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CLEARINGHOUSE

Attached as an appendix to this issue of the Bulletin are two examples of an Order, Motion, and Memorandum which can be used to support a request for a Nebbia hearing, an inquiry into the source and sufficiency of the posted bail, even if posted fully in cash, in cases presenting a high risk of flight by the defendant. See United States v. Nebbia, 357 F.2d 303 (2d. Cir. 1966). These attachments may be altered to fit the requirements of your district. The material was submitted by Assistant United States Attorney Robert M. Lipman, Southern District of Florida, and Assistant United States Attorney William B. Lytton, Eastern District of Pennsylvania.

The United States District Court for the Southern District of Florida recently extended Nebbia to uphold a judicial inquiry into the motives behind the posting of a corporate security as bail (United States v. Dussuyer, 526 F. Supp. 838 (S.D. Fla. 1981)).

(Executive Office)

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Settlement Authority Of United States Attorneys In Civil Cases

Civil Division Directive No. 145-81 (published at 46 Fed. Reg. 52352, 10/27/81), regarding settlement authority of United States Attorneys in civil cases has been revised. The revisions appeared in the May 19, 1982, Federal Register, Volume 47, No. 97, Page 21532.

These revised delegations apply to cases that are either delegated to the United States Attorney by the Civil Division or in which direct referral is authorized. Generally, the United States Attorney or the Attorney in Charge of a field office is authorized to:

(1) reject offers to settle monetary claims, in cases for which they are primarily responsible, when the amount offered is under $100,000, or under an amount previously indicated by the Civil Division to be an acceptable minimum; and

(2) accept or reject offers to compromise cases and close claims in cases delegated or directly referred by the Civil Division in the same manner as Civil Division Branch Directors; but the maximum settlement authority is limited to either $100,000, or where the difference between the gross amount of the original claim and the proposed settlement exceeds $100,000 or 10% of the original claim.

The authority of Branch Managers, which is essentially the same as is described in (1) above, is discussed in Section (1)(b) of the Directive. Also, this authority to settle, compromise and close cases is delegable by the United States Attorney to Assistants who supervise civil litigation in an office.

The limitations on this authority relate to actions which will have an impact on other claims, in cases involving novel legal questions or policy determination, and where an outside agency or the United States Attorney which is involved opposes the proposed settlement. These limitations are listed in Section (1)(d) of the Directive.

The text of the revised Civil Division Directive is attached as an Appendix to the Bulletin. The revised Civil Division Directive will be incorporated into USAM Sections 4-2.100 et seq. in the near future.

(Civil Division)

IRS Summons Enforcement

Effective immediately the updated JURIS IRS Summons Enforcement library, entitled "SUMENF," is available to all United States Attorneys' offices in the JURIS General Legal Library.

The SUMENF library was announced in 29 USAB No. 26 (December 18, 1981). It is a comprehensive collection and legal analysis of all summons enforcement and summons-related cases, and contains a selected sampling of citations to significant administrative agency subpoena (SEC and FTC) cases whose principles frequently impact or rely upon summons law.

The outstanding feature of the SUMENF library (unique in the JURIS system) is that each summons or summons-related case has been analyzed by the Tax Division and coded by one or more of 112 issues and sub-issues occurring in summons enforcement law. This library thus makes key word and expression searches unnecessary. Instead, the user simply determines the summons issue(s) in the case, finds the applicable code number(s), and searches by code number(s) to obtain citations to all cases involving the issue(s).

The issue codes, titles and explanations are available in the Summons Enforcement Decisions List, which was distributed to all United States Attorneys' offices in October, 1980. In addition, an abbreviated list of the issue codes is available in JURIS by typing "ISSUES" and pressing the HELP button after having accessed the SUMENF library as described below. In addition, an explanation and examples of sample research techniques will be available in a forthcoming edition of the JURIS Newsletters.

To access the SUMENF library, enter your JURIS user ID, transmit, select "WORKPRDT" file, transmit, select "SUMENF" and transmit.

JURIS' 7-month test period has shown that, due to the fact that each case is issue-coded, most research can be accomplished in just a few minutes by a few simple search

expressions and modifiers. Also, since the library is comprehensive and updated quarterly, you are assured of retrieving citations to all cases on point, and only summons or summons-related cases.

User assistance is available from the User Assistance Office (FTS 633-4537) or from the library's authors at the Tax Division (Robert G. Nath, FTS 724-6574 and James H. Jeffries, III, FTS 724-6575).

Attorneys: Robert G. Nath - FTS 724-6574
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Tax Division

Summons Enforcement - John Doe Summons

In the Matter of the Tax Liabilities of John Does (United States v. Agricultural Assets, Inc.) (2d Cir.). On August 31, 1982, the Second Circuit affirmed the district court's order enforcing a John Doe summons against a tax shelter promoter and held that the respondent in a John Doe summons enforcement proceeding may not "look back" and challenge the determination of the district court which originally authorized service of the summons in an ex parte proceeding pursuant to Section 7609(f) and (h) of the Internal Revenue Code.

The decision is especially significant because it is the first appellate determination upholding our position that the showing necessary for the service of a John Doe summons under Section 7609(f) may not be challenged by the summoned party in a subsequent enforcement action.

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(Tax Division)

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Assistant Attorney General J. Paul McGrath

Adams v. Bell, D.C. Cir. No. 81-1715 (August 24, 1982). D.J. #145-16-372.

Title VI of the Civil Rights Act/Compliance Procedures: D.C. Circuit Dismisses Appeal of Plaintiffs Seeking To Overturn The Government's Settlement Of Its Title VI Civil Rights Enforcement Action Against The State University System Of North Carolina.

This appeal arises from a suit originally instituted by Kenneth Adams and others more than a decade ago to challenge the method chosen by the Department of Health, Education and Welfare -- now the Department of Education -- for obtaining compliance with Title VI of the Civil Rights Act of 1964. As a result of that litigation, the Department instituted an administrative enforcement proceeding against North Carolina in 1979, and promptly became embroiled in a suit filed by the State in the North Carolina District Court. In June 1981, Secretary of Education Bell announced the Government's intention to settle its Title VI dispute with the North Carolina university system by filing a consent decree with the district court in North Carolina, subject to that court's approval. The Adams plaintiffs then moved in the D.C. District Court for a temporary restraining order and preliminary injunction to prevent Secretary Bell from going forward with the settlement. By order of June 25, 1981, the district court denied the Adams plaintiffs' motions, holding that it no longer retained jurisdiction over the Title VI proceedings involving North Carolina. Plaintiffs then asked the D.C. Circuit for an emergency injunction pending appeal, which the court of appeals denied on June 30. Accordingly, the Department of Education went forward with the North Carolina settlement, which the North Carolina District Court approved on July 17.

Now, more than a year later, a divided court of appeals panel has issued a decision that allows the North Carolina settlement to remain undisturbed. The majority, in an opinion authored by Chief Judge Markey of the Court of Customs and Patent Appeals and joined by Judge Tamm, did not address our argument concerning the district court's lack of jurisdiction over this matter but, instead, accepted our alternative argument that principles of comity among Federal courts of different circuits barred the kind of relief sought by plaintiffs in this case. The majority further reasoned that this controversy has become moot, since the proposed North Carolina settlement has already been executed and judicially approved. Accordingly, the court dismissed the appeal.

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Judge Wright vigorously dissented in a 47-page opinion. In his view, the D.C. District Court should have exercised jurisdiction over plaintiffs' claim and, on the merits, should have held the Secretary of Education in contempt of the 1977 injunctive order requiring further efforts to secure Title VI compliance from North Carolina.

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FTS (633-1597)

Michael Jay Singer (Civil Division)
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Bobby Goble v. John O. Marsh, Secretary of the Army and Frank J. Preston v. John O. Marsh, D.C. Cir. Nos. 81-2151 and 81-2156 (July 9, 1982). D.J. #145-4-3913.

Tucker Act/Waiver of Damages: D.C. Circuit Reverses Order Transferring Military Personnel Cases To Court Of Claims And Remands For Further Consideration Of Waiver Of Excess Damages Issue.

Plaintiffs, Army reserve officers, challenging their release from active duty, invoked the district court's jurisdiction under 28 U.S.C. §1331 (1976) and §1361 (1976), seeking declaratory relief, correction of their military records, and such further relief as the court deemed appropriate. In order to obtain Tucker Act jurisdiction in the district court, plaintiffs waived all pre-litigation damages in excess of $10,000. The district court found that plaintiffs' claims were essentially for back pay and that their waivers of claims in excess of $10,000 were ineffective and that therefore the actions were within the exclusive jurisdiction of the Court of Claims. The district court ordered the cases transferred to the Court of Claims pursuant to 28 U.S.C. §1406(c).

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On plaintiffs' appeal, the D.C. Circuit held that the transfer order was a final, appealable order, and also held that the record on the waiver question was insufficient for a decision. The court vacated the transfer order and remanded the case to the district court for consideration of whether plaintiffs wish to waive all damages exceeding $10,000 (including those which accrued after the case was filed) as a condition of litigating their Tucker Act claims in the district court.

Attorney: Assistant United States Attorney
John Birch (U.S. Attorney's Office
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FTS (633-4925)

Oliver Johnson v. John F. Lehman, Secretary of the Navy, D.C. Cir. Nos. 80-2172 and 81-1033 (decided May 25, 1982). D.J. #35-16-1426.

Age Discrimination in Employment Act: D.C. Circuit Holds That Lehman v. Nakshian, 101 S. Ct. 2698, Should Be Applied Retroactively To Jury Tried ADEA Case.

In this age and race discrimination case, plaintiffs claims were tried by a jury. In a special verdict, the jury found that the plaintiff was the victim of unlawful age discrimination. Damages were determined by the court. On cross-appeals, the Government successfully argued that the judgment must be reversed and remanded for a court trial in view of Lehman v. Nakshian, 101 S. Ct. 2698 (1981), handed down while this case was on appeal. (Nakshian held that as to a claim arising under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §633a, there is no right to a jury trial, against the Government.) The court of appeals held that retroactive application of Nakshian would not threaten "manifest injustice" because it would only necessitate a retrial. Additionally, the court struck down a jury instruction on the burden of proof of an ADEA plaintiff holding that a finding of a failure on the part of the prospective employer to follow its own regulations and

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procedures, alone, may not be sufficient to support a finding of age discrimination. Like plaintiffs in Title VII cases, the court held, in order to prevail in ADEA cases plaintiffs must establish a discriminatory motive.

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Martin v. Lauer, D.C. Cir. No. 82-1322 (August 17, 1982). D.J. #35-16-1813.

Privacy Act/FOIA: D.C. Circuit Holds That Government Employees Are Not Necessarily Free To Disclose Agency Documents To Their Attorneys Without The Knowledge Or Permission Of The Agency.

This case involved two supervisors who were concerned about a reduction-in-force affecting certain of their staff members in the Office of Juvenile Justice and Delinquency Prevention within the Justice Department. The supervisors notified the head of the Office that they intended to be part of a suit challenging the RIF procedure. The head of the Office indicated that they were free to file a suit, but warned the supervisors that there were limitations on use of Government property, including documents, for personal purposes. This warning was necessitated by the fact that the supervisors had access to some of the Form 171s of the personnel who would be involved in the RIF, and the agency feared that these or other documents would be given to the attorneys filing the suit. Accordingly, the agency barred release of agency documents without prior approval, and requested a report from the supervisors regarding agency information they might have already turned over to their attorneys. The supervisors brought suit challenging this agency action, claiming that it violated the First Amendment, lawyer-client privilege, and the whistle-blower provisions of the Civil Service Reform Act. The district court upheld the agency restrictions to the extent that they covered material within the FOIA and the Privacy Act. The plaintiffs sought an injunction pending appeal to prevent the agency from disciplining them for failing to comply with the restrictions, and we opposed this request. The D.C. Circuit denied the request in part, requiring the plaintiffs to notify

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the agency of any agency documents they had actually handed over to their attorneys. The court stayed disciplinary action for violation(s) of other parts of the restrictions and set the case for expedited consideration. On the appeal, we argued first that it was not clear that there was any controversy here because the Government did not know if the employees had actually given out prohibited Government information.

We also argued that while the employees certainly had First Amendment rights, and the right to consult with attorneys, they did not have the right to hand out Government documents for their own purposes when those documents were protected from disclosure by the Privacy Act and the FOIA. The D.C. Circuit has now remanded the case to the district court to determine if indeed there is any Privacy Act information involved. With respect to the information covered by the FOIA, the court stated that an agency could validly restrict distribution of such information by employees to their attorneys, but struck down the present restriction as too broad because it could cover certain FOIA Exemption 2 data. (We had argued to the court that the agency was not concerned with such information, and did not intend it to be covered by the restriction, but the court apparently ignored this point.) The court remanded the case to the district court to determine if there was other more serious FOIA material at issue. However, the court did accept our argument that a restriction on release of such material could be constitutional. In addition, the D.C. Circuit rejected the plaintiffs' "whistleblower" argument. The case will now proceed in the district court, and if there is Privacy Act or important FOIA material at issue, will return to the D.C. Circuit.

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Assistant Attorney General J. Paul McGrath

DiPippa v. United States, 3d Cir. No. 82-3000 (August 24, 1982). D.J. #192-63-22.

FECA/FTCA/Swine Flu: Third Circuit Rules That A Federal Employee Injured By A Swine Flu Inoculation She Received At Work Is Entitled To Federal Employees' Compensation Act Benefits Only, And May Not Sue The United States Under The Swine Flu Act.

Plaintiff in this case, a Federal employee, received a swine flu inoculation at her place of employment during her normal working hours after her employer, the old Civil Service Commission, had announced the vaccine's availability. She later suffered from Guillain-Barre Syndrome, a disease she attributed to the swine flu vaccine. She filed a suit for damages against the United States under the Swine Flu Act. The Swine Flu Act made the Government exclusively liable both for its own torts and for the torts of non-Government "program participants" in the swine flu program, such as vaccine manufacturers. The district court dismissed plaintiff's suit on the ground that her claim presented a "substantial question" of coverage under the Federal Employees' Compensation Act, which is the exclusive remedy for Federal employees' work-related injuries. While the case was pending on appeal, however, the Fourth Circuit decided Wallace v. United States, 669 F.2d 947 (4th Cir. 1982). Wallace held, in circumstances indistinguishable from this case, that the Federal employee's injury clearly did not fall within FECA's ambit, and that even if it did, the FECA defense would not bar a Federal employee from pursuing Swine Flu Act damages against the United States for the torts of the non-Government "program participants." The Third Circuit accepted our arguments that a Federal employee injury resulting from an on-the-job inoculation necessarily raises a "substantial question" of FECA coverage precluding tort relief, and that, in enacting the Swine Flu Act, Congress contemplated that Federal employees would be left to their previously-existing remedy, FECA, and could not sue the United States even in its role as a surrogate defendant for the "program participants." The Third Circuit decision should be of great use in resisting Federal employee swine flu suits pending throughout the nation.

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Assistant Attorney General J. Paul McGrath

Ulas Murphy v. Secretary of Health and Human Services, 6th Cir. No. 81-5234 (decided June 16, 1982). D.J. #137-30-1778.

Eligibility For Social Security Disability Benefits/Retroactive Application Of Grid Regulations: Sixth Circuit Directs Health and Human Services Secretary To Reconsider All Pending Cases Where Application Of The Grid May Produce A Different Result.

In this Social Security disability case, the claimant was denied benefits. Although a vocational expert did not testify, after considering all of the evidence, the ALJ concluded that the claimant's impairments were not of sufficient severity to preclude substantial gainful employment. The Secretary's decision was affirmed by the district court. On appeal, the Sixth Circuit reversed and remanded the action to the district court with instructions to remand the case to the Secretary for expedited determination of whether the claimant is entitled to benefits under the Secretary's new grid regulations, 20 C.F.R. 404.1562, which became effective after the ALJ made his initial determination in this case. The court of appeals held that the Secretary should be permitted to reconsider this and all other pending cases where it appears that application of the new regulations may produce a different result.

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Clayton Avery, Jr. v. United States and Abel Rocha v. United States, 9th Cir. Nos. 81-3119 and 81-4073 (June 29, 1982). D.J. #157-82-827.

FTCA Jurisdiction/Adequacy of Administrative Claim: Ninth Circuit Holds Notice of General Circumstances Of Injury and Damages In Sum Certain To Be Sufficient For Purposes of 28 U.S.C. § 2675(a).

In these consolidated Federal Tort Claims Act (FTCA) cases the plaintiffs had timely filed administrative claims, describing the manner and general circumstances of their injuries and stating damages in sums certain. Plaintiffs failed, however, to fully document their administrative claims with medical and other reports and their claims were denied for failure to furnish

required supporting evidence. The district court held that the failure to provide a fully documented administrative claim was a jurisdictional bar to the suit. On appeal, the Ninth Circuit reversed the dismissals, adopting the Fifth Circuit rule set forth in Adams v. United States, 615 F.2d 284 (5th Cir.), on rehearing, 622 F.2d 197 (5th Cir. 1980): a claim is presented properly to an agency within the meaning of 28 U.S.C. §2675(a) when the agency is given sufficient written notice to commence investigation, and the claimant places a value on the claim. The Government has petitioned for rehearing en banc in Rocha.

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Aircrash in Bali Indonesia v. Pan American World Airways, Inc., 9th Cir. Nos. 79-3341 and 78-3761 - 3763 (August 24, 1982). D.J. #157-0-108.

Warsaw Convention: Ninth Circuit Upholds Application Of Warsaw Convention And Declines To Decide Plaintiffs' Constitutional Challenges In View Of Availability Of Tucker Act Remedy.

This case involves the constitutionality and proper interpretation of the Warsaw Convention -- a multilateral treaty limiting carrier liability in international aircrash suits. We successfully intervened on behalf of the appellant-carrier in the Ninth Circuit, arguing that the district court had too narrowly construed the limitation provision, and defending the treaty against plaintiffs' due process and equal protection attacks. More than one year later, the Ninth Circuit requested supplemental briefing on whether the limitation of the Convention, if applied, effectuates a taking for which just compensation is required under the Fifth Amendment, and on whether such a remedy would be available under the Tucker Act. We urged the court to defer consideration of the taking claim, as the Supreme Court had done in Dames and Moore v. Reagan upon finding that a Court of Claims action would not be barred by the "treaty exception" to the Tucker Act, and we alternatively argued that no "taking" (i.e., no deprivation of a vested property right) resulted from the operation of the Warsaw Convention. On

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August 24, 1982, the Ninth Circuit agreed with us that the Convention's limitation on liability preempted California law (which permitted unlimited recovery by decedents' dependents and heirs), and remanded to the district court for further proceedings consistent with the terms and conditions of the Convention. The court rejected plaintiffs' due process and equal protection claims, and deferred resolution of the taking claim for the Court of Claims, whose jurisdiction the Ninth Circuit determined was not impeded by the Tucker Act's treaty exception. In dictum, the Ninth Circuit suggested that the extinguishment of plaintiffs' right to recovery under California law could well effectuate a "taking."

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George A. Keller v. MSPB, 11th Cir. No. 81-7696 (decided June 21, 1982). D.J. #35-1-26.

Pre-Civil Service Reform Act Case/Tucker Act Jurisdiction: Eleventh Circuit Reverses Judgment In Favor of RIFfed Employee And Transfers Entire Case To Court of Claims.

Plaintiff's employment at NASA was involuntarily terminated in an agency RIF in 1972. Plaintiff unsuccessfully appealed his termination to the Civil Service Commission. After exhausting his administrative remedies, the plaintiff filed a pro se complaint in Federal district court, challenging the Commission's decision as arbitrary and unsupported by the evidence and seeking reinstatement and back pay accruing from the date of termination. The district court found certain errors in the Commission's decision and remanded the case back to the Commission for further findings. The Commission again upheld the termination and denied relief to plaintiff. Plaintiff sought review a second time in district court, which reversed the decision of the Commission on the ground that it was unsupported by the evidence and ordered reinstatement of appellee with back pay.

The Government appealed the district court's decision on several grounds including that the district court was without jurisdiction to adjudicate plaintiff's claim. The Eleventh Circuit reversed the judgment for plaintiff, holding that because plaintiff's back pay claim exceeded $10,000 at the outset of the

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litigation, exclusive jurisdiction over this case lay in the Court of Claims. Additionally, the court of appeals held that it was improper for the district court to decide the reinstatement issue because it was based on the same factual predicate as plaintiff's right to back pay and the plaintiff asserts essentially the same legal bases for both forms of relief. In short, the appellate court found that the district court's resolution of appellee's right to reinstatement effectively disposed of all issues concerning his right to back pay except the amount. Such an adjudication by the district court was held to be too substantial an infringement on the Court of Claims' exclusive jurisdiction over plaintiff's backpay claim. For this reason, the court of appeals transferred the entire claim to the Court of Claims, albeit 10 years after suit was filed.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Deltona Corp. v. Alexander, No. 81-5226 (11th Cir. August 9, 1982) D.J. # 90-5-1-7-414.

Clean Water Act: Corps Of Engineers Not Estopped From Refusal To Issue Section 404 Permits.

Affirming the district court, the court of appeals held that the Corps of Engineers was not estopped from refusing to issue permits pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act to a developer who intended to construct a major planned community by dredging and filling wetlands. The court of appeals also held that the district court had properly declined to specify exactly which lands were "wetlands" within the meaning of those two statutes because the plaintiff had not exhausted its administrative remedies.

Attorney: Fred Disheroon (Land and Natural Resources Division) FTS (633-2306)

Attorney: Nancy J. Marvel (Land and Natural Resources Division) FTS (633-5260)

Attorney: Robert L. Klarquist (Land and Natural Resources Division) FTS (633-2731)

Cabinet Mountains Wilderness v. Peterson, No. 81-1671 (D.C. Cir. August 13, 1982) D.J. # 90-8-6-11.

NEPA: Forest Service's Decision Not To Prepare EIS, Based On Finding Of No Significant Report, Sustained.

This case alleged that the Forest Service violated NEPA and the Endangered Species Act by approving an exploration plan on unpatented mining claims in Cabinet Mountains Wilderness. The district court granted summary judgment in our favor and the court of appeals affirmed. The plaintiffs alleged that the exploration activities would adversely affect grizzly bear habitat. The Forest Service decided not to prepare an EIS as a result of the Fish and Wildlife Service's biological opinion which stated

that if certain mitigation measures were imposed on the project, the bears would not be jeopardized. The court of appeals ruled that the Forest Service complied with NEPA even though the agency's finding of no significant impact relied largely on adoption of the mitigation measures recommended by FWS. The court rejected the appellants' argument that an agency cannot rely on mitigation measures to support a finding of no significant impact. The court also held that CEQ statements in the Federal Register which are not subjected to notice and comment procedures are not binding on Federal agencies and may not be subject to deference. Finally, the court of appeals ruled that the standard of review of agency action under the Endangered Species Act is the arbitrary and capricious standard and that the citizens suit provision of that Act does not entitle the appellants to de novo review of agency decisions.

Attorney: Jerry L. Jackson (Land and Natural Resources Division) FTS (633-7377)

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS (633-2813)

Humboldt County, Nev. v. United States, No. 80-4419 (9th Cir. August 24, 1982) D.J. # 90-1-4-1997.

Quiet Title Act: 12-Year Statute Of Limitations In Section 2409a(f) Bars County's Claim Against The United States.

In 1952 the Bureau of Land Management constructed an unpaved road across Federal land providing access to Blue Lake. A second such alternate access road to Blue Lake was built by unknown persons across Federal land between 1952 and 1975. In 1977, BLM closed portions of both roads to vehicles to prevent erosion and protect the Blue Lake Area pending a wilderness classification study. The Blue Lake Area was designated a wilderness study area in 1980 under Section 603(a) of FLPMA, 43 U.S.C. 1782(a). Humboldt County claimed it had acquired the right-of-way to the first road under former 43 U.S.C. 932 (1970 ed.), repealed by FLPMA in 1976. The court of appeals held that this claim was time-barred under the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f), because the county had been on notice since the early 1950s that the road to be constructed would be Government owned. On the merits, the court held that former 43 U.S.C. 932 did not apply either.

The Federal lands surrounding and including this road had been withdrawn from entry and disposition, under 43 U.S.C. 932 and similar statutes, by the general withdrawal in Executive Order 6910 and by the establishment of a grazing district thereon under Section 1 of the Taylor Grazing Act, 43 U.S.C. 315; since the Secretary of the Interior, under Section 7 of that Act, 43 U.S.C. 315f, had not classified this Federal land as open to disposition, no rights-of-way thereto could arise under former 43 U.S.C. 932. Humboldt County's objection to the closure of the general Blue Lake Area as unauthorized was ultimately rejected by reason of Executive Order 11644 and 43 C.F.R. 8342.2(a).

Attorney: James C. Kilbourne (Land and Natural Resources Division) FTS (724-7354)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

The Township of Lower Alloways Creek v. Public Service Electric & Gas Co. and the United States Nuclear Regulatory Commission, No. 81-2335 (3rd Cir. August 27, 1982) D.J. # 90-1-4-2386.

NEPA: NRC's Determination Not To File EIS On Storage Of Spent Fuel At Reactor Site, As Not Being Significant, Was Reasonable Under The Circumstances.

The Township petitioned for review of an NRC decision that an EIS was not required before permitting the licensee of a nuclear generating plant in New Jersey to store additional quantities of spent fuel at the reactor site. The NRC had prepared an Environmental Impact Appraisal for the proposed expansion of the storage capacity of the spent fuel pool at the reactor site and had concluded that the activity was not significant for NEPA purposes. The standard applied by the court of appeals in reviewing NRC's decision not to prepare an EIS was whether it was "reasonable under the circumstances." The court further noted that intervenors in NRC proceedings must demonstrate "specifically how and why" NRC's finding was "erroneous or unreasonable."

Attorney: Martha Torgow (Nuclear Regulatory Commission) FTS (634-1465)

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

SEPTEMBER 15, 1982 - SEPTEMBER 30, 1982

Immigration. On Wednesday, September 22, the House Judiciary Committee completed its mark up of the Immigration Reform and Control Act of 1982 (H.R. 6314). Prior to reporting the bill, the Committee, by a vote of 13-15, rejected a motion to recommit the bill to subcommittee.

The Committee reconsidered, by vote of 16-12, an amendment by Congressman Edwards that required the Federal Government to pay the full cost to the states for the legalization of aliens. The Committee accepted an amendment that states that Federal payments are subject to available appropriations. Chairman Rodino is working hard to schedule the legislation for the House floor as soon as possible.

Federal Court Reform Act (H.R. 6872). The House passed this noncontroversial judicial reform proposal by a voice vote on September 20. Title I of the bill would generally convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari, except in connection with review of decisions by three-judge district courts. Title II of H.R. 6872 would amend various U.S. Code provisions to facilitate Federal jury service. Title III of H.R. 6872 would eliminate over 50 different provisions scattered throughout the U.S. Code which require that particular classes of civil cases be given priority by the courts over other cases.

Indian Claims. On September 23, the House Interior and Insular Affairs Committee held a hearing on legislation permitting Indian tribes to bring action on certain claims on behalf of tribe members. Carol Dinkins, Assistant Attorney General, Land and Natural Resources Division, represented the Department.

Fraudulent Identification. On September 23, the Senate Governmental Affairs Committee's Subcommittee on Permanent Investigations held a hearing on the use of fraudulent identification to

receive Federal benefits. Doris Meissner, Acting Deputy Commissioner of Immigration and Naturalization Service, represented the Department.

Forfeiture Amendments. With a strong push from the Department, the forfeiture bill, H.R. 7140, has been approved by the House Judiciary Committee. Although the bill falls short of the Administration proposal reported by the Senate Judiciary Committee, S. 2330, we believe a House-Senate Conference could produce a measure that could significantly strengthen the fight against narcotics trafficking. Although there is still far to go and little time to get there, forefeiture legislation is still very much alive and could be enacted.

Extradition Amendments. House legislation to facilitate extradition of foreign terrorists, narcotics traffickers and other serious international criminals, H.R. 6046, has come under attack in recent days from a number of Members of Congress. The Senate has already approved a comparable bill, S. 1940. Efforts are under way to get this Administration-sponsored bill to the House Floor, but its enactment this year is seriously jeopardized.

H.R. 6995-FTC Authorization. The Department has conveyed its opposition to the Congress concerning the legislative veto provision in H.R. 6995, the Federal Trade Commission authorization bill. The Department strongly supports the determination of the House Rules Committee to delete the provision.

Federal Prison Industries - S. 1747. On September 23, 1982, the Senate Judiciary Committee's Subcommittee on Criminal Law held a hearing on S. 1747, Federal Prison Industries. Norman Carlson, Director of the Bureau of Prisons and Commissioner of the Federal Prison Industries, testified on behalf of the Administration and spoke in opposition to this legislation.

Insanity Defense Reform. Senator Thurmond, with 25 co-sponsors, introduced his "consenus" insanity defense bill as S. 2902. This proposal varies from the Administration's means rea approach by using the M'Naghten test with the burden on the defendant by clear and convincing evidence to establish that defendant lacked entirely the ability to understand the nature and quality of his acts or to distinguish right from wrong.

Nuclear Material Protection. The Senate has approved, with amendments, the House-passed bill to implement the Convention on the Physical Protection of Nuclear Material by establishing criminal penalties for the theft of or extortion through the use of

nuclear materials. It remains to be seen whether the House will accept the Senate amendments or request a conference.

Trademark Counterfeiting. Assistant Attorney General William Baxter testified on Tuesday before the Senate Judiciary Subcommittee on Criminal Law in support of S. 2428, which would increase effective remedies for the offense of trademark counterfeiting. Although expressing strong Department support for the thrust of the bill, he pointed out numerous drafting problems in the bill and offered to work with the Subcommittee in resolving the drafting difficulties.

U.S. Territories and Insular Areas. On September 13, 1982, the Senate Committee on Energy and Natural Resources held a hearing on six measures affecting the territories and insular areas of the United States. The Committee members were particularly interested in the Department's views on S. 2729, a bill to amend or repeal certain provisions of the Organic Acts applicable to the Virgin Islands; S. 2088, a bill to require treatment of citizens of the Northern Mariana Islands as citizens of the United States; S. 2089, a bill to clarify the applicability of the Federal Tort Claims Act to claims arising in the Northern Mariana Islands; and S. 2090, a bill to amend the application of the Clean Air Act to the Northern Mariana Islands. Larry Simms, Deputy Assistant Attorney General, Office of Legal Counsel, represented the Department.

Refugee Reauthorization Act. The Subcommittee on Immigration and Refugee Policy of the Senate Judiciary Committee held a hearing on September 13, on the Refugee Reauthorization Act. Alan Nelson, Commissioner, Immigration and Naturalization Service, represented the Department.

State Water Rights. On September 15, 1982, Assistant Attorney General Carol E. Dinkins, Land and Natural Resources Division, appeared before the Subcommittee on Water Resources of the Senate Committee on Environment and Public Works to discuss the recent Supreme Court decision in Sporhase v. Nebraska.

VOL. 30 October 1, 1982 NO. 19

Federal Rules of Criminal Procedure

Rule 6(e). Recording and Disclosure of Proceedings

Rule 6(e)(3)(C)(i). Exceptions.

A district attorney, in cooperation with Federal officials, suspended an investigation into possible RICO activities in exchange for an FBI promise to pass along any evidence of state law violations at the conclusion of the Federal investigation. No Federal prosecutions resulted from the inquiry and the Government turned over to the district attorney all materials other than grand jury testimony. The Government then moved for and was granted an order pursuant to Rule 6(e) authorizing disclosure of all matters which had occurred before the grand jury. Defendant, a subject of the probe, filed a petition to vacate the order. The district court denied the motion and held that the FBI materials previously turned over, such as tape recordings of monitored conversations, documents obtained without grand jury subpoenas and prosecution memoranda, had been properly disclosed as they were not matters which had been developed before the grand jury. The court then authorized the district attorney to obtain the witness transcripts pursuant to Rule (6)(e)(3)(C)(i), because (1) the state investigation was preliminary to a judicial proceeding and (2) a "particularized need" for the testimony had been established. Defendant appealed.

The court of appeals affirmed the order as it pertained to the products of the FBI investigation, finding these materials to be outside the disclosure ban of Rule 6(e) as they had not been generated or subpoenaed by the grand jury, even though they may have been developed with an eye toward that purpose. The order permitting disclosure of grand jury witness testimony was reversed. The court held that while the 6(e)(3)(C)(i) exception to Rule 6(e) secrecy was applicable, the district court erred in accepting the district attorney's difficulties, caused by his voluntary delay in the state investigation, as a bona fide need. The anticipated recalcitrance of witnesses and the desire to use the transcripts for impeachment

purposes are insufficient reasons for disclosure of grand jury testimony, especially at an early stage in an investigation when the need for particular testimony has not yet been determined.

(Affirmed in part and reversed and remanded in part.)

In re Grand Jury Matter. Appeal of Nicholas Catania, 682 F.2d 61 (3rd Cir. 1982).

VOL. 30 October 1, 1982 NO. 19

Federal Rules of Criminal Procedure

Rule 6(e)(3)(C)(i). Exceptions.

See Rule 6(e) Federal Rules of Criminal Procedure, this issue of the Bulletin for syllabus.

In re Grand Jury Matter. Appeal of Nicholas Cantania, 682 F.2d 61 (3rd Cir. 1982).

U.S. ATTORNEY'S LIST AS OF October 1, 1982

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
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	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Stephen S. Trott
California, S	Peter K. Nunez
Colorado	Robert N. Miller
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Stanley S. Harris
Florida, N	K. M. Moore
Florida, M	Robert W. Merkle, Jr.
Florida, S	Stanley Marcus
Georgia, N	Larry D. Thompson
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Daniel A. Bent
Idaho	Guy G. Hurlbutt
Illinois, N	Dan K. Webb
Illinois, S	Frederick J. Hess
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	Sarah Evans Barker
Iowa, N	Evan L. Hultman
Iowa, S	Richard C. Turner
Kansas	Jim J. Marquez
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	Joseph S. Cage, Jr.
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

DISTRICT	U.S. ATTORNEY
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	Lamond R. Mills
New Hampshire	W. Stephen Thayer, III
New Jersey	W. Hunt Dumont
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	John S. Martin, Jr.
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
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	J. William Petro
Ohio, S	Christopher K. Barnes
Oklahoma, N	Francis A. Keating, II
Oklahoma, E	Gary L. Richardson
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
Pennsylvania, E	Peter F. Vaira, Jr.
Pennsylvania, M	David D. Queen
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Raymond L. Acosta
Rhode Island	Lincoln C. Almond
South Carolina	Henry Dargan McMaster
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
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	Brent D. Ward
Vermont	George W.F. Cook
Virgin Islands	Hugh P. Mabe, III
Virginia, E	Elsie L. Munsell
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	David A. Faber
Wisconsin, E	Joseph P. Stadtmueller
Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

O R D E R

AND NOW, this day of , 19__, upon consideration of the Government's motion for a hearing to determine the source of bail posted by defendant, it is hereby

ADJUDGED, ORDERED and DECREED

that the Motion is GRANTED.

BY THE COURT:

_____

J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

GOVERNMENT'S MOTION FOR A HEARING TO DETERMINE THE SOURCE OF THE BAIL POSTED BY THE DEFENDANT

The United States of America, by United States Attorney for the District of , respectfully moves that this Honorable Court order a hearing to determine the source of the bail posted by the defendant for the reasons stated in the attached memorandum.

Respectfully submitted,

_____

United States Attorney

_____

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A HEARING TO DETERMINE THE SOURCE OF THE BAIL POSTED BY DEFENDANT

The Government respectfully requests that a hearing be held inquiring into the source of the bail posted by the defendant to determine if it adequately assures the defendant's presence at future court proceedings. In support of this hearing the Government relies on United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966), Title 18, United States Code, 3146(a)(5), (b), and (e), and Rule 46(d) of the Federal Rules of Criminal Procedure.

Section 3146(b) requires the court, initially, to set conditions of release which will "reasonably assure" defendant's appearance after release. Moreover, these conditions of release are expressly left to the court's discretion which may "impose any other condition deemed reasonably necessary to assure appearance as required." 18 U.S.C. § 3146(a)(5). Implicitly, this inquiry may be conducted at the time bail is posted pursuant to Section 3146(e) which states, "a judicial

officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release..."

In the leading case on this subject, United States v. Nebbia, supra, the Second Circuit Court held that even when full cash bail is posted, the court may properly consider the source of the cash and the sufficiency of the personal assurances. The court stated, "the mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might bear on the question of the adequacy of the bail..." Id. at 304. See also, United States v. Field, 190 F.2d 554 (2d Cir. 1951); Concord Casualty & Surety Co. v. United States, 69 F.2d 78 (2d Cir. 1934).

The basis for this ruling was clearly explained by the court. "The giving of security is not the full measure of the bail's obligation..." Nebbia 357 F.2d at 304. It "is not the sum of the bail bond that society asks for, but rather the presence of the defendant..." Id.

If the court "lacks confidence in the surety's purpose or ability to secure the appearance of the bailed defendant, it may refuse its approval of a bond even though the financial standing of the bail is beyond question." Id. The Nebbia Court partially relied upon Rule 46 of the Federal Rules of Criminal Procedure. Since Nebbia, however, that rule has been amended to give further support to the Nebbia holding. Thus, Rule 46(d) now states:

> Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

In United States v. Fedullo, 525 F.Supp. 1210 (D. N.J. 1981) the court relied on Rule 46(d), and Sections 3143 and 3146(b) of Title 18, in holding that the court had authority to make an inquiry of the surety regarding the source and status of the funds which it used to post bail. The court explained that since the source of the proffered bail was not a corporate surety, Rule 46(d) expressly supports such an inquiry.

The Fedullo Court further concluded that a similar inquiry could be undertaken even where an approved corporate surety had proffered the bail funds, such as in United States v. Melville, 309 F.Supp. 824 (S.D.N.Y. 1970). In Melville, the Government sought to learn the identities of persons who had provided collateral for the bond with the approved corporate surety. In ruling on the motion the court explained, "the Government is entitled and is granted the opportunity to ascertain the facts in respect to the sources of the bail including those to whom the corporate surety looks to secure

its agreement to issue the bond". Melville, 309 F.Supp. at 829. The court explained that although the corporate surety was approved as required by law, it was nevertheless essential that a court which was attempting to satisfy itself of the adequacy of bail have some "detailed knowledge of those posting the collateral." Id. 309 F.Supp. at 828. For example, a source of bail or collateral which has been identified as one who is sympathetic to escape or as a means to facilitate escape would be illegitimate and "would tend to assure against defendant's reappearance" (emphasis in original). Id. 309 F.Supp. at 827. Similiarly profits from narcotics sales or racketeering enterprises which were illegally obtained also would provide no assurance of the defendant's reappearance after release.

United States v. Dussuyer, 526 F.Supp. 838 (S.D. Fla. 1981), echo's these concerns:

> The reasons for requiring a Nebbia hearing do not disappear solely because a corporate surety is involved. Regardless of whether the bond is posted by a corporate surety or in cash, the only means of accurately assessing the effect of a bail bond on the defendant's incentive to flee is to inquire into the motives of the surety. If a corporate surety is fully indemnified for its loss by benefactors of the defendant, the Court is entitled to inquire into the identity of the indemnitors, the source of their collateral and the motive for their undertaking. If the indemnitors are criminal associates of the defendant or the collateral

> is derived from illegitimate sources, the indemnitors may be willing to post the collateral soley to enable their associate to flee. The loss of the collateral is then written off as a cost of engaging in the criminal enterprise.

Id. 526 F.Supp. at 883. Dussuyer, like Melville, involved an approved corporate surety. Consequently, the defendant argued that Rule 46(d) limited the ability of the court to inquire concerning the corporate surety. Rejecting this argument, the court explained, "the rule provides only that an approved corporate surety does not have to provide an affidavit setting forth its assets; the rule does not limit, indeed it does not mention, the court's authority to consider the source of the corporate surety's collateral for an individual bond." Id. 526 F.Supp. at 884. The court in upholding the granting of the "Nebbia hearing" concluded that a "corporate bond is not intended to act as a shield for benefactors of the defendant who seek his release at any cost, including the loss of their collateral." Id.

Thus, bail should not be accepted when it is from illegitimate sources or criminal sources since these afford no assurance of the defendant's reappearance after release. Moreover, where bail is posted under suspect circumstances by any person or entity, it is not only within the court's discretion to hold a Nebbia hearing, but it is also the court's right and duty to look at the assurance given, not merely the sum of the

money, to determine whether the surety assumes the responsibilities which the law imposes. See United States v. Ellis De Marchena, 330 F.Supp. 1223, 1226 (S.D. Cal. 1971).

Therefore, it is proper for the court to inquire into the source of the bail posted in order to determine if it adequately assures the defendant's appearance after release.

WHEREFORE, the Government prays that its motion be granted.

Respectfully submitted,

_____

United States Attorney

_____

Assistant United States Attorney

WBL:mmq

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

O R D E R

AND NOW, this day of , 19__, upon consideration of the Government's motion for a hearing to determine the source of bail posted by defendant, it is hereby

ADJUDGED, ORDERED and DECREED

that the Motion is GRANTED.

BY THE COURT:

_____
J.

WBL:mmq

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

GOVERNMENT'S MOTION FOR A HEARING TO DETERMINE THE SOURCE OF THE BAIL POSTED BY THE DEFENDANT

The United States of America, by Peter F. Vaira, United States Attorney for the Eastern District of Pennsylvania, respectfully moves that this Honorable Court order a hearing to determine the source of the bail posted by the defendant for the reasons stated in the attached memorandum.

Respectfully submitted,

_____
PETER F. VAIRA
United States Attorney

_____
Assistant United States Attorney

WBL:mmq

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : MAGISTRATE NO. _____

_____ :

GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A HEARING TO DETERMINE THE SOURCE OF THE BAIL POSTED BY DEFENDANT

The Government respectfully requests that a hearing be held inquiring into the source of the bail posted by the defendant to determine if it adequately assures the defendant's presence at future court proceedings. In support of this hearing the Government relies on United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966), Title 18, United States Code, 3146(a)(5), (b), and (e), and Rule 46(d) of the Federal Rules of Criminal Procedure.

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officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release..."

In the leading case on this subject, United States v. Nebbia, supra, the Second Circuit Court held that even when full cash bail is posted, the court may properly consider the source of the cash and the sufficiency of the personal assurances. The court stated, "the mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might bear on the question of the adequacy of the bail..." Id. at 304. See also, United States v. Field, 190 F.2d 554 (2d Cir. 1951); Concord Casualty & Surety Co. v. United States, 69 F.2d 78 (2d Cir. 1934).

The basis for this ruling was clearly explained by the court. "The giving of security is not the full measure of the bail's obligation..." Nebbia 357 F.2d at 304. It "is not the sum of the bail bond that society asks for, but rather the presence of the defendant..." Id.

If the court "lacks confidence in the surety's purpose or ability to secure the appearance of the bailed defendant, it may refuse its approval of a bond even though the financial standing of the bail is beyond question." Id. The Nebbia Court partially relied upon Rule 46 of the Federal Rules of Criminal Procedure. Since Nebbia, however, that rule has been amended to give further support to the Nebbia holding. Thus, Rule 46(d) now states:

> Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

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The Fedullo Court further concluded that a similar inquiry could be undertaken even where an approved corporate surety had proffered the bail funds, such as in United States v. Melville, 309 F.Supp. 824 (S.D.N.Y. 1970). In Melville, the Government sought to learn the identities of persons who had provided collateral for the bond with the approved corporate surety. In ruling on the motion the court explained, "the Government is entitled and is granted the opportunity to ascertain the facts in respect to the sources of the bail including those to whom the corporate surety looks to secure

its agreement to issue the bond". Melville, 309 F.Supp. at 829. The court explained that although the corporate surety was approved as required by law, it was nevertheless essential that a court which was attempting to satisfy itself of the adequacy of bail have some "detailed knowledge of those posting the collateral." Id. 309 F.Supp. at 828. For example, a source of bail or collateral which has been identified as one who is sympathetic to escape or as a means to facilitate escape would be illegitimate and "would tend to assure against defendant's reappearance" (emphasis in original). Id. 309 F.Supp. at 827. Similiarly profits from narcotics sales or racketeering enterprises which were illegally obtained also would provide no assurance of the defendant's reappearance after release.

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> is derived from illegitimate sources, the indemnitors may be willing to post the collateral soley to enable their associate to flee. The loss of the collateral is then written off as a cost of engaging in the criminal enterprise.

Id. 526 F.Supp. at 883. Dussuyer, like Melville, involved an approved corporate surety. Consequently, the defendant argued that Rule 46(d) limited the ability of the court to inquire concerning the corporate surety. Rejecting this argument, the Court explained, "the rule provides only that an approved corporate surety does not have to provide an affidavit setting forth its assets; the rule does not limit, indeed it does not mention, the court's authority to consider the source of the corporate surety's collateral for an individual bond." Id. 526 F.Supp. at 884. The court in upholding the granting of the "Nebbia hearing" concluded that a "corporate bond is not intended to act as a shield for benefactors of the defendant who seek his release at any cost, including the loss of their collateral." Id.

Thus, bail should not be accepted when it is from illegitimate sources or criminal sources since these afford no assurance of the defendant's reappearance after release. Moreover, where bail is posted under suspect circumstances by any person or entity, it is not only within the court's discretion to hold a Nebbia hearing, but it is also the court's right and duty to look at the assurance given, not merely the sum of the

money, to determine whether the surety assumes the responsibilities which the law imposes. See, United States v. Ellis De Marchena, 330 F.Supp. 1223, 1226 (S.D. Cal. 1971).

Therefore, it is proper for the court to inquire into the source of the bail posted in order to determine if it adequately assures the defendant's appearance after release.

WHEREFORE, the Government prays that its motion be granted.

Respectfully submitted,

PETER F. VAIRA
United States Attorney

Assistant United States Attorney

[Directive No. 145-81]

REDELEGATION OF AUTHORITY OF BRANCH DIRECTORS, HEADS OF OFFICES AND UNITED STATES ATTORNEYS IN CIVIL DIVISION CASES

Section 1. Authority to compromise or close cases.

(a) Delegation to Deputy Assistant Attorneys General. The Deputy Assistant Attorneys General are authorized to act for, and to exercise the authority of, the Assistant Attorney General in charge of the Civil Division with respect to the institution of suits, the acceptance or rejection of compromise offers, and the closing of claims or cases, unless any such authority is required by law to be exercised by the Assistant Attorney General personally or has been specifically delegated to another Department official.

(b) Delegation to Branch Directors, the Director of the Appellate Staff, the Chief of the Judgment Enforcement Unit and the Director of the Office of Foreign Litigation. Subject to the limitations imposed by paragraph (d) of this section, Branch Directors, the Director of the Apellate Staff, the Chief of the Judgment Enforcement Unit and the Director of the Office of Foreign Litigation are hereby authorized, with respect to matters assigned to their respective components, to reject any offer in compromise and to accept offers in compromise and close claims or cases in the manner and to the same extent as Deputy Assistant Attorneys General, except that Branch Directors, the Director of the Appellate Staff, the Chief of the Judgment Enforcement Unit and the Director of the Office of Foreign Litigation cannot accept or reject any offers in compromise of, or settle administratively any claim or case against the United States where the principal amount to be paid by the United States exceeds $150,000. Nor can these Civil Division officials close (other than by compromise or by entry of judgment), any claim or case on behalf of the United States where the gross amount involved exceeds $150,000, or accept or reject any offers in compromise of any such claim or case in which the difference between the gross amount of the original claim and the proposed settlement exceeds $150,000 or 10 percent of the original claim, whichever is greater. Branch Directors, the Chief of the Judgment Enforcement Unit and the Director of the Office of Foreign Litigation are further authorized to file suits, counterclaims, and cross-claims, or to take any other action necessary to protect the interests of the United States in all nonmonetary cases, in all routine loan collection and foreclosure cases, and in other monetary claims or cases where the gross amount of the claim does not exceed $150,000.

(c) Delegation to U.S. Attorneys and Attorneys-in-Charge of Field Offices. Subject to the limitations imposed by paragraph (d) of this section, and the authority of the Solicitor General set forth in 28 CFR 0.163, United States Attorneys and Attorneys-in-Charge of field offices are authorized to:

(1) Reject any offer to settle a monetary claim on behalf of the United States where the amount offered is below $100,000 or below an amount previously indicated by the appropriate Civil Division official to be an acceptable minimum, in any case for which they have primary responsibility.

(2) Accept or reject offers to compromise cases and close claims which have been directly referred or delegated to them by the Civil Division, as set forth in sections 4 (a) and (b) of this directive, in the same manner and to the same extent as Branch Directors, except that United States Attorneys and Attorneys-in-Charge of field offices cannot accept or reject any offers in compromise of any claim or case against the United States where the principal amount of the proposed settlement exceeds $100,000. Nor can United States Attorneys or Attorneys-in-Charge of field offices close (other than by compromise or by entry of judgment), any claim or case on behalf of the United States where the gross amount involved exceeds $100,000, or accept or reject any offers in compromise of any such claim or case in which the difference between the gross amount of the original claim and the proposed settlement exceeds $100,000 or 10 percent of the original claim, whichever is greater. United States Attorneys may redelegate this authority to Assistant United States Attorneys who supervise other Assistant United States Attorneys who handle civil litigation.

(d) Limitations on delegations. The authority to compromise cases, file suits, counterclaims, and cross-claims, or take any other action necessary to protect the interests of the United States, delegated by paragraphs (a), (b) and (c) of this section, may not be exercised, and the matter shall be submitted for resolution to the Assistant Attorney General, Civil Division, when:

(1) For any reason, the proposed action, as a practical matter, will control or adversely influence the disposition of other claims totalling more than the respective amounts designated in the above paragraphs.

(2) Because a novel question of law or a question of policy is presented, or for any other reason, the proposed action should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General, Civil Division.

(3) The agency or agencies involved are opposed to the proposed action. (The views of an agency must be solicited with respect to any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies.)

(4) The U.S. Attorney involved is opposed to the proposed action and requests that the decision be submitted to the Assistant Attorney General for reconsideration.

Section 2. Action Memoranda.

(a) Whenever a United States Attorney compromises a case or closes a claim pursuant to the authority delegated by this Directive, a memorandum fully explaining the basis for the action taken shall be executed and placed in the file. A copy of the memorandum must be sent to the appropriate branch of the Civil Division.

(b) The compromising of cases or closing of claims which a United States Attorney is not authorized to approve shall be referred to the Civil Division official having the requisite approval authority. The referral memorandum shall contain a detailed description of the matter, the United States Attorney's recommendation, and a full statement of the reasons therefor.

(c) Whenever an official of the Civil Division accepts or rejects a compromise or closes a claim pursuant to the authority delegated by this Directive, a memorandum containing a detailed statement of the matter and a full statement of the reasons for the action taken shall be placed in the file.

Section 3. Return of civil judgment cases to agencies. Claims arising out of judgments in favor of the United States which cannot be permanently closed as uncollectible may be returned to the referring Federal agency for servicing and surveillance whenever all conditions set forth in USAM 4-2.230 have been met.

Section 4. Authority for direct reference and delegation of Civil Division cases to United States Attorneys.

(a) Direct reference to United States Attorneys by agencies. The following civil actions under the jurisdiction of the Assistant Attorney General, Civil Division, may be referred by the agency concerned directly to the United States Attorney for handling in trial courts and United States Attorneys are hereby delegated the authority to take all necessary steps to protect the interests of the United States, without prior approval of the Assistant Attorney General, Civil Division, or his representatives. Agencies may, however, if special handling is desired, refer these cases to the Civil Division. Also, when

constitutional questions or other significant issues arise in the course of such litigation, or when an appeal is taken by any party, the Civil Division should be consulted.

(1) Money claims by the United States (except penalties and forfeitures) where the gross amount of the original claim does not exceed $100,000.

(2) Single family dwelling house foreclosures arising out of loans made or insured by the Department of Housing and Urban Development, the Veterans Administration and the Farmers Home Administration.

(3) Suits to enjoin violations of, and to collect penalties under, the Agricultural Adjustment Act of 1938, 7 U.S.C. 1376, the Packers and Stockyards Act, 7 U.S.C. 203, 207(g), 213, 215, 216, 222, and 228a, the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. 499c(a) and 499h(d), the Egg Products Inspection Act, 21 U.S.C. 1031 *et seq.*, the Potato Research and Promotion Act, 7 U.S.C. 2611 *et seq.*, the Cotton Research and Promotion Act of 1966, 7 U.S.C. 2101 *et seq.*, the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*, and the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*

(4) Suits by social security beneficiaries under the Social Security Act, 42 U.S.C. 402 *et seq.*

(5) Social security disability suits under 42 U.S.C. 423 *et seq.*

(6) Black lung beneficiary suits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 921 *et seq.*

(7) Suits by Medicare beneficiaries under 42 U.S.C. 1395ff.

(8) Garnishment actions authorized by 42 U.S.C. 659 for child support or alimony payments.

(9) Judicial review of actions of the Secretary of Agriculture under the food stamp program, pursuant to the provisions of 7 U.S.C. 2022 involving retail food stores.

(10) Cases referred by the Department of Labor for the collection of penalties or for injunctive action under the Fair Labor Standards Act of 1938 and the Occupational Safety and Health Act of 1970.

(11) Cases referred by the Department of Labor solely for the collection of civil penalties under the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. 2048(b)

(12) Cases referred by the Interstate Commerce Commission to enforce orders of the Interstate Commerce Commission or to enjoin or suspend such orders pursuant to 28 U.S.C. 1336.

(13) Cases referred by the United States Postal Service for injunctive relief under the nonmailable matter laws, 39 U.S.C. 3001 *et seq.*

(b) Delegation to United States Attorneys. Branch and office directors and unit chiefs of the Civil Division may delegate to United States Attorneys any nonmonetary claims or suits, and monetary claims or suits involving amounts up to $100,000, where the circumstances warrant such delegations. Upon the recommendation of branch and office directors and unit chiefs, the Assistant Attorney General, Civil Division, may delegate to United States Attorneys any claims or suits involving amounts up to $750,000, where the circumstances warrant such delegations. All delegations pursuant to this subsection shall be in writing and no United States Attorney shall have authority to compromise or close any such delegated case or claim except as is specified in the required written delegation or in section 1(c) of this directive. The limitations of section 1(d) of this directive also remain applicable in any case or claim delegated hereunder.

(c) Cases not covered. Regardless of the amount in controversy, the following matters will normally not be referred to United States Attorneys for handling but will be retained and handled by the appropriate branch within the Civil Division:

(1) Civil Actions in the Court of Claims.

(2) Cases within the jurisdiction of the commercial litigation branch involving patents, trademarks, copyrights, etc.

(3) Cases before the United States Court of International Trade and the Court of Customs and Patent Appeals.

(4) Any case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office; or any False Claims Act case where the amount of single damages, plus forfeitures, exceeds $100,000.

(5) Any case involving vessel-caused pollution in navigable waters.

(6) Cases on appeal, except as determined by the Director of the Appellate Staff.

(7) Any case involving litigation in a for-

Section 5. Adverse decisions. All final judicial decisions adverse to the Government involving any direct reference or delegated case must be reported promptly to the Assistant Attorney General, Civil Division, attention Director, Appellate Staff. Consult Title 2 of the United States Attorneys' Manual for procedures and time limitations.

Section 6. This directive supersedes Civil Division Directive No. 110-78 regarding redelegation of the Assistant Attorney General's authority in Civil Division cases to branch directors, heads of offices, and United States Attorneys. This directive clarifies the intent set forth in Directive 110-78 which this directive supersedes.

[Order No. 960-81, 46 FR 52352, Oct. 27, 1981]