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COMMENDATIONS

Assistant United States Attorney JULIA BARASH, Central District of California, has been commended by Mr. Edgar N. Best, Special Agent in Charge, Federal Bureau of Investigation in Los Angeles, California, for the successful prosecution of United States v. Criswell dealing with a conspiracy which involved the interstate transportation of counterfeit securities.

Assistant United States Attorney MARK E. KALMANSOHN, Central District of California, has been commended by Mr. Edgar N. Best, Special Agent in Charge, Federal Bureau of Investigation in Los Angeles, California, for his outstanding work in the prosecution of the complex fraud case, United States v. Aguilar which led to a guilty plea by the subject, Aguilar.

Assistant United States Attorney LAYN R. PHILLIPS and former Assistant United States Attorney IRMA GONZALEZ, Central District of California, have been commended by Mr. Rolland N. Hughes, Special Agent in Charge, Drug Enforcement Administration in Los Angeles, California, for their thorough preparation and skillful presentation in the case of United States v. Murillo which resulted in a guilty verdict on an eight-count indictment charging drug and income tax offenses.

Assistant United States Attorney GAVIN SCOTTI, Eastern District of New York, has been commended by Mr. Bruce E. Jensen, Special Agent in Charge, Drug Enforcement Administration in the New York District Office, for his outstanding performance during the successful prosecutions of the United States v. Lauretano and United States v. Manolides cases which involved a complicated heroin scheme including seven Class I and II heroin dealers.

Assistant United States Attorney ABRAHAM Y. SKOFF, Eastern District of New York, has been commended by Mr. David Margolis, Chief of Organized Crime and Racketeering Section, Criminal Division, Department of Justice, for his fine work which resulted in judgment for the government and successful appeal in Nass v. Local 348 which represents a case of first impression under 29 U.S.C. 504 pertaining to disqualification of convicted union officials from positions of responsibility.

Special Attorney ALBERT WICKS, Philadelphia Strike Force, Department of Justice, has been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his successful efforts in United States v. Stanfa which has created a significant impact within a particular organized crime community.

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, DirectorPOINTS TO REMEMBERElectronic Surveillance (Title III) -
Title III Affidavits; Extension Orders

A Title III request, with necessary documentation, must be received by the Office of Enforcement Operations (Criminal Division) at least three full working days before final action is required. The period is needed to ensure proper review of the Title III materials as well as to allow the Office of Enforcement Operations time to prepare an action memorandum to the Assistant Attorney General and other documents. The three working days are computed as of the time the Title III package is received by the Office of Enforcement Operations, not as of the time the package is placed in the mail. In any case where an emergency situation may exist the three-day time limit is subject to waiver; but the Director or Associate Director of the Office of Enforcement Operations should be contacted by telephone in such situations and informed of the reasons requiring expeditious action.

Identity of Persons to be Overheard: Pursuant to 18 U.S.C. 2518 (1) (b) (iv), a Title III application must state "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Merely knowing a person's name, without having reason to believe that the person is involved in criminal activities and that he will engage in incriminating conversations, is not sufficient to require the person being named in the application and order. However, if a person is "known" within the meaning of the statute; i.e., if the probable cause information contained in the affidavit indicates that he is a violator whose communications are likely to be intercepted, he must be named in the application and order. Failure to name such persons may lead to suppression. See United States v. Donovan, 429 U.S. 413, 428 (1977), where the Supreme Court rejected the government's contention that the identification requirements of 18 U.S.C. 2518 apply only to the principal targets of the investigation. The Court held that the statute required that an individual be named in the application "if the government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." See also United States v. Martin, 599 F.2d 880, 884-886 (9th Cir. 1979).

Extensions of Intercept Orders: Recently, an extension of a Title III intercept order was obtained from a district court without the prosecutor having first obtained the necessary approval of the Attorney General or a specially designated Assistant Attorney General. The United States Attorneys' Manual instructions on the obtaining of extensions of intercept orders are quite clear. USAM 9-7.333 states, "[i]f the supervising attorney decides that [an] application for an extension is appropriate, he should obtain authorization from the Attorney General or specially designated assistant attorney general to apply for the extension exactly as if he were applying for an original order for an interception." See also United States v. Bynum, 513 F.2d 533 (2d Cir.), cert. denied, 423 U.S. 952 (1975). Failure to obtain necessary approval from the Department will result in the extension order being considered illegal with concomitant problems of illegally seized evidence, necessary segregation of tainted materials, etc. Thus, an application for an extension of an ongoing intercept order should not be filed with a court until the application has first been approved by the Department. Extension order applications are processed (as are original Title III applications) by the Office of Enforcement Operations.

(Criminal Division)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

FLRA v. PATCO, No. 81-2135 (D.C. Circuit October 27, 1981).
D.J. # not yet assigned.

PATCO: COURT OF APPEALS DENIES STAY PENDING
APPEAL PERMITTING FLRA'S ORDER REQUIRING THE
IMMEDIATE REVOCATION OF PATCO'S STATUS AS
AN EXCLUSIVE BARGAINING REPRESENTATIVE.

On October 22, 1981, two members of a divided Federal Labor Relations Authority panel joined in an order requiring the immediate revocation of PATCO's exclusive representative status based on its conduct of and refusal to abate an unlawful strike by federal employees. On the same day, the District of Columbia Circuit Court of Appeals awarded PATCO a temporary emergency stay of the revocation, and afforded the FLRA until Monday, October 26, to oppose PATCO's request for a stay throughout the pendency of the appeal. The FLRA is an independent agency which represents itself in these matters. We moved on behalf of the FAA to intervene in the appeal on October 26, and simultaneously filed a comprehensive memorandum in opposition to the stay. On October 27, the same panel issued a per curiam opinion dissolving the stay, and setting an expedited briefing schedule. Under the terms of the order our responding brief is due on November 16, and the case has been scheduled for a hearing on December 3 before a special emergency panel.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Jaffee v. United States, C.A. 3 No. 79-1543 (November 2, 1981).
D.J. #145-15-110.

FERES DOCTRINE: EN BANC THIRD CIRCUIT REJECTS
A SOLIDER'S CONSTITUTIONAL CLAIM FOR DAMAGES
AGAINST FELLOW SERVICEMEN AND AGAINST CIVILIAN
GOVERNMENT OFFICIALS WHERE THE SOLIDER'S
INJURY OCCURRED INCIDENT TO HIS MILITARY
SERVICE.

While in the Army in 1953, plaintiff Stanley Jaffee was present at an atmospheric nuclear weapons test in Nevada. He now has contracted cancer. He and his wife sued his former military and civilian superiors, claiming that they deliberately and unconstitutionally exposed him to excessive radiation, and were responsible for his current cancer condition. The district court dismissed the suit on the authority of Feres v. United States. On appeal, however, a panel of the Third Circuit, in an opinion by Judge Gibbons, ruled that individual constitutional damages suits within the military are permissible. On our petition, the Third Circuit subsequently agreed to rehear the case en banc. On rehearing we argued that the important policy concerns recognized in the Feres line of cases required recognition of an absolute immunity from suit where one soldier seeks damages from another for intra-military wrongs. We also argued that the need to insulate military decisionmaking and command authority from the inhibitions created by individual torts suits, along with the availability of comprehensive veterans' benefits to compensate injured soldiers, constituted a "special factor" precluding constitutional damages actions. The en banc court of appeals has just issued an opinion not reaching directly the immunity question, but endorsing our "special factor" approach. Judge Higginbotham, who had concurred in Judge Gibbons' original panel opinion, apparently changed his view, and authored the lengthy en banc opinion rejecting the Jaffees' right to sue. Five other judges joined Judge Higginbotham's opinion, two judges concurred in part and dissented in part, and two judges dissented in full.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

The Jaffees undoubtedly will seek Supreme Court review of the Third Circuit's decision, but that decision, which is in accord with all modern judicial authority, should go a long way toward establishing as the law of the land the freedom of military (and civilian) officers from damages suits by fellow servicemen for service-connected injuries.

Attorney: John F. Cordes (Civil Division)
FTS 633-4214

Gwynith Raymer v. United States C.A. 6 No. 80-3033 (October 9, 1981). D.J. #157-31-216.

FEDERAL TORT CLAIMS ACT: SIXTH CIRCUIT
REVERSES DISTRICT COURT'S LIABILITY JUDGMENT
AND HOLDS THAT NO "GOOD SAMARITAN" LIABILITY
AROSE UNDER COAL MINE SAFETY ACT.

The estates of two employees of the Peabody Coal Company brought this action against the United States under the Federal Tort Claims Act for wrongful death arising out of the accidental roll-over of a front end loader. The claimed negligence of the government involved its failure to have strictly enforced mandatory safety standards under the Coal Mine Health & Safety Act of 1969. The record disclosed that federal mine inspectors had repeatedly granted extensions of time for compliance with a roll-over protection system requirement and had failed to enforce a guardrail or berm requirement. The government contended that regulatory enforcement activities under the Safety Act constituted "discretionary functions" within the meaning of 28 U.S.C. §2680(a), and that, in any event, no "actionable tort duty" arose out of its inspection and enforcement proceedings. The district court rejected both arguments, as well as all other defenses, and entered judgment in excess of 1.2 million dollars, holding that the United States had undertaken a duty to render

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

services in enacting the Safety Act and that its negligent failure to enforce the Act rendered it liable under the Good Samaritan doctrine.

Reversing the district court, the Sixth Circuit held that although it endorsed the lower court's determination that the government had undertaken the rendition of services, the remaining prerequisite elements of good samaritan liability must also be satisfied and that, as a matter of law, the government's inspection and enforcement conduct does not constitute an undertaking to perform the mine operator's statutory duties. Nor, the court further held, does the Safety Act itself engender reliance per se, and in the absence of a clear showing of actual and detrimental reliance, liability may not be imposed under the Federal Tort Claims Act.

This is the first time that a court of appeals delineated the boundaries of FTCA liability under the Good Samaritan doctrine in the area of mine safety enforcement.

Attorney: James P. Klapps (Civil Division)
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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

OCTOBER 27, 1981 - NOVEMBER 10, 1981

DOJ Authorization. On October 30, the Senate passed H.R. 4608, a continuing resolution to extend the authorities provided under the Department's Authorization Act until the enactment of a general Authorization of Appropriations Act for the Department or the expiration of the period beginning October 1, 1981, and ending February 1, 1982, whichever is earlier. The Senate's action cleared the measure for the President. The President signed the bill into law (P.L. 97-76) on November 5.

Criminal Forfeiture. The House Judiciary Subcommittee on Crime has tentatively scheduled a markup of legislation dealing with criminal forfeiture for the week of December 7. The Criminal Division is currently working with DEA in drafting the Department's own comprehensive proposal on criminal forfeiture amendments.

Violent Crime. On November 4, the Attorney General appeared before the House Judiciary Subcommittee on Crime to outline the Administration's legislative initiatives against violent crime. Generally, the Committee members were supportive of the initiatives but criticized the lack of funding available for fighting crime. On October 23, the Attorney General appeared before the Senate Judiciary Subcommittee on Criminal Law to discuss the same matter.

Busing. On November 3, the Senate Judiciary Subcommittee on the Constitution favorably reported to the full Committee S. 1760, Senator Hatch's anti-busing bill. Last month, the Department testified on a similar, although not identical anti-busing proposal, Senator East's S. 1647. It is our understanding that S. 1647 will shortly be reported out of the Subcommittee on Separation of Powers and that both bills will go before the full Committee for joint consideration.

Violence Against Minorities. On November 12, Assistant Attorney General William Bradford Reynolds, Civil Rights Division, will testify before the House Judiciary Subcommittee on Criminal Justice. The subject of the hearing is violence against minorities.

Federal Tort Claims Act. On November 13, the Deputy Attorney General will testify before the Senate Judiciary Subcommittee on Agency Administration. Mr. Schmults will testify in support of S. 1775, the Department's Federal Tort Claims Act amendments, which Senator Grassley introduced on the Department's behalf. One additional day of hearings is set for November 16.

AT&T Litigation/S. 898. On Wednesday, November 4, the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee conducted an oversight hearing of the Department's conduct of the antitrust litigation involving AT&T and the Department's involvement in the Administration's position on S. 898, the telecommunications legislation. William F. Baxter, Assistant Attorney General, Antitrust Division, appeared before the Subcommittee.

S. 884/Farm Bill. Section 1236 of the House version of the Farm bill permits employees of the Inspector General of the Department of Agriculture, after designation by the Attorney General and the Inspector General, to carry firearms, to make arrests, and to serve arrest and search warrants. The Department opposed this provision when it was placed in the bill on the House floor.

Bail Reform. On October 21, the Senate Judiciary Subcommittee on Constitutional Law held a hearing on bail reform. Jeffrey Harris, Deputy Associate Attorney General, testified for the Department. The primary focus of the hearing was S. 1552, a bill to reform the bail laws. The Administration supports S. 1552 which includes a pretrial detention provision and would authorize judges to consider dangerousness to the community as a factor in determining bail; however, it eliminates money bond which the Administration does not support.

FBI/National Crime Information Center. William Bayse, Assistant Director, FBI, testified before the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, on October 22 about the Interstate Identification Index pilot project. The project is a National Crime Information Center (NCIC) program which would give the states a more active role in the NCIC system and thus reduce the burden on the FBI's center in Washington.

S.326. On October 21, William Baxter, Assistant Attorney General, Antitrust Division, testified before the Senate Judiciary Committee on S. 326, the Small Business Motor Fuel Marketer Preservation Act of 1981. The bill would prohibit major refiners from operating retail gasoline stations. It would also establish a daily wholesale transfer price for motor fuel and, with certain exceptions, require a supplier of motor fuel to sell or transfer fuel only at that price. Because of the severe restructuring that would take place if the bill were enacted, and the consequential anticompetitive effects, the Department strongly opposes this legislation.

Employer Sanctions. On October 21, the Subcommittee on Immigration, Refugees and International Law, House Judiciary Committee, held a hearing on employer sanctions and employment verification systems. The members of the Committee focused on methods to determine an individual's eligibility to work in the United States. Rudolph Giuliani, Associate Attorney General, and Alan C. Nelson, Deputy Commissioner, INS, represented the Department.

Temporary Workers. On October 22, the Subcommittee on Immigration and Refugee Policy, Senate Judiciary Committee, held a hearing on temporary workers. Alan C. Nelson, Deputy Commissioner, INS, represented the Department.

Court of Appeals for the Federal Circuit. On October 20, the Senate Judiciary Committee ordered favorably reported S. 1700, the Court of Appeals for the Federal Circuit bill. By voice vote, the Committee adopted Senator Dole's amendment to restrict the new Claims Court's equitable jurisdiction to contract cases prior to award. The language agreed to represents a compromise between the Senator and the Department, and was last week incorporated into the House counterpart of this legislation, H.R. 4482.

Nominations: On November 2, the United States Senate received the following nominations:

Joseph P. Stadtmueller to be U.S. Attorney for the Eastern District of Wisconsin;

John R. Bynes to be U.S. Attorney for the Western District of Wisconsin.

On November 5, 1981 the United States Senate received the following nominations:

Robert G. Doumar, to be U.S. District Judge for the Eastern District of Virginia;

David V. O'Brien to be U.S. District Judge for the District of the Virgin Islands.

On November 4, 1981, the United States Senate received the following nominations:

John H. Moore II, to be U.S. District Judge for the Middle District of Florida.

Jackson L. Kiser, to be U.S. District Judge for the Western District of Virginia.

John C. Shabaz, to be U.S. District Judge for the Western District of Wisconsin.

Donald B. Ayer, to be U.S. Attorney for the Eastern District of California.

Hinton R. Pierce, to be U.S. Attorney for the Southern District of Georgia.

Louis G. DeFalaize, to be U.S. Attorney for the Eastern District of Kentucky.

Robert G. Ulrich, to be U.S. Attorney for the Western District of Missouri.

Byron H. Dunbar, to be U.S. Attorney for the District of Montana.

Joe B. Brown, to be U.S. Attorney for the Middle District of Tennessee.

Benjamin F. Baer, of California, to be a Commissioner of the U.S. Parole Commission.

On November 3, the United States Senate received the following nominations:

Frederick N. Falk, to be U.S. Marshal for the Western District of Wisconsin, and

William S. Vaughn to be U.S. Marshal for the Eastern District of Missouri.

Stanley S. Harris, to be U.S. Attorney for the District of Columbia.

Howard V. Adair, to be U.S. Marshal for the Southern District of Alabama.

John W. Roberts, to be U.S. Marshal for the District of Arizona.

Warren D. Stump, to be U.S. Marshal for the Southern District of Iowa.

Kenneth L. Pekarek, to be U.S. Marshal for the District of Kansas.

John L. Meyers, to be U.S. Marshal for the Middle District of Louisiana.

Robert L. Pavlak, Sr., to be U.S. Marshal for the District of Minnesota.

Lee Koury, to be U.S. Marshal for the Western District of Missouri.

Ronald D. Daniels, Jr., to be U.S. Marshal for the District of New Hampshire.

Kenneth B. Muir, to be U.S. Marshal for the District of North Dakota.

Paul R. Nolan, to be U.S. Marshal for the Eastern District of Washington.

Federal Rules of Evidence

Rule 801(d)(1)(C). Definitions. Statements which are not hearsay. Prior statement by witness.

Defendant was convicted of robbing four savings and loan associations. On appeal, he contended, inter alia, that the trial court erred by admitting as substantive evidence the testimony of a Federal Bureau of Investigation agent regarding an eyewitness' out-of-court identification. He argued that Rule 801(d)(1)(C)'s definition of statements which are not hearsay refers only to testimony by a witness regarding previous identifications made by that witness, and does not permit testimony by others regarding the witness' previous identifications.

Examining the plain words of the Rule, "[a] statement is not hearsay if-- . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him . . .," the Court held that Rule 801(d)(1)(C) does not contain the limitation urged by the defendant. The Court also found that the legislative history of the Rule supports testimony by a third party. The Court concluded that the Rule encompasses the testimony of another concerning the declarant's statements so long as the declarant testifies and is available for cross-examination and that such testimony is consequently not hearsay.

(Affirmed.)

United States v. Thomas Elemy, 656 F.2d 507 (9th Cir., September 14, 1981).

U.S. ATTORNEY'S LIST AS OF November 20, 1981

UNITED STATES ATTORNEYS

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	A. Melvin McDonald
Arkansas, E	George W. Proctor
Arkansas, W	Larry R. McCord
California, N	Rodney H. Hamblin
California, E	William B. Shubb
California, C	Andrea Sheridan Ordin
California, S	William H. Kennedy
Canal Zone	Frank J. Violanti
Colorado	Joseph F. Dolan
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Charles F. C. Ruff
Florida, N	Nickolas P. Geeker
Florida, M	Gary L. Betz
Florida, S	Atlee W. Wampler, III
Georgia, N	James E. Baker
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Wallace W. Weatherwax
Idaho	Guy G. Hurlbutt
Illinois, N	Dan K. Webb
Illinois, S	James R. Burgess, Jr.
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	Sarah Evans Barker
Iowa, N	James H. Reynolds
Iowa, S	Kermit B. Anderson
Kansas	Jim J. Marquez
Kentucky, E	Joseph L. Famularo
Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	J. Ransdell Keene
Maine	Richard S. Cohen
Maryland	J. Fredrick Motz
Massachusetts	William F. Weld
Michigan, E	Leonard R. Gilman
Michigan, W	John A. Smietanka
Minnesota	James M. Rosenbaum
Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

UNITED STATES ATTORNEYS

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Montana	Robert L. Zimmerman
Nebraska	Thomas D. Thalken
Nevada	Lamond R. Mills
New Hampshire	W. Stephen Thayer, III
New Jersey	William W. Robertson
New Mexico	R. E. Thompson
New York, N	George H. Lowe
New York, S	John S. Martin, Jr.
New York, E	Edward R. Korman
New York, W	Roger P. Williams
North Carolina, E	Samuel T. Currin
North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
North Dakota	Rodney S. Webb
Ohio, N	James R. Williams
Ohio, S	James C. Cissell
Oklahoma, N	Francis A. Keating, II
Oklahoma, E	Betty O. Williams
Oklahoma, W	David L. Russell
Oregon	Sidney I. Lezak
Pennsylvania, E	Peter F. Vaira, Jr.
Pennsylvania, M	Carlton M. O'Malley, Jr.
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Raymond L. Acosta
Rhode Island	Paul F. Murray
South Carolina	Henry D. McMaster
South Dakota	Philip N. Hogen
Tennessee, E	W. Thomas Dillard
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	James A. Rolfe
Texas, S	Daniel K. Hedges
Texas, E	Robert J. Wortham
Texas, W	Edward C. Prado
Utah	Francis M. Wikstrom
Vermont	George W.F. Cook
Virgin Islands	Ishmael A. Meyers
Virginia, E	Justin W. Williams
Virginia, W	John S. Edwards
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	Wayne A. Rich, Jr.
Wisconsin, E	Joseph P. Stadtmueller
Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood