14449-1

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Smithsonian Institution Use of Appropriated Funds for Legal Representation of Officers and Employees

File: B-241970.2

Date: July 29, 1991

DIGEST

Appropriated funds of the Smithsonian Institution are not available to provide litigative services to federal employees unless the Attorney General determines that representation of the employee would be in the interest of the United States but cannot be provided by the Justice Department. Based on the record submitted to this Office, we conclude that the Smithsonian should not have used appropriations to finance the legal defense of a Department of the Interior employee detailed to the Smithsonian who became the subject of multiple federal civil and criminal investigations, and should not spend any additional appropriated funds for this purpose unless the Justice Department, based on evidence not made available to us, certifies that representing Dr. Mitchell is in the government's interest.

DECISION

In a letter dated January 9, 1991, the Under Secretary of the Smithsonian Institution asked this Office to review the Smithsonian's use of appropriated funds to pay a private lawyer to defend Dr. Richard Mitchell (a Department of the Interior employee detailed to the Smithsonian) against charges stemming from federal civil and criminal investigations. Among other things, Dr. Mitchell is alleged to have facilitated violations of the U.S. Endangered Species Act, 16 U.S.C. § 1531 (1988), and engaged in unlawful financial arrangements in conflict with his official responsibilities. As explained below, we conclude that the Smithsonian should not have used appropriated funds to pay Dr. Mitchell's attorney, and should spend no further federal funds for Dr. Mitchell's attorney fees unless the Attorney General certifies that representing Dr. Mitchell is in the government's interest.

BACKGROUND

Dr. Richard Mitchell is employed as a staff zoologist by the Department of the Interior's (DOI) Fish and Wildlife Service. His responsibilities there involve him in the implementation and enforcement of the Endangered Species Act and other similar laws. Over the past decade, Dr. Mitchell has traveled extensively in the People's Republic of China (China) and

Pakistan in the pursuit of his interests in scientific research and big-game hunting. In 1984, he and his wife (and at least one other person) established the American Ecological Union (AEU), a non-profit organization dedicated to ecological research and welfare.

In 1987, at the request of Dr. Mitchell and Smithsonian staff, the DOI detailed Dr. Mitchell to the Smithsonian for the first of two consecutive 1-year periods. The Smithsonian hoped that his contacts with the Chinese and Pakistani governments would facilitate increased Smithsonian research efforts within those countries. While on detail to the Smithsonian, Dr. Mitchell was allowed broad discretion to determine his responsibilities and how to carry them out. Among other things, Dr. Mitchell was not required to obtain approval for his activities or travel on behalf of the Smithsonian, and he alone determined which times and activities would be counted towards Smithsonian business, as opposed to his own affairs and interests.

In the spring of 1988, Dr. Mitchell traveled to China, Pakistan, and Nepal for approximately three weeks. Although he had an informal agreement with his Smithsonian supervisor to attempt to accomplish three tasks for the Smithsonian while in China, the record does not specify that he took this trip at the direction of the Smithsonian, or even primarily to benefit the Smithsonian. Dr. Mitchell did not use Smithsonian funds to pay for any part of the trip and did not request or receive Smithsonian travel orders. He advised DOI that he would be on annual leave during the trip. In advance of the trip, he initiated and completed arrangements with officials of the Chinese government and a group of private hunters under which he joined a big-game hunt in the Gansu Province of China, and he made arrangements to travel to Pakistan and Nepal after the hunt to pursue other interests. Dr. Mitchell did not mention the hunt to Smithsonian officials before he left.

It was the big-game hunt in China and its consequences which triggered the present controversy. While the details of that trip are subject to debate, it is undisputed that during it, some "argali" mountain sheep were shot. The hunters took the sheep hides and horns as "trophies," and Dr. Mitchell took some tissue samples from the sheep.

When the hunters returned to the United States, the Customs Service and DOI's Fish and Wildlife Service impounded the argali trophies and charged the hunters with violations of the Endangered Species Act. See 16 U.S.C. § 1538. Dr. Mitchell's tissue samples were not impounded, because Customs and DOI were not aware of them. Since he was going to Pakistan after the hunt, Dr. Mitchell had asked one of the hunters to carry

the tissue samples into the United States and mail them to a professor in Utah.1/ The hunter did this, but apparently failed to declare the samples on the appropriate forms.

Dr. Mitchell's presence on the hunt brought him to the attention of the investigators looking into the taking of the argali sheep. As more of his activities came to light, the circle of investigators and the scope of the investigations widened substantially. Although the extent of these investigations is presently obscured by the cloak of grand jury secrecy, they appear to focus on allegations that he facilitated violations of the Endangered Species Act, had a personal financial interest in and made illegal use of the AEU, and engaged in outside employment which improperly capitalized on his official position and duties.

Upon learning that he was under investigation, Dr. Mitchell asked the Smithsonian to pay a private lawyer to defend him. The Smithsonian agreed, based on a resolution passed by the Board of Regents which generally obligates the Smithsonian to indemnify officers, employees, and others who incur legal expenses while acting on its behalf. The Smithsonian considers these payments to be "advances" that Dr. Mitchell will have to repay after these investigations are concluded, unless the Board finds at that time that indemnification is appropriate. Under the agreement with Dr. Mitchell, his lawyer's bills are sent directly to the Smithsonian for approval by its General Counsel, and paid directly to the attorney. To date, the Smithsonian has paid $284,004.50, and is withholding payment on additional invoices which total approximately $99,000. The attorney continues to represent Dr. Mitchell and bill the Smithsonian. Thus far, the Smithsonian has used its appropriations, rather than its nonappropriated trust fund resources, to pay these bills.

The Smithsonian's Inspector General questions these arrangements. He claims that Dr. Mitchell's activities in this matter were not within the scope of his employment, and that the Smithsonian's appropriations are not available for this purpose. Since this Office is authorized to settle and adjust

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1/ The professor to whom the samples were sent later published an article in The Journal of Heredity, vol. 81(3), p. 227 (1990), on the evolution of argali sheep. He shared authorship of the article with Dr. Mitchell and another associate.

the accounts of the Smithsonian,2/ the Smithsonian's Under Secretary requested our decision on the matter.

DISCUSSION

It is well-established that federal funds may not be used to reimburse a government employee for legal fees incurred in connection with matters of personal, rather than official, interest. E.g., 57 Comp. Gen. 444, 446 (1978); 55 Comp. Gen. 1418, 1419 (1976). However, it is also well-established that where officers or employees of the United States are involved in litigation on account of the discharge of their official duties, the government should bear the costs of representing them in such litigation. E.g., 58 Comp. Gen. 613, 615-16 (1979). Since 1870, the statutes governing this area have entrusted to the Justice Department nearly exclusive authority to perform or provide litigative services to government agencies and their employees.3/ Act of June 22, 1870, 41st Cong., 2d Sess. §§ 5, 14-17, 16 Stat. 162, codified at 28 U.S.C. §§ 515-519, 543, 547; 5 U.S.C. § 3106 (1988). They generally preclude the use of appropriated funds, other than those appropriated for the Justice Department, to employ or hire attorneys to perform such services.4/ 5 U.S.C. § 3106. Cf., e.g., 53 Comp. Gen. 301, 302-03 (1973). This prohibition applies to the Smithsonian when it uses appropriated funds. Cf., e.g., Perry v. United States, 28 Ct. Cl. 483, 492-493 (1893); 45 Comp. Gen. 685, 688 (1966); B-154459-O.M., Dec. 18, 1979. Justice Department regulations implementing these statutes authorize representation if the employee's actions reasonably appear to have been performed within the scope of his duties and if representation would be in the interests of the United States. 28 C.F.R. §§ 50.15, 50.16 (1990), as amended by 55 Fed. Reg. 13129 (1990).

We have held that agencies may use their own appropriations if the evidence demonstrates that the employee was acting within the scope of his duties in a manner necessary to accomplish an agency function. A precondition, however, is that the Attor-

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2/ 31 U.S.C. §§ 3523, 3526 (1988), superceding 31 U.S.C. § 72 (1976) (eighth paragraph). Cf. H.R. Rep. No. 651, 97th Cong., 2d Sess. 293 (1982) (Table 2A).

3/ E.g., 13 Op. Att'y Gen. 580, 583 (1871).

4/ There are two exceptions to this rule, neither of which is applicable here: (1) where the agency is expressly authorized by law to represent itself, and (2) where there is or may be a conflict between coordinate branches of the government. See, respectively, 5 U.S.C. § 3106 and 53 Comp. Gen. 301, 305 (1973) (Administrative Office of the U.S. Courts).

ney General must have determined that official representation of the individual would otherwise be proper, but cannot be provided by the Justice Department (e.g., where he determines that representation is not an effective or efficient use of Justice's limited resources, or where Justice must avoid a potential conflict of interest). For example, in 55 Comp. Gen. 408, 412-13 (1979), the Small Business Administration's appropriations were available to pay an employee's private attorney, hired when the United States Attorney representing the employee became unavailable. The Justice Department withdrawal resulted not from a determination that the United States was no longer officially interested in the employee's defense, but that the Assistant U.S. Attorney assigned to the case had proved ineffective, and no other attorney could be assigned to the case. See also 58 Comp. Gen. 613, 616, 618 (1979); 53 Comp. Gen. 301, 305 (1973); B-127945, Apr. 5, 1979.

Our cases do not support and were not intended to allow agencies to pursue their own litigative policies. Instead, they recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General. Cf. 39 Comp. Gen. 643, 646-47 (1960). For this reason, an agency cannot justify the use of its appropriations where the Attorney General believes that representation of the employee would not be in the interests of the United States. This is particularly true where the services requested consist of defending a federal criminal investigation or prosecution, as opposed to defending a civil complaint brought by a state or private party. To allow the use of appropriated funds in instances such as this would seriously undermine the litigative posture of the Attorney General. It would also place this Office and the agency involved in the position of contradicting the clearly expressed intent of the Congress to centralize control of government litigation under the Attorney General, and to restrict the availability of appropriations in order to reinforce that policy.

Based on the submissions made to this Office by the Smithsonian, we have serious doubts that the Justice Department could properly conclude that the activities under investigation, including Dr. Mitchell's trip to China, were within the scope of Dr. Mitchell's duties, and, thus, that representation of Dr. Mitchell would be in the interest of the United States. The record includes substantial evidence to support the conclusion that Dr. Mitchell's activities were arranged primarily, if not wholly, to pursue personal business and research interests, and that any official Smithsonian business or interests served in the course of the trip were incidental, at best. The trip was not mandated or even requested by the Smithsonian. It was undertaken, according to Dr. Mitchell's

own certification, during a period of annual leave. The trip was pursued without the benefit of Smithsonian travel orders or Smithsonian funding; indeed, there is evidence to suggest that Dr. Mitchell's expenses may have been underwritten by the hunters. There is substantial evidence to support the conclusion that, in advance of the trip, Dr. Mitchell orchestrated the requests of the Chinese government and the hunters that he join the trip, and used AEU to channel cash donations from the hunters to Chinese authorities to facilitate the acquisition of hunting rights; and, there is evidence that he offered his personal services to the hunters (and was viewed by them) as a professionally retained scientific expert on endangered species and as a big-game hunting guide.

The benefits that the Smithsonian claims to have resulted from the activities under investigation appear illusory. For example, the tissue samples taken by Dr. Mitchell were never offered to the Smithsonian, and their use in the Heredity magazine article provided no clear benefit to the Smithsonian in particular. Neither has the Smithsonian offered any evidence to show that Dr. Mitchell's participation in the hunting trip directly or indirectly led to any additional Smithsonian research in China, or that he used AEU to raise funds for the Smithsonian during his detail.

The Smithsonian argues that its employees are always "on duty," and that Dr. Mitchell was under a constant obligation to take advantage of any and every opportunity that might redound to the Smithsonian's benefit, including during periods of annual leave. Even were we to accept this as true, it is irrelevant since there is no basis to conclude that Dr. Mitchell is being investigated for any act that significantly benefitted the Smithsonian. The fact that he may have attended to a couple of items of Smithsonian business while in China is also irrelevant, since those acts apparently occurred at places and times that were completely separate from and unconnected to the issues under investigation.

The Smithsonian did not seek or obtain a certification from the Justice Department that representation of Dr. Mitchell would be appropriate. Neither does it appear, based on this record, that such a certification could properly be made. Consequently, the Smithsonian should not have used its appropriations to pay Dr. Mitchell's attorney, and should

spend no additional federal funds for Dr. Mitchell's attorney fees unless and until the Attorney General has reviewed the matter and certifies, based on adequate additional evidence not made available to this Office, that the activities at issue here were within the scope of Dr. Mitchell's employment, and that representing Dr. Mitchell is in the interest of the United States.

for Milton J. Socolar
Comptroller General
of the United States