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LAWYERING FOR THE NATIONAL PARK SERVICE

GINA GUY*

I. ORGANIZATIONAL SETTING

The Office of the Solicitor, or General Counsel, of the Department of the Interior, provides "in-house" legal services to all the constituent bureaus of the Department, including the National Park Service (NPS), which nearly everyone has heard of, while public awareness of the Department itself is quite limited. Established on March 3, 1849, Interior is the fifth-oldest cabinet department.

The Solicitor is a Presidential appointee and the third-ranking official in the Department after the Secretary and the Deputy Secretary. Attorneys specializing in NPS legal issues are located in Washington, D.C. and various locations within the seven Solicitor's Office Regions. Since 1946, the Solicitor has been charged by statute¹ with responsibility for all the legal work in the Department, and neither the NPS nor other bureaus may employ lawyers in legal positions. The legal work in the Department continues to grow in volume and complexity without equivalent increases in staffing or funding. Sometimes NPS managers feel short-changed because of inadequate legal resources to assist them.

The NPS is a large (about 20,000 employees) and diverse organization operating in all 50 states, the Virgin Islands, the Commonwealth of Puerto Rico, and the Pacific Trust Territories, and, in an advisory capacity, in various foreign countries. The sheer size and diversity of the workforce mean that the Office of the Solicitor must be prepared to provide advice in labor law and increasingly, in all areas of employment discrimination law. It also has a sizeable budget each fiscal year for contracting for the construction of visitor facilities and infrastructure projects, which generates the need for expertise in federal procurement law counseling and, sometimes, litigation in which millions of dollars are at stake.

Attorneys often spend their entire careers in the Office of the Solicitor, and develop highly specialized legal knowledge. In the NPS, there is a fair amount of mobility throughout the country, which results in turnover of managers at nearly all levels. Most attorneys have the most significant attorney-client relationships with park superintendents and their immediate staffs, fol-

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1. 43 U.S.C. § 1455.

lowed by Washington office managers and staff of the seven geographic Regions. The turnover rate requires some adjustment on both sides, as the stationary lawyer may have related in a particular way with the prior manager, while the new manager may have done the same with a particular attorney. Decisions often have to be made quickly, and by telephone or e-mail between people who have never met each other in person. The distance between lawyer and client can make it very difficult for a park manager to identify a legal problem or for the lawyer to interact sufficiently with clients. For example, counsel for Glacier National Park is in Billings, for Everglades in Atlanta, for Grand Canyon in San Francisco, for Big Bend in Santa Fe, for Yellowstone and the Gateway Arch (St. Louis) in Denver.

Many NPS properties are located in remote and thinly-populated areas. Employee housing is sometimes substandard, and resources for families limited. Interaction with the local community can present particular problems in these situations, such as pressure to provide improved, but perhaps more damaging access or to grant special use permits which may be questionable from a resource protection perspective. Even in metropolitan areas, the NPS staff may be the only federal employees many people in the area deal with on a regular basis. In most cases, relationships are cordial, but park staff must often walk a fine line between meeting park needs and local interests. In some cases long-time NPS employees develop close family or personal connections with the community, which can result in conflict-of-interest situations in procurement or land acquisition and even careless talk that can prejudice law enforcement operations. In a few places NPS contributes much of the funding for the local school district, which can be the source of numerous legal problems as well as disagreements between NPS parents and the community about curriculum or how the schools should be managed. Legal problems with local law enforcement and social service agencies often need to be worked through, particularly in parks such as Yellowstone in which jurisdiction is exclusively federal concerning such questions as jurisdiction over juvenile offenders and child protection proceedings. Geographic proximity, human relationships, and genuine institutional efforts to be responsive to local needs mean that the NPS may, unwittingly and after having acted in total good faith over time, find itself in a situation that may suddenly require decisive, and perhaps unpopular legal action. Our attorneys must be prepared to analyze the application of the Federal Advisory Committee Act with respect to efforts by NPS to involve non-federal entities in management and planning decisions.

II. BROAD AUTHORITIES

All units of the National Park System, whether called national parks, national monuments, national recreation areas, or otherwise, are subject to the broad mandate of the National Park System's Organic Act of 1916² which requires a high level of deference to the preservation of natural values.

Each park unit was created by Congress through enabling legislation or

2. 16 U.S.C. § 1 (1994).

Executive Order, which may specifically provide for uses the NPS would otherwise prohibit, such as hunting or livestock grazing. All NPS discretionary decisions that are not categorically excluded require compliance with the National Environmental Policy Act, which means attorneys must have expertise in that area.

The Antiquities Act of 1906³ authorized the President to create, by public proclamation (Executive Order) historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest "that are situated upon the lands owned or controlled by the Government of the United States." The statute also requires that the reservation be confined "to the smallest area compatible with the proper care and management of the objects to be protected." The Antiquities Act was passed ten years before the Park Service was created, and only the passage of the Organic Act cited above vested management authority for "national parks, monuments, and reservations" in the NPS. Once the boundaries for a monument have been established, land use and management decision tend not to differ significantly from those for parks because the Antiquities Act charges the NPS with "proper care" and the protections afforded by the Organic Act also apply. On occasion, such as the quantification of reserved water rights or expansion of a road easement, questions have arisen about the purposes for which a monument was established and what is needed to effectuate the intention of the Executive Order.

III. LEGAL SERVICES PROVIDED

The types of legal services to NPS can be broadly categorized as dealing with:

- (1) organizational and institutional support (employment, contracting, land and water acquisition and management, admiralty law, environmental compliance and environmental quality), and
- (2) external affairs and visitor-generated issues.

Organizational/Internal Issues. Lands become part of the NPS system in three major ways: (1) reservation from the public domain by Congress or by Executive Order, (2) acquisition by purchase (including exchanges) or (3) by condemnation, all of which require varying degrees of legal assistance. Easements and rights-of-way are also routine, both as to NPS as grantor and grantee. In parks within which there are significant amounts of lands held privately (inholdings), these issues can become quite complex, and may present many questions about the nature and extent of valid existing rights. Another variation occurs when lands are owned by a non-federal entity and managed for park purposes, such as the trust holding much of the land in the newly-established Tall Grass Prairie National Preserve in Kansas. Water rights in the West may be either reserved or appropriative; both can require intense legal work at times by lawyers familiar with the needs of the particular park and the water law system of the state in which the park is located.

3. 16 U.S.C. § 431 (1994).

Historic preservation law issues arise from time to time, both because the NPS must comply with the National Historic Preservation Act, and also because the "keeper" of the National Register of Historic Places is an NPS employee, who acts on the findings of each state's Historic Preservation Officer with respect to National Register listings. All too frequently, other federal agencies and the public at large are simply not aware of the requirements of Section 106 of the National Historic Preservation Act, and legal advice must be furnished quickly and informally.

Environmental compliance laws in which the Congress has waived sovereign immunity for federal agencies and delegated enforcement authority to states have generated considerable legal work and sometimes, confusion, among both state and federal agencies, including the NPS, in such matters as Federal Water Pollution Control Act (Clean Water Act) permits, landfills, and underground storage tank permitting. The NPS also owns some sites which are subject to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) on which it is seeking to conduct or participate in the remediation. The Office of the Solicitor also provides assistance to the NPS concerning air quality issues and hydropower licensing actions by the Federal Energy Regulatory Commission.

External/Visitor-Service Issues

Controversy abounds relative to the duty of the NPS to preserve the areas charged to its care vis-a-vis the duty to make those areas accessible to the increasing numbers of visitors, including access for those with disabilities. As more than one observer has noted, "Americans are loving their parks to death". Some of the most significant visitor-generated legal issues arise from the fact that the National Park Service includes both rangers who hold federal law enforcement commissions and the Park Police. Several attorneys provide essentially full-time support to the Park Police, principally in the National Capital Region, and other attorneys who advise NPS on law enforcement matters must work closely with the Department of Justice and local law enforcement authorities. Major, often violent crimes occur every day in national parks, and some areas, because of geography and market proximity, are the location of choice for drug shipments and sales. Wildlife poaching is also a serious problem in some parks.

Each year visitors to the national parks suffer a variety of personal injuries and fatal accidents. Congress, in enacting the Federal Tort Claims Act, has partially waived sovereign immunity for the negligence of federal employees under certain circumstances. Tort claims (a jurisdictional prerequisite to suit) have been received (and denied) in many cases in which the claimant seemed to have alleged that the United States was an insurer of visitor safety, especially in claims involving injuries from wildlife (bears, moose, and bison), climbing accidents, rescue operations, and falls off clearly visible cliffs or into signed thermal areas. Sometimes the liability of United States is also affected if the state where the claim arose has enacted a type of recreational use statute which generally absolves a landowner from liability if the injured party has

not paid an entrance or use fee.

In recent years some parks have become the focal point for First Amendment cases involving freedom of speech and the free exercise of religion. The NPS has attempted to address the speech issues by allowing each park to designate a "free-speech" or designated area where individuals may speak, distribute leaflets or sell published materials. More recently, several groups have asserted a Constitutionally-protected right to sell message-bearing T-shirts, which has received mixed reviews from courts. The most noted cases have involved the Mall in Washington, D.C., which the NPS asserts would become a "flea market" if all groups wishing to sell T-shirts could do so at will. Some of cases involving T-shirt sales, speaking and leafleting, and even begging for alms also present free-exercise issues if the group claims that its religious beliefs require the conduct.

The final major group of legal issues relating to visitor use and presence in parks relate to concessions management and contracting. The activities of concessioners providing lodging, campgrounds, restaurants, shopping, and recreational activities such as canoeing, rafting, scenic flights and riding are governed by the Concessions Policy Act. The policy of the Congress is that all development for visitor services "shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area. . . and that are consistent to the highest practicable degree with the preservation and conservation of the areas."⁴ The concession businesses often involve very large operating budgets with hundreds of employees. The negotiation and review of concession contracts consumes a significant amount of attorney time each year both in Washington and elsewhere. The concession operators are always represented by counsel, and this work requires expertise in contract law, accounting practices, and sometimes, knowledge of business practices in the hospitality industry. The review and renewal of concession contracts sometimes falls behind schedule, and attorneys can be faced with convincing both the client NPS manager and the concessioner that changes may be needed either to address changed circumstances or to assure contract compliance over time.

CONCLUSION

The legal issues confronted by attorneys in the Solicitor's office dealing with the National Park Service are unfailingly interesting. Some are fleeting; others are of monumental and lasting importance, such as the transfer of the Presidio of San Francisco from the Army to the NPS as part of the Golden Gate National Recreation Area or the multilateral effort to restore the Everglades after decades of dewatering and contamination from agricultural runoff. Our concerns are twofold: first, to be as effective and responsive as possible in our day-to-day legal tasks, and secondly, in spite of distance and resource limitations, to assist the NPS in all appropriate ways in its efforts to arrive at

4. 16 U.S.C. § 20 (1994).

often difficult and controversial decisions about how these precious natural, historic and cultural resources should be managed for the present and conserved for posterity.

EDITOR'S NOTE

The *Denver University Law Review's* 1997 Symposium Conference, entitled "Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law," brought together doctors, law professors, philosophers, and attorneys. The Conference, the culmination of several months of weekly group discussions, consisted of two days of panel presentations and debate in an informal setting. This format permits the free exchange of ideas between professionals and academics, across disciplines and often across ideological gulfs.

Past Symposia have concentrated upon new trends in the law. The topic of coercion, at the intersection of law, psychology and philosophy, is our first truly interdisciplinary topic. It is therefore appropriate that this issue open with a paper that attempts to identify and resolve the problems raised by interdisciplinary efforts. Professor Catherine Kemp writes:

subject matters, controversies, and strands of theoretical development located in one discipline often appear out of context to scholars trained in another. . . . [D]egrees and types of abstraction form a notable instance of this phenomenon, especially for interdisciplinary work in law and philosophy.¹

Thus forewarned, we proceed to the remarks of Professor Alan Wertheimer, a philosopher whose books *Coercion* and *Exploitation* were central to this year's Symposium.

Our first topic centers on coercive and exploitative bargaining. Professor John Lawrence Hill offers an overview and critical analysis of Professor Wertheimer's moralized theory of coercion. Professor Penelope Bryan's commentary on the coercion of women in divorce settlement negotiations discusses concrete examples of systemic coercion. David Kaplan and Lisa Dixon provide the practitioner's viewpoint on coerced waiver and consent in the context of criminal procedure.

Professor Albert Alschuler opens the section on coerced confessions, arguing that in order to determine whether a confession is "voluntary," one need look no further than the conduct of the government employees who extracted that confession. As the exchange that follows indicates, not all commentators are prepared to accept that analysis. An unexpected benefit of our Symposium format is that it permits discussions that begin at the Conference to continue in print. Professors Richard Leo and Richard Ofshe resume their dialogue on coerced confessions with Professor Paul Cassell in our pages. We hope you will find their spirited exchange informative.

Dr. Robert Miller and Professor Bruce Winick debate involuntary commit-

1. Catherine Kemp, *The Uses of Abstraction: Remarks on Interdisciplinary Efforts in Law and Philosophy*, 74 DENV. U. L. REV. 877, 877-78 (1997).

ment in the next section. Dr. Miller's novel analysis examines both internal and external coercion as it relates to all aspects of the mental health care profession. Professor Winick examines the interplay of legal rules and therapeutic values.

We close the issue with a series of trans-substantive themes. Professor Wertheimer discusses exploitation and commercial surrogacy. Professor Ian Ayres relates a fascinating account of coercion, extortion, and judicial corruption in Cook County, Illinois. The paradox described by Professor Jennifer Brown challenges a fundamental assumption of the foregoing papers: that choice itself is always preferable. Finally, Professor Nancy Ehrenreich treats the analytical approach employed by Professor Wertheimer as it reflects the interaction between theoretical perspectives in legal academia. She issues a warning against the formalist analysis of sociolegal issues.

The faculty of the University of Denver College of Law, especially Professors David Barnes and Roberto Corrada, Nancy Ehrenreich, and Martha Ertman, were generous with their time. This Symposium would not have been possible without their participation and guidance. Dean Dennis Lynch, a mainstay of the Symposium from its inception, has provided invaluable assistance over the last three years. We are indebted, as ever, to the Hughes Research and Development Fund for their sponsorship of the Symposium Conference. Dean Robert Yegge provided the unusual and enjoyable forum for the Conference's second day, high in the Rocky Mountains atop Yegge Peak.

With this issue, Volume 74 of the *Denver University Law Review* draws to a close. It has been a pleasure editing the most thematically varied (and largest) volume in recent memory. Chad Henderson, Editor-in-Chief of Volume 75 of the *Review*, has been indispensable to the production of this Symposium issue. We leave the *Review* in his capable hands and wish him the best of luck.

S. Tarek Younes
Editor-in-Chief