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ROUTING AND TRANSMITTAL SLIP		ACTION
1 TO (Name, office symbol or location)  Eva Daughtrey	INITIALS	CIRCULATE
	DATE	COORDINATION
2	INITIALS	FILE
	DATE	INFORMATION
3	INITIALS	NOTE AND RETURN
	DATE	PER CON - VERSATION
4	INITIALS	SEE ME
	DATE	SIGNATURE
<b>REMARKS</b>  Re: <u>Racki</u> v. <u>Ford</u>  Pursuant to our telephone conversation today, I am attaching a copy of the letter received by us with regard to the above case from Mr. Buchen.  Thanks for your help.   Carolyn Brammer Secretary to Rex Lee   Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions		
FROM (Name, office symbol or location)		DATE 11-4-75  PHONE 739-3301

OPTIONAL FORM 41

AUGUST 1967

GSA FPMR (41CFR) 100-11.206

048-16-81504-1

552-103

GPO

5041-101

THE WHITE HOUSE  
WASHINGTON

November 3, 1975

Dear Mr. Lee:

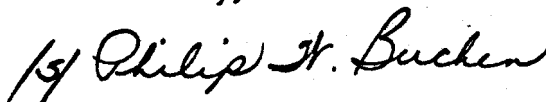
The enclosed complaint in the matter of Racki v. Ford, D. Mass., was received by mail in my office.

This is to request that the Department of Justice handle this matter on behalf of the President. In addition, I have enclosed copies of correspondence relating to this action which Mr. Racki has previously sent to the White House.

We would also appreciate your providing this office with copies of any materials which you file in this regard.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Philip W. Buchen". The signature is written in dark ink and is positioned above the typed name.

Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D. C. 20530

Enclosures

*Justice*

THE WHITE HOUSE  
WASHINGTON

November 7, 1975

Re: Relf, et al. v. United States,  
et al., D. D. C., C.A. No. 74-224

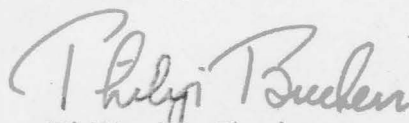
Dear Mr. Lee:

Referencing your letters of September 11 and August 28, 1975, enclosed are responses from Dr. James Cavanaugh and Mr. Paul O'Neill to the relevant interrogatories in the above-captioned action.

As you are aware, to the extent these interrogatories would require a search of the "Presidential historical materials of the Nixon Administration" within the meaning of the Order of the United States District Court for the District of Columbia, entered October 21, 1974, as amended in Nixon v. Sampson, et al., that Order effectively requires the consent of Mr. Nixon or his counsel before such a search can be made. No request for such consent has been made. If you feel that a search of these materials is necessary, my office can request the consent of Mr. Nixon's counsel if you so desire.

We are unaware of any additional information that might bear on this matter. If you require additional assistance in this regard, please contact Mr. Barry Roth of my staff.

Sincerely,



Philip W. Buchen  
Counsel to the President

Honorable Rex E. Lee  
Assistant Attorney General  
Department of Justice  
Washington, D. C. 20530



THE WHITE HOUSE  
WASHINGTON

November 1, 1975

MEMORANDUM FOR: BARRY ROTH  
FROM: JIM CAVANAUGH  
SUBJECT: Interrogatories in Relf, et al.,  
V. United States, et al.

Following up your recent request, attached are my recollections in the form of answers to the interrogators posed in Relf, et al., V. United States, et al.

Attachment



Page 3 10 - Not that I am aware of.

Page 4 11 - N.A.

12 - Not that I am aware of.

13 - N.A.

14 - Not that I am aware of.

15 - N.A.

16 - Not that I am aware of.

17 - N.A.

18 - Not that I am aware of.

19 - N.A.

Page 8 45 - Not that I am aware of.

46 - N.A.

Page 9 47 - Not that I am aware of.

48 - N.A.

49 - No.

50 - N.A.

51 - N.A.

52 - Not that I am aware of.

53 - N.A.

Page 10 57 - Not that I am aware of.

58 - N.A.

Page 11 8 - Yes.

9 - a. Don't know.

b. EOB.

c. Late spring of 1972.

d. Press stories about OEO plans to set up a categorical sterilization program.



16 - (1) See item 9, page 12.





EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

NOV 3 1975

MEMORANDUM FOR BARRY ROTH

FROM: Paul H. O'Neill

*O'Neill*

Attached in response to your request are my answers to the interrogatories posed in the Relf, et al., v. United States, et al. case.

Attachment



page 3, No. 10. - Not to my knowledge.

page 4, No. 11. - N.A. (see answer to No. 10, above)

page 4, No. 12. - Not to my knowledge.

page 4, No. 13. - N.A. (see answer to No. 12, above)

page 4, No. 14. - Not to my knowledge.

page 4, No. 15. - N.A. (see answer to No. 14, above)

page 4, No. 16. - Not to my knowledge.

page 4, No. 17. - N.A. (see answer to No. 16, above)

page 4, No. 18. - I did not.

page 5, No. 19. - N.A. (see answer to No. 18, above)

page 8, No. 45. - Not to my knowledge.

page 8, No. 46. - N.A. (see answer to No. 45, above)

page 9, No. 47. - Not to my knowledge.

page 9, No. 48. - N.A. (see answer to No. 47, above)

page 9, No. 49. - Not to my knowledge.

page 9, No. 50. - N.A. (see answer to No. 49, above)

page 9, No. 51. - N.A. (see answer to No. 49, above)

page 9, No. 52. - Not to my knowledge.

page 9, No. 53. - N.A. (see answer to No. 52, above)

page 10, No. 57. - Not to my knowledge.

page 10, No. 58. - N.A. (see answer to No. 57, above)

page 11, F. General - OEO, No. 8. To the best of my recollection, there was one meeting to discuss the guideline instructions in the Spring of 1972, involving Wesley Hjernevik, then Deputy Director of OEO; Dr. Leon Cooper, then Director of Health Affairs, OEO; Dr. James Cavanaugh, Assistant Director of the Domestic Council, and myself.



page 12, No. 9. -

- a) I do not recall who arranged the meeting.
- b) The meeting was held in the Executive Office Building.
- c) In the Spring of 1972. I believe in March or April.
- d) General discussion of guidelines, led by Dr. Cooper; spelling out his concerns.

page 12, No. 16.-

- a) See answer to page 12, No. 9 above. To the best of my recollection, no other contact with this question.

page 12, No. 17.- See answer to page 12, No. 9. above.



SEP 11 1975

*sent to  
Dudley  
9/12*

Philip H. Buchen, Esquire  
Counsel to the President  
The White House  
Washington, D. C. 20501

Re: Mary Alice Relf, Minnie Relf, and  
Katie Relf, by and through their  
next friend, Lonnie Relf v. United  
States, et al., Civil No. 74-224,  
U.S.D.C. for the District of Columbia

Dear Mr. Buchen:

Reference is made to my letter of August 28, 1975 requesting your help in answering interrogatories filed by the plaintiff in the above titled action. Enclosed is another set of interrogatories that plaintiff has just recently filed. Any responses you are able to provide to questions F. General - OEO 8, 9, 16, and 17, would be appreciated.

Thank you for your help in this matter.

Yours very truly,

REX E. LEE  
Assistant Attorney General  
Civil Division

Enclosure

cc: Mr. Earl J. Silbert  
United States Attorney  
Washington, D. C. 20001  
Attention: Mr. Eric Marcy  
Assistant U. S. Attorney



THE WHITE HOUSE  
WASHINGTON

*Justice*

September 2, 1975

MEMORANDUM FOR:

DUDLEY CHAPMAN

FROM:

PHILIP BUCHEN *P.W.B.*

Attached is a communication from the Department of Justice involving interrogatories in the case of Relf v. U.S. Kindly handle this matter for me and frame a reply for me to send Rex Lee.

RECEIVED  
SEP 11 1975  
U.S. DEPT. OF JUSTICE





Department of Justice  
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL  
CIVIL DIVISION

August 28, 1975

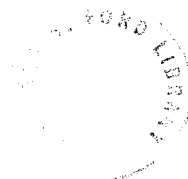
Philip H. Buchen, Esquire  
Counsel to the President  
The White House  
Washington, D. C. 20501

Re: Mary Alice Relf, Minnie Relf, and  
Katie Relf, by and through their  
next friend, Lonnie Relf v. United  
States, et al., Civil No. 74-224,  
U.S.D.C. for the District of Columbia

Dear Mr. Buchen:

For your information a copy of the Complaint and a copy of 92 interrogatories filed by the plaintiffs in the above captioned case are enclosed. The Department of Justice represents the United States and John Dean, III. According to our present information John Ehrlichman has not been served with process and is not properly a party to the litigation. To our present knowledge the United States and John Dean, III are the only named defendants who have been properly served.

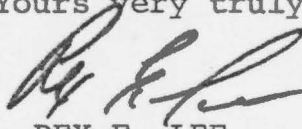
This case arises out of an OEO funded program called the Montgomery Community Action Agency which ran a family planning clinic that in turn administered experimental drugs to and, on June 14, 1973, sterilized by tubular ligation the twelve and fourteen year old Relf sisters. One of the plaintiffs' theories of liability is that sterilization guidelines which would have prevented the 1973 sterilizations of the Relf sisters were ready for publication in early 1972 but were not published because of pressure from the White House.



My immediate reason for troubling you with this matter is that we need any help that members of your staff may be able to give us with regard to 21 interrogatories, questions number 10-19, 45-53, 57 and 58. On the face of things, I would doubt that anyone presently on your staff would be able to provide anything, but we should determine whether there is anything that we can supply. We have also submitted the entire 70 interrogatories to John Dean.

Thank you for your help in this matter.

Yours very truly,



REX E. LEE

Attachments

cc: Mr. Earl J. Silbert  
United States Attorney  
Washington, D. C. 20001



29 appears. Plaintiffs are minors and citizens of the State of  
30 Alabama. and bring this action through their next friend

THE WHITE HOUSE

WASHINGTON

November 11, 1975

*Justice*

Dear Mr. Lee:

The attached summons and complaint in the matter of Remington v. Ford, D. W. D. Wisc., C.A. No. 75C504 was received by mail at the White House on November 6, 1975.

This is to request that the Department of Justice handle this matter on behalf of the President, and that you provide this office with copies of any materials that are filed in this regard. Should you require additional information or assistance, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,

*Philip W. Buchen*

Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D. C. 20530

Enclosure

NOV 12 1975

THE WHITE HOUSE  
WASHINGTON

*Justice*

November 18, 1975

Dear Mr. Lee:

The attached summons was received by mail in the matter of Boutin v. Ford, D. Vt., C. A. No. 75-241.

This is to request that the Department of Justice handle this matter on behalf of President Ford, and that you provide this office with copies of any pleadings that are filed in response to this summons. Should you require any assistance in this regard, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,

*Philip W. Buchen*

Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Department of Justice  
Washington, D. C. 20530

Attachment



Justice

THE WHITE HOUSE  
WASHINGTON

December 23, 1975

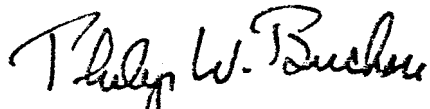
Dear Rex:

Enclosed is a copy of a summons and complaint in the matter of Schmalzried v. Ford, et al., D.D.C., C.A. No. 75-2065, which has been served upon defendants Cheney, Nessen and Shuman at their office on December 18. This summons provides for a return period of 60 days. A summons and complaint also was mailed by the plaintiff to these three defendants at their personal residences. In each case, this summons provides for a return period of 20 days. To date, there has been no attempt to serve President Ford with the summons and complaint.

The particular matter in controversy relates to actions taken by the defendants in the course of their government responsibilities. Accordingly, this is to request that the Department of Justice handle this matter on their behalf. Mr. Barry Roth of my staff is presently assembling all available information with respect to this matter. In the meantime, I would appreciate it if the appropriate member of your staff would contact Mr. Roth at 456-2397 to discuss the handling of this case. I have also provided Mr. Carl Goodman, General Counsel of the Civil Service Commission, with a copy of this complaint.

Your assistance is appreciated.

Sincerely,



Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Washington, D.C. 20530



THE WHITE HOUSE  
WASHINGTON

December 29, 1975

Dear Mr. Lee:

The enclosed summons and complaint in the matter of Jensen v. Ford, et al., D., Me., C.A. No. 75-174, S.D., was received by mail at the White House on December 19, 1975.

This is to request that the Department of Justice handle this matter on behalf of the President, and that this office be provided with copies of any materials that are filed in this regard. Should you require any assistance in this matter, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,

*Philip W. Buchen*  
Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D. C. 20530

Enclosures



Justice

THE WHITE HOUSE  
WASHINGTON

December 29, 1975

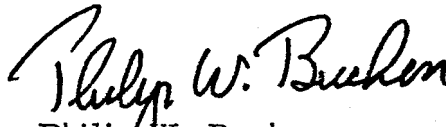
Dear Mr. Lee:

The attached complaint in the matter of Teutsch v. Ford, et al., S.D. Tex., C.A. No. 75-H-2033, was received by mail at the White House.

This is to request that the Department of Justice handle this matter on behalf of the President. Should you require additional information in this regard, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,



Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Department of Justice  
Washington, D. C. 20530

Attachment



THE WHITE HOUSE  
WASHINGTON

December 29, 1975

Dear Mr. Lee:

The enclosed summons and complaint in the matter of Mapco, Inc. v. Ford, et al., N.D. Okla., C.A. No. 75-C-573, was received by mail at the White House on December 27, 1975.

This is to request that the Department of Justice handle this matter on behalf of the President, and that this office be provided with copies of any materials that are filed in this regard. Should you require any assistance in this matter, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,

*Philip W. Buchen*  
Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Department of Justice  
Washington, D. C. 20530

Enclosures





*Mr. Lee*

THE WHITE HOUSE  
WASHINGTON

December 29, 1975

Dear Mr. Lee:

The enclosed summons and complaint in the matter of Sullivan, et al. v. Ford, et al., N.D. Ill., C.A. No. 75 C 3954, was received in the mail at the White House on December 19, 1975.

This is to request that the Department of Justice handle this matter on behalf of the President. Should you require additional information in this regard, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,

*Philip W. Buchen*

Philip W. Buchen  
Counsel to the President

The Honorable Rex E. Lee  
Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D. C. 20530

Enclosures



THE WHITE HOUSE

WASHINGTON

December 30, 1975

Dear Mr. Lee:

The enclosed summons and complaint in the matter of Zatko, et al., v. The Los Angeles Times, et al., S.D. Cal., C.A. No. 75-1083-E, was received in the mails at the White House on December 29, 1975.

This is to request that the Department of Justice handle this matter on behalf of the President. Should you require additional information in this regard, please contact Mr. Barry Roth of my staff.

Your assistance is appreciated.

Sincerely,



Philip W. Buchen  
Counsel to the President

The Honorable Rex Lee  
Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D. C. 20530



ASSISTANT ATTORNEY GENERAL  
CIVIL DIVISION

Department of Justice  
Washington, D.C. 20530

*Copy to  
Barry  
Borah*

25 FEB 1976

Mr. Philip W. Buchen  
Counsel to the President  
The White House  
Washington, D. C. 20501

Dear Mr. Buchen:

I am pleased to enclose herewith a copy of the Order  
of Dismissal dated February 2, 1976, entered in proceedings  
entitled James S. Racki v. President Gerald Ford, D. Mass.,  
Civil Action No. 75-4319-T.

Sincerely,

REX E. LEE  
Assistant Attorney General



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JAMES S. RACKI

V.

Civil Action  
No. 75-4319-T

PRESIDENT GERALD FORD

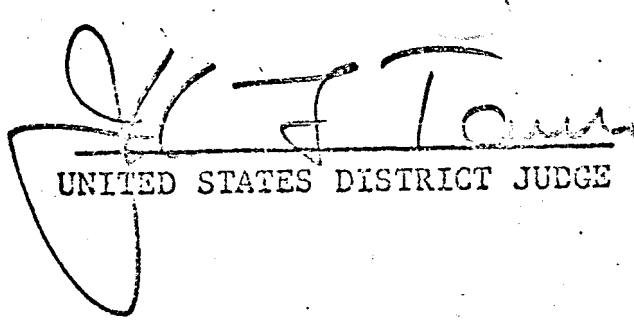
ORDER OF DISMISSAL

FEBRUARY 2, 1976

TAURO, D.J.

In accordance with the oral order of the Court  
entered this date,

IT IS ORDERED that this case be and it hereby is  
dismissed for failure of the Plaintiff or his personal  
representative to appear at the hearing scheduled for this date.

  
UNITED STATES DISTRICT JUDGE

THE WHITE HOUSE

WASHINGTON

June 11, 1976

MEMORANDUM FOR: ROBERT H. BORK  
SOLICITOR GENERAL

FROM: PHILIP BUCHEN *P.*

SUBJECT: Dellums v. Powell, D.D.C.;  
appeal of Richard M. Nixon

Following receipt of your memorandum of June 3rd and submission to the President, the President has approved your recommendation not to appear as amicus curiae in the Court of Appeals to argue the issue of executive privilege.

I would appreciate your having someone from your office call Jack Miller to indicate that you are not filing a brief, giving him such explanation as you think appropriate.

Copy sent to Barry

THE WHITE HOUSE  
WASHINGTON

June 10, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN  
FROM: JIM CONNOR JEC  
SUBJECT: Dellums v. Powell, D. D. C.  
Appeal of Richard M. Nixon

The President reviewed your memorandum of June 8 concerning the above case and approved the recommendation made by the Solicitor General and supported by yourself:

"Do not appear as amicus curiae in the court of appeals to argue the issue of executive privilege."

Please follow-up with appropriate action.

cc: Dick Cheney



*Justice* ✓

THE WHITE HOUSE  
WASHINGTON

Date 8/11

TO: *Erin*

FROM: BOBBIE GREENE KILBERG

- ☐ For Your Information
- ☐ For Your Comments/Recommendations
- ☒ Per Your Request
- ☐ Per Our Conversation

REMARKS:

100-100000-100000

THE WHITE HOUSE

WASHINGTON

September 22, 1976

MEMORANDUM FOR: PHIL BUCHEN  
FROM: BOBBIE GREENE KILBERG  
SUBJECT: Split Briefs

*Bbki*

FYI.

Deputy Attorney General Tyler wrote you on July 26 opposing the continuation of the "split brief procedure" under which Justice files a split brief delineating the separate views of Justice and Interior in cases of disagreement with Interior over litigation involving Indian trust matters. Tyler's letter and a response from Interior Solicitor Austin on August 6 are attached at Tab A for your information.

Attached at Tab B is a memo which I received yesterday from Mary Wagner, Tyler's Special Assistant. As that memo indicates, Justice and Interior have worked out an agreement on the tax case raising the immediate problem, the Critzer case, and Justice has withdrawn its request for a general review of the split brief policy. You should be aware that this issue generated considerable disagreement within Justice, and it became clear to me fairly early in the discussions that Scott Crampton, Assistant Attorney General, Tax Division, had drafted the Tyler memo without consulting Peter Taft, Assistant Attorney General, Land and Natural Resource Division, and that Tyler signed the memo without consulting Taft. Taft supports the use of the split brief when necessary. One of the results is the rather blistering Taft memo attached at Tab C.

Though Tyler has in effect withdrawn his letter to you, I would not be suprised to see the issue resurface at a later date, when Tyler resolves the internal debate within Justice.

Attachments





A



JUL 26 1976

Honorable Philip W. Buchen  
Counsel to the President  
The White House  
Washington, D. C. 20500

Re: Amy T. Critzer v. United States  
Ct. Cl. No. 134-75

Dear Mr. Buchen:

The above-captioned tax refund suit was recently tried before a trial judge of the Court of Claims, and we are now in the process of preparing our brief for submission to the Court. The basic question involved is whether income is taxable which plaintiff, a Cherokee Indian, received from the operation of a motel and a restaurant located on inherited property on the Eastern Cherokee Reservation in North Carolina.

The issue involved in this case has been given careful consideration by the Internal Revenue Service, as well as this Department, and we believe that the Government should file a brief stating its views that the income which plaintiff received has not been exempted from taxation by any treaty or statute. The problem which we bring before you for consideration is whether the brief which we file must also contain the views of the Department of the Interior which are contrary to ours.

This case is a sequel to a criminal tax prosecution captioned United States v. Amy T. Critzer, in which plaintiff was convicted of tax evasion as a result of having filed income tax returns understating her income from the



operation of the same motel and restaurant. When Mrs. Critzer appealed that conviction to the Court of Appeals for the Fourth Circuit, her attorneys communicated with the Department of the Interior which, in turn, insisted that our brief in the Court of Appeals should contain a statement of the views of that Department even though those views were diametrically opposed to ours and supported a reversal of the judgment of conviction rather than an affirmance. This insistence was the result of an understanding which had been reached between the Department of the Interior and the Department of Justice with respect to "litigation in which Indian natural resource trust interests may be challenged or threatened." That agreement was embodied in a letter from Attorney General John Mitchell to Mr. John D. Ehrlichman, Assistant to the President for Domestic Affairs, dated February 28, 1972. A copy of that letter is enclosed for your information.

It seems appropriate at this time to reopen the entire question of proper representation of the Government's interests in Indian litigation, apart from the narrower question as to whether this case involves "Indian natural resource trust interests." In our view, it is neither wise nor proper for the United States Government to submit a bifurcated brief (as we did in the first Critzer case) which carefully analyzes the issues and concludes that the income received by the Indian is taxable and which has appended to it several more pages stating the views of the Department of the Interior which are exactly the opposite. When the Critzer case came before the Court of Appeals, we received some criticism from the Court for our inability to resolve this matter within the Executive Branch. The Court reversed the conviction on the ground that if two agencies of the Government could not agree on whether the income was taxable, the Court was not going to affirm a criminal conviction arising out of the receipt of income by an Indian. Critzer v. United States, 498 F.2d 1160 (1974).





In our pending case in the Court of Claims, we believe that a brief should be filed stating a single view ~~as finally determined by this Department~~. If you agree, we shall proceed accordingly in this and future cases. We will continue, of course, to notify, ~~advise~~ and consult with the Department of Interior as to the position proposed to be taken by the Department of Justice in any case involving Indian trust interests. If you do not agree, we would like to meet with you and perhaps the Department of Interior to further explain our views on this matter.

Sincerely yours,

  
Harold R. Tyler, Jr.

Enclosure

cc: Honorable H. Gregory Austin  
Solicitor  
Department of the Interior  
1951 Constitution Avenue, N.W.  
Washington, D.C. 20240



FEB 23 1972

Mr. John D. Ehrlichman  
Assistant to the President  
for Domestic Affairs  
The White House  
Washington, D. C. 20500

Dear Mr. Ehrlichman:

----- This is in reply to your memorandum of February 15, 1972, addressed jointly to the Secretary of the Interior and me, concerning the representation of Indian natural resource trust interests pending the creation of an Indian Trust Counsel Authority as proposed by the President to the Congress.

An understanding has been reached with the Department of the Interior under which the several divisions of the Department of Justice which may have occasion to conduct litigation in which Indian natural resource trust interests may be challenged or threatened will advise the Solicitor of the Department of the Interior of the case title and number and the nature of the interests involved immediately as such interests become apparent. This will be done except where it is clear that the Department of the Interior will otherwise have timely knowledge of such information, because it referred the case to the Department of Justice or for other reasons. It has been agreed that cases involving condemnation of real property shall come within the exception. The Department of Justice will furnish to the Department of the Interior, thereafter, any further information concerning any such case that the Department of the Interior may request.

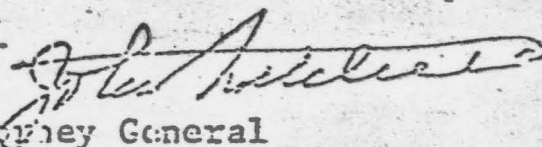


The Department of Justice will advise and consult with the Department of the Interior as to the position proposed to be taken by the Department of Justice. Upon timely request of the Secretary of the Interior, or of the Solicitor of the Department of the Interior, any brief filed by the Department of Justice in any case in which Indian natural resource trust interests may be challenged or threatened (other than Supreme Court briefs, which are referred to below) shall include supplementary matter setting forth the views of the Department of the Interior with respect to these interests.

-----The Department of Justice will make any adjustments in the foregoing procedures that appear necessary to carry out as fully as possible the spirit of the President's Indian Trust Counsel proposal.

Briefs for filing in the Supreme Court present a special problem, which is receiving further study, and are not subject to the above procedures.

Sincerely,



Attorney General







UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

AUG 6 1976

Honorable Philip W. Buchen  
Counsel to the President  
The White House  
Washington, D.C. 20500

Dear Mr. Buchen:

On July 26, Deputy Attorney General Tyler wrote to you asking to be relieved of the Department of Justice's agreement of February 28, 1972. This agreement requires the Justice Department to state separately the views of this Department, when requested to do so by the Solicitor, in cases where the position taken by Justice conflicts with rights of Indians to natural resources. This Department strongly opposes the proposal of the Justice Department.

The reasons for the 1972 agreement are as follows. The United States is obligated, on the one hand, to determine and advocate the public interest; in litigation, the Attorney General has this responsibility. On the other hand, pursuant to treaties and agreements with Indian tribes and acts of Congress, the United States serves as trustee for certain private property rights of Indian tribes and, in some instances, individual Indians. Our Department is principally charged with administration of those trust obligations; in litigation, this trust responsibility is also an obligation of the Department of Justice. See, e.g., 25 U.S.C. § 175.

On many occasions, the needs of a policy or program of a public agency conflict with those private property rights of Indians for which the United States has this unique trust obligation. This conflict-of-interest was recognized by President Nixon's 1970 Message to Congress on Indian Affairs:



"The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance both the national interest in the use of land and water rights and the private interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance in interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.

In order to correct this situation, I am calling on the Congress to establish an Indian Trust Counsel Authority to assure the independent legal representation for the Indians' natural resource rights . . . .





The Indian Trust Counsel Authority would be independent of the Departments of the Interior and Justice and would be expressly empowered to bring suit in the name of the United States in its trustee capacity. The United States would waive its sovereign immunity from suit in connection with litigation involving the Authority." (emphasis in original)

This 1970 Message, which has been universally lauded in the Indian community, remains Administration policy, and the Administration continues to support legislation to establish the Indian Trust Counsel Authority. I should mention that the Administrative Conference of the United States has also recognized the problems created by this conflict of interest within the Executive Branch and has recommended enactment of the Trust Counsel Bill in its Recommendation No. 33, adopted June 9, 1972. We view the split brief procedure as an essential interim mechanism to the protection of Indian trust property pending enactment of the Trust Counsel proposal.

The Deputy Attorney General's letter makes reference to one case, United States v. Critzer, where the Department of Justice filed a split brief and was subsequently unsuccessful in persuading the Court of Appeals for the Fourth Circuit to sustain a conviction of an Indian for tax fraud. In that case, this Department's portion of the brief argued that no federal income tax should be assessed for income derived by an Indian from trust property assigned to her on the Eastern Cherokee Reservation. As trustee of this Indian property, we believe that income derived for it is not subject to taxation; in this respect, we differ with the views of the Internal Revenue Service and Department of Justice. We regret the criticism to which the Court of Appeals subjected the Department of Justice. After Critzer was decided, representatives of this Department met with officials of the Justice Department's Tax Division to explore ways in which communication could be improved in tax cases. (In this regard, we emphasize that no official of the Justice Department or Internal



Revenue Service at any time prior to commencing the Critzer prosecution sought this Department's views on the taxability of this kind of income.) Some improvements in communications have been made, and in the two years since Critzer, we have not requested the filing of a split brief in several tax cases brought to our attention by the Department of Justice because, in our view, the position taken by our Justice Department in those cases was sound.

The split brief procedure was established initially as a result of a dispute between this Department and the Justice Department in Stevens v. Commissioner of Internal Revenue. Stevens involved whether income to an Indian of the Fort Belknap Reservation for lands allotted under a special allotment act and lands acquired by purchase, gift, and inheritance was subject to the Federal income tax. The position of this Department that income directly derived from the lands acquired as aboved described and held in trust pursuant to Act of Congress was exempt from Federal income tax was separately stated in the Government's brief. The Justice Department advocated the contrary view. The Interior Department's position was adopted by the Ninth Circuit Court of Appeals. See Stevens v. Commissioner of Internal Revenue, 452 F.2d 741 (9th Cir. 1971). The issues in Critzer were similar to those in Stevens--one difference being that they arose in Critzer in a criminal case. Disputes involving trust properties do not ordinarily arise in a criminal prosecution context. Even in tax cases (where the potential for crimes to become involved is somewhat higher) the dispute can be resolved in civil litigation without the risk of dismissal. As the Court of Appeals for the Fourth Circuit pointed out in Critzer, "the appropriate vehicle to decide this pioneering interpretation of tax liability is the civil procedure of administrative assessment . . . ." Mrs. Critzer subsequently filed a civil suit which was recently argued and pending submission of briefs in the Court of Claims.





In considering Deputy Attorney General Tyler's proposal, we have reviewed all the situations in which the split brief procedure has been utilized. Apart from Stevens and Critzer, it has been followed in four cases, none involving tax questions. Two of these cases involve litigation on behalf of the Corps of Engineers to take property which Indian tribes claim is protected by treaty from such a taking without specific congressional consent.\*/ In our separately submitted views, this Department argues that such consent was lacking. Neither case has been finally decided.

The two other cases involved conflicting views between our Department and Justice concerning the position to be taken in cases involving Indian trust resources before the Supreme Court. In Oneida Indian Nation v. County of Oneida, the United States Court of Appeals for the Second Circuit had dismissed under the "well pleaded complaint" rule an action brought by the Oneida Indian Nation claiming ownership of certain tracts of land. In a memorandum filed on the Oneida Nation's petition for writ of certiorari, the Solicitor General (while conceding the difficulty of the question) urged that the Supreme Court sustain the lower court and deny a writ of certiorari. The memorandum, however, also included the argument of this Department that a writ of certiorari should be granted. The Supreme court granted the writ and reversed the Second Circuit, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Northern Cheyenne Tribe v. Hollowbreast, \_\_\_ U.S.

\*/ These cases are: (1) Confederated Tribes of the Umatilla Reservation v. United States, Civil No. 74-991, U.S.D.C., Ore., which challenges construction of Catherine Creek Dam in Oregon because of its infringement on treaty fishing rights and (2) United States v. 210.43 Acres, now before the Court of Appeals for the Eighth Circuit, where the Corps seeks to condemn land on the Winnebago Reservation in Iowa and Nebraska.



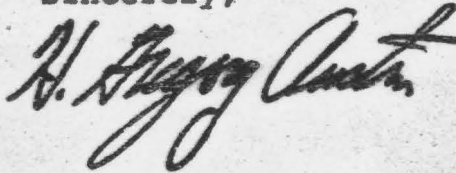
(1976), 44 U.S. Law Week 4655 concerned whether the tribe or individual allottees own the mineral estate beneath lands on the Northern Cheyenne Reservation. Following a decision by the Court of Appeals for the Ninth Circuit against the tribe, this Department favored the grant of certiorari and reversal of the decision. The Department of Justice decided not to support or oppose certiorari, but separately stated our views. The Court granted the petition, and reversed.

Thus, in every case where a split brief has been filed and the matter has been finally decided, the views of this Department as trustee for Indian property rights have been sustained. We are aware, of course, that in ordinary litigation, the Justice Department formulates the position of the United States and contrary views can be presented to the courts by opposing attorneys--here, for example, by attorneys for Indian tribes. But these attorneys represent the tribes, and not the United States as trustee. The Department of Justice represents agencies such as the Internal Revenue Service and the U.S. Army Corps of Engineers which are taking positions adverse to Indian private property rights for which the United States is a trustee. A private trustee would have to subordinate his own interests to those of his trust beneficiaries, a rule which--if applicable to the Department of Justice in these cases--would require support of any plausible Indian claim of right where a conflict is presented. Such a rule as applied to an Executive Department is, of course, impractical. However, fulfillment of the trust responsibilities of the United States to Indians in these cases at least requires that our Department's position be separately presented to the courts, and that the Department of Justice openly acknowledge the existence of its conflict-of-interest and advise the court both of the views of the United States as advocate for the public interest and the views of the United States as fiduciary for Indian trust property. The split brief procedure accomplishes this desirable result.



As the record of its use shows--the positions advocated by this Department in all cases having been judicially sustained--~~the procedure has been employed with extreme~~ circumspection and we expect that great care would be exercised in any future use. The split brief procedure is an integral part of the policy of this Administration toward increasingly vigorous protection of Indian trust property rights, and we strongly urge that it be continued. We would be glad to discuss our views further with you.

Sincerely,

A handwritten signature in dark ink, appearing to read "H. Gregory Austin". The signature is fluid and cursive, with the first name "H." and last name "Austin" being more distinct than the middle name "Gregory".

H. Gregory Austin  
Solicitor





B

UNITED STATES GOVERNMENT

# Memorandum

TO : Bobbie Greene Kilberg  
Associate Counsel

FROM : Mary E. Wagner *NEW*  
Special Assistant to the  
Deputy Attorney General

SUBJECT: Split Briefs

DATE: September 20, 1976

Attached is a suggested paragraph for use in responding to correspondence you have received on the above issue. The Department of Justice welcomed the opportunity to review the split brief procedure with you. Since our meeting, the Department's Tax Division has met with appropriate representatives of the Department of Interior to work out the particular problems raised by the Critzer litigation, which prompted the Deputy Attorney General's request for review. At this time, we seek no further review of the split brief policy.

Attachment

cc: Bradley H. Patterson, Jr.



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

September 20, 1976

. A meeting was held recently in our office to discuss the Department of Justice request for a review of the policy embodied in the 1972 Agreement. Subsequent to that meeting, representatives of the Departments of Justice and Interior met to see if they could reach a mutually acceptable procedure by which Interior's Indian trust responsibilities can be presented in court. As a result of those meetings, the Department of Justice has informed me that at present it does not desire any further review of the 1972 Agreement, which remains in effect.





TO : Scott P. Crampton, AAG  
Tax Division

DATE: September 10, 1961

FROM : Peter R. Taft, AAG  
Land and Natural Resources Division

SUBJECT: Split Briefs

Attached is a letter from the National Tribal Chairman's Association and another one from the National Congress of American Indians which give you some idea of the trouble stirred up by the Deputy's letter to Buchen seeking to abandon split briefs.

Whereas the predicament may appear anomalous to you, it is an ordinary fact of life for our Division. The problem is that the United States appears in two separate capacities, one a governmental capacity, and the other as trustee for Indian tribes. These two capacities are often in conflict. However, the mere assertion of a major governmental interest or more persuasive legal argument on behalf of the governmental interest has never been an excuse to abandon the trust responsibility.

Usually if the Federal agency is sensitive to the Indian problem, it is possible to either avoid or minimize the taking of conflicting positions in court. However where the conflict is inevitable, some means must be found to satisfy the trustee's responsibility. Generally, we have been able to devise such procedures depending upon the particular facts of each case without totally jeopardizing the legal position of the United States in its sovereign capacity. I would suggest that when the problem arises in the future in the Tax field, that either Myles Flint, our Indian Resources Section Chief, or Ed Clark, our Appellate Section Chief, could give helpful advice. However, it is equally important in our experience that the involve federal agency, such as the IRS, accept the fact that they have a serious problem on their hands when major Indian interests are involved, and avoid attempting to steamroller their viewpoint.

cc: Harold R. Tyler, Jr.  
Deputy Attorney General



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