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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 24, 2003

MEMORANDUM FOR THE ATTORNEY GENERAL

From:  Theodore B. Olson
Solicitor General

Subject: Weekly Report

A. NEXT WEEK

- **Office of Solicitor General to Present Argument in Section 1983 Case:** On March 31, the Department will present argument as *amicus curiae* supporting petitioner in part and respondent in part in *Inyo County, California v. Paiute-Shoshone Indians*. The Department will argue that neither an Indian Tribe nor a corporation established by the Tribe to operate a Class III gaming operation under the Indian Gaming Regulatory Act is a "person" entitled to sue under 42 U.S.C. 1983; (2) that state law enforcement officers lack authority to seize the records of a tribal corporation pursuant to a warrant issued by a state court in connection with an investigation of alleged state-law offenses committed by the corporation's employees; and (3) that the state law enforcement officers who executed the search are entitled to qualified immunity.
- **Office of the Solicitor General to Present Argument in Statute of Limitations Case:** On March 31, the Department will present argument as *amicus curiae* supporting the respondent in *Stogner v. California*. The questions presented are: (1) whether a law that permits the government to prosecute an offense for which the statute of limitations had expired before the law's enactment violates the Ex Post Facto Clause; and (2) whether such a statute violates the Due Process Clause. The Department will argue that such statutes are constitutional.
- **Solicitor General to Present Argument in University Admissions Cases:** On April 1, the Solicitor General will present argument as *amicus curiae* supporting petitioners in *Grutter v. Bollinger* and *Gratz v. Bollinger*. The questions presented are: whether the admissions processes of (i) the

University of Michigan's Law School (in *Grutter*) and (ii) its undergraduate college (in *Gratz*) violate the Equal Protection Clause of the Fourteenth Amendment because they consider and assign great weight to the race of applicants. The Department will argue that the two schools' admissions processes violate the Equal Protection Clause.

- **Office of Solicitor General to Present Argument in Removal Case:** On April 2, the Department will present argument as *amicus curiae* supporting respondent in *Breuer v. Jim's Concrete of Brevard*. The federal removal statute, 28 U.S.C. 1441(a), provides that "[e]xcept as otherwise expressly provided by Act of Congress," any action in state court of which the federal district courts also have jurisdiction may be removed to federal district court. The Fair Labor Standards Act of 1938, in 29 U.S.C. 216(b), provides that an action to recover liability under the Act "may be maintained against any employer * * * in any Federal or State court of competent jurisdiction by any one or more employees." The question presented is whether an action filed in state court under 29 U.S.C. 216(b) is subject to removal to federal court under 28 U.S.C. 1441(a). The Department will argue that such actions are removable to federal court.

- **Office of the Solicitor General to Present Argument in Trademark Case:** On April 2, the Department will present argument as *amicus curiae* supporting petitioner in *Dastar v. Twentieth Century Fox Film Corp.* The questions presented are: (i) whether Section 43(a)(1) of the Lanham Act, 15 U.S.C. 1125(a)(1), protects creative works from uncredited copying; and (ii) whether Section 35(a) of the Lanham Act, 15 U.S.C. 1117(a), permits the award of twice the defendant's profits for deterrent purposes. The Department will address the first question and argue that the Lanham Act, which is the primary federal trademark law, does not protect creative works from copying, whether or not credited; and that such protection is properly granted only by copyright or patent law.

B. THIS WEEK

- **Supreme Court Invites Office of Solicitor General to Express Views of United States in ERISA Case:** On March 24, the Supreme Court invited the Department to express its views on the petition for certiorari in *Central Laborers' Pension Fund v. Heinz*. ERISA's "anti-cutback" rule, 29 U.S.C. 1054(g), generally prohibits any pension plan amendment which has the effect of eliminating or reducing a participant's early retirement benefit or a retirement-type subsidy with respect to benefits attributable to service before the amendment. The question presented is whether a "suspension" of early retirement benefits pursuant to a multi-employer pension plan amendment is an "elimination" or a "reduction" of benefits prohibited by ERISA's anti-cutback rule.

- **Office of the Solicitor General Presents Argument in Separation of Powers Case:** On March 24, the Department presented argument as respondent in *Nguyen v. United States*. The question presented is whether in reviewing a conviction imposed by a territorial court, a panel of the Court of Appeals for the Ninth Circuit may include a judge appointed to a territorial court without the

tenure and salary protections of Article III, and whether the petitioners may raise the question for the first time before the Supreme Court. The Department argued that petitioners had no constitutional right to an Article III tribunal, and that they forfeited any right they might have had by not raising it before the court of appeals.

- **Office of the Solicitor General to Presents Argument in Capital Case:** On March 24, the Department presented argument as *amicus curiae* supporting the respondent in *Wiggins v. Smith*. The Department addressed the question whether defense counsel rendered ineffective assistance under the Sixth Amendment when counsel elected not to conduct additional investigation of petitioner's background and not to present possibly mitigating evidence of his background at his capital sentencing after determining that the evidence could undercut counsel's strategy of creating doubt that petitioner had actually killed the victim. The Department argued that counsel did not render ineffective assistance.

- **Office of Solicitor General to Present Argument in Federal Election Campaign Act Case:** On March 25, the Department will present argument as petitioner in *FEC v. Beaumont*. The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy. The Department will argue that Section 441b is constitutional as applied.

- **Office of Solicitor General to Present Argument in Prison Visitation Case:** On March 26, the Department will present argument as *amicus curiae* supporting petitioners in *Overton v. Bazzetta*. The questions presented are: (i) whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments; (ii) whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests; and (iii) whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment. The Department will argue that prisoners have no constitutionally protected right to non-contact visitation and that if such a right exists Michigan's restrictions on non-contact visitation do not violate it.

C. LAST WEEK

- **Office of Solicitor General Filed Petition for Certiorari in Partnership Tax Case:** On March 20, the Department filed a petition for certiorari in *United States v. Galletti*. The question presented is whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership

against each of the partners directly. The petition seeks review of a decision of a panel of the Ninth Circuit Court of Appeals holding that such assessments are required:

• **Office of Solicitor General Filed Petition for Certiorari in Telecommunications Case:**

On March 20, the Department filed a petition for certiorari in *Federal Communications Commission v. Missouri Municipal League*. The question presented is whether 47 U.S.C. 253(a), which provides that "[n]o State * * * regulation * * * may prohibit * * * the ability of any entity to provide any interstate or intrastate telecommunications service," preempts a state law prohibiting political subdivisions of the State from offering telecommunications service to the public. The petition seeks review of a decision of a panel of the Eighth Circuit Court of Appeals holding that the federal statute preempted the State law.



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