanded* 442 U.S. 653 (1979).
50. Omaha Indian Tribe v. Jackson, 433 F. Supp. 67 (N.D. Iowa 1977).
51. Wilson v. Omaha Indian Tribe, 109 S. Ct. 2429 (1989).
52. *Jackson*, 433 F. Supp. at 88.
53. *Wilson*, 575 F.2d at 651.
54. Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).
55. *Id.* at 667-68.
56. Omaha Indian Tribe v. Wilson, 614 F.2d 1153 (8th Cir. 1980).
57. United States v. Wilson, 523 F. Supp. 874, 897-898 (N.D. Iowa 1981).
58. *Id.* at 899.

property rights.[59]

The Eighth Circuit Court of Appeals reversed and remanded the district court decision.[60] In regard to about 700 acres of land, the court decided that the tribe must show avulsion caused the movement of lands claimed by the State of Iowa and individual landowners.[61] On remand, the district court later decided that the tribe did not meet its burden of proof in respect to the lands claimed by the State of Iowa and the individual owners. The court ruled the land quieted in the State of Iowa and the individual owners.[62]

The tribe appealed the decision, and the Eighth Circuit agreed with the district court that the tribe failed to sustain its burden of proof.[63] However, the court disagreed with the district court's conclusion that the government should have quieted title to the trust lands many years ago. The court believed insufficient evidence existed to show that the tribe experienced a disadvantage as a result of the timing of the action and to show that the government intentionally avoided instituting the action.[64] As a result, the government could use escrowed profits from leases of the land to pay for improvements to the lands.

The Supreme Court denied certiorari,[65] rejecting three separate appeals by the tribe, private landowners and the State of Iowa. The tribe contended that two Department of Justice attorneys engaged in "forced, fraudulent representation" of the tribe during the proceedings.[66] The validity of the tribe's contention remains unresolved. However, the fact that the tribe did not succeed in its claims against the State of Iowa may support the argument that the level of governmental protection given Native Americans from state intrusion is arguably much lower now than in recent years.

A Senate panel will soon release a report which argues that the government has failed in its responsibility to Native Americans, although the government spends approximately three billion dollars a year on Indian programs.[67] While the policy decisions are often on subtle matters, at times the process engages the interest of Congress and its oversight function.[68] It is through this political system of checks and balances that policy decisions are reviewed to ensure fair

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59. *Id.*
60. United States v. Wilson, 707 F.2d 304 (8th Cir. 1982), *cert. denied*, 465 U.S. 1025 (1984).
61. Wilson, 707 F.2d at 308-09.
62. United States v. Wilson, 578 F. Supp. 1191, 1196 (N.D. Iowa 1984).
63. Omaha Indian Tribe v. Jackson, 854 F.2d 1089, 1094 (8th Cir. 1988).
64. *Id.* at 1095.
65. Wilson v. Omaha Indian Tribe, 109 S. Ct. 2429 (1989).
66. *The Omaha World Herald*, May 30, 1989, at 13.
67. *The Omaha World Herald*, June 10, 1989, at 12.
68. *See generally* Biden, *supra* note 1.

administration of justice by government lawyers.

Conclusion

I am convinced that as long as individuals make laws and enforce policies, there will be variations in "justice." These variations can never be eliminated and are best left to the balance of power that exists among the Judiciary, the Congress, and the Executive. In my career, I almost always worked with justice officials who were extremely competent and certainly well-meaning. Of course, some were better qualified and experienced than others, and there were different philosophic approaches.

Overall, however, during the twenty-five years I have worked in and observed the Justice Department and the judicial system, I am convinced that the past traditions and reputation of the Department will continue to attract high quality attorneys to its ranks, and experienced and high quality attorneys to its leadership posts. This will always provide the proper checks and balances in our system and will ensure the best decisions.

I shall always be grateful for the opportunity to have served in the Department of Justice. My respect for the Department and my loyalty to it was enhanced by the professionalism and dedication I saw in the men and women who worked there. They were the ones who carried the burden of protecting the ideals and aspirations of a nation of laws—a burden that sometimes seemed unbearably heavy. My admiration extends as well to the many nonlegal activities of the Justice Department: the Federal Bureau of Investigation; the Bureau of Prisons; the Marshals Service; and others. It is fitting that this symposium celebrate the 200th anniversary of the Attorney General's office. The office and its personel have served this country well.