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Executive Office for United States Attorneys

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COMMENDATIONS

Assistant United States Attorney JAMES R. ARNOLD, Central District of California, has been commended by Mr. Wilbur Jennings, Regional Attorney, United States Department of Agriculture, and Mr. Zane G. Smith, Jr., Regional Forester, San Francisco, California, for the outstanding work in resolving the case of Pyramid Ranch v. United States of America, involving suit to quiet title.

United States Attorney GERALD D. FINES, Central District of Illinois, has been awarded the following: Certificate of Meritorious Service from the Assistant Commissioner (Criminal Investigations) with the Department of the Treasury, Internal Revenue Service in Washington, D.C.; Citation from the Assistant Commissioner of Internal Revenue Service for leadership provided to the Central District of Illinois Law Enforcement Coordinating Committee; and Certificate of Appreciation for Outstanding Contributions in The Field of Drug Law Enforcement from Mr. William J. Olivanti, Special Agent in Charge, Chicago Divisional Office, United States Drug Enforcement Administration.

Supervisory Assistant United States Attorney FRANCES C. HULIN, Central District of Illinois, has been awarded The Certificate of Appreciation for Outstanding Contributions in the Field of Drug Law Enforcement from Mr. William J. Olivanti, Special Agent in Charge, Chicago Divisional Office, United States Drug Enforcement Administration, and a Certificate of Appreciation for her Continued Efforts in The Protection of Revenue from Mr. Ira S. Loeb, District Director, Internal Revenue.

First Assistant United States Attorney LARRY A. MACKEY, Central District of Illinois, has been awarded The Certificate of Appreciation for Outstanding Contributions in the Field of Drug Law Enforcement from Mr. William J. Olivanti, Special Agent in Charge, Chicago Divisional Office, United States Drug Enforcement Administration.

Assistant United States Attorney SHARON A. WERNER, District of Kansas, has been commended by Major General Thomas B. Bruton, Judge Advocate General, United States Air Force, and Assistant Attorney General J. Paul McGrath, Civil Division, Department of Justice, for her legal expertise, dedication and professionalism exhibited in developing the defense strategy of the United States in the Rock, Kansas, Titan II missile litigation, involving 46 plaintiffs with a potential liability exposure in excess of $70 million.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Offset Of Federal Employee Judgment Debtors' Salaries By Employing Federal Agency

Section 124 of Public Law 97-276, 96 Stat. 1195 (effective October 2, 1982) authorizes that, once determined by a court of the United States that a debt is owed to the United States by one of its employees, collection of that debt may be made by offset of up to 25 percent from the employee's current pay account. Section 124, which has not been codified but appears in a note following 5 U.S.C. §5514, reads as follows:

> SEC. 124. Notwithstanding any other provision of this joint resolution, in the case of any employee of the Federal Government who is indebted to the United States, as determined by a court of the United States in an action or suit brought against such employee by the United States, the amount of the indebtedness may be collected in monthly installments, or at offically established regular pay period intervals, by deduction in reasonable amounts from the current pay account of the individual. The deductions may be made only from basic pay, special pay, incentive pay, or, in the case of an individual not entitled to basic pay, other authorized pay. Collection shall be made over a period of not greater than the anticipated period of employment. The amount deducted for any period may not exceed one-fourth of the pay from which the deduction is made, unless the deduction of a greater amount is necessary to make the collection within the period of anticipated employment. If the individual retires or resigns, or if his employment otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from later payments of any nature due to the individual from the United States Treasury.

Although Section 102 of P.L. 97-276 was a "sunset" provision which caused much of the law to expire on December 17, 1982, the Department's Office of Legal Counsel (OLC) con-

cluded in a formal memorandum dated March 11, 1983, to Assistant Attorney General J. Paul McGrath, Civil Divsion, that the opening phrase of Section 124, "[n]otwithstanding any other provision of this joint resolution . . . ." saves Section 124 from the "sunset" provision of Section 102. Therefore, the offset authority contained in Section 124 is not subject to the general expiration date P.L. 97-276 and the Government may proceed in accordance with the provisions of Section 124 to deduct the amount of any adjudicated indebtedness from a Federal employee's current salary.

The Executive Office for United States Attorneys will provide final guidance to all United States Attorneys in the near future on the process to be followed once it has been determined that a judgment debtor is also a Federal employee.

If OLC's legal interpretation concerning Section 124 is formally challenged, please contact Mr. C. William Lengacher, Chief, Judgment Enforcement Unit, Civil Division, on FTS 724-7303 for further advice. Also, a copy of OLC's formal memorandum of March 11, 1983, may be obtained by contacting Mr. Lengacher.

(Executive Office)

Multi-Agency Equal Access To Justice Act Award Procedure

The Office of Management and Budget (OMB) has established a procedure to determine the allocation among agencies of payments for attorneys fees and expert witnesses awarded under the Equal Access to Justice Act, U.S.C. 2412(d)(A), where more than one agency is liable for the award and there is a dispute among the agencies as to the proper allocation of the award. The procedure provides that the Deputy Attorney General, in such instances, shall prepare and forward to the Director of OMB a report recommending allocation of the award payment among the liable agencies. The recommended allocation will become final within fifteen days of receipt by the Director of OMB, unless he determines otherwise. A Departmental memorandum implementing the new procedure requests that the litigating division responsible for any multi-agency Equal Access to Justice Award case forward to the Deputy Attorney General for his signature a draft report to the Director, OMB, summarizing the relevant facts of the case and recommending an allocation of fees awarded among the liable agencies.

Copies of OMB's as well as the Department's memoranda are attached as appendices to this issue of the United States Attorneys' Bulletin. The new procedures are being incorporated into the relevant sections of the United States Attorney's Manual.

(Executive Office)

United States Attorney's Bulletin Correction

In the May 13, 1983, issue of the Bulletin (31 U.S. Att'y's Bull. 333-334), the name of

Marye L. Wright
Assistant United States Attorney
(S.D. W. Va.)
FTS (930-5145)

was erroneously omitted from the summary of the decision in Tug Valley Recovery Center v. Watt, No. 82-1194 (4th Cir. March 29, 1983). In fact, Ms. Wright served as primary attorney on the brief and argued the case to the court of appeals.

(Land and Natural Resources Division)

OFFICE OF THE SOLICITOR GENERAL
Soliciter General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari on or before September 3, 1983, with the Supreme Court in FCC v. ITT World Communications, Inc. There are two issues. The first is whether the Government in the Sunshine Act, 5 U.S.C. 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf participate in informal, general discussions with their foreign counterparts concerning issues of common interest. The second is whether suit may be brought in district court to enjoin allegedly ultra vires action by the Federal Communications Commission even though jurisdiction to review that agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court suit could have been reviewed by this method.

A petition for a writ of certiorari on or before September 19, 1983, with the Supreme Court in United States v. McManigal. The issue is the same as that now before the Supreme Court in Russello v. United States, No. 82-472--whether racketeering profits and proceeds are subject to forfeiture under 18 U.S.C. 1963.

A petition for a writ of certiorari on or before September 23, 1983, with the Supreme Court in United States v. Larry Wayne Rodgers. The issue is whether intentionally false, volunteered statements made to Federal law enforcement officers are statements "within the jurisdiction of any department or agency of the United States," within the meaning of 18 U.S.C. 1001.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

Porter v. United States, No. 81-32 (D. Del. July 7, 1983).

FEDERAL TORT CLAIMS ACT: DENIAL OF REQUEST TO INCREASE CIVIL DAMAGES ABOVE STATUTORY LIMITATION CLAIMED AT ADMINISTRATIVE LEVEL

Plaintiff filed a complaint in Porter v. United States, No. 81-32 (D. Del. July 7, 1983), after her administrative claim seeking recovery of $25,000 was denied. Plaintiff subsequently filed a motion for leave to amend the complaint by raising the amount demanded to $250,000.

The United States District Court for the District of Delaware held that the plaintiff failed to meet her burden under 28 U.S.C. §267(b) of proving the existence of newly discovered evidence or intervening facts and therefore would not permit recovery of damages beyond the statutory limitation claimed at the administrative level.

Attorney: William C. Carpenter, Jr.
Assistant United States Attorney
District of Delaware
FTS (487-6277)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Bruce Brown and Daniel Charest v. Department of Justice, Immigration and Naturalization Service, ____ F.2d ____ No. 82-1729 (D.C. Cir. Aug. 26, 1983). D.J. # 145-12-1405.

D.C. CIRCUIT UPHOLDS INDEFINITE SUSPENSION OF CIVIL SERVICE EMPLOYEES BASED UPON JOB-RELATED INDICTMENTS.

Petitioners' Bruce Brown and Daniel Charest, INS Border Patrol agents, were indicted on September 25, 1979, on charges of conspiring to violate the civil rights of illegal aliens and to defraud the United States by interfering with the lawful functions of the Border Patrol. On the day after their indictment, petitioners were notified that the INS proposed to suspend them indefinitely without pay pending disposition of the criminal charges, pursuant to 5 U.S.C. 7513(b)(1), which allows the agency to give less than 30 days notice if "there is reason to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." The proposed action was based solely on the indictment itself; the agency undertook no independent investigation and presented no evidence of wrongdoing by petitioners other than the indictment. On October 10, 1979, petitioners responded orally to the proposed adverse action; on October 15, 1979, the Chief Patrol Agent informed petitioners of his decision to suspend them indefinitely without pay effective October 16, 1979.

Petitioners appealed their suspension to the MSPB. They argued that the Civil Service Reform Act of 1978 does not authorize indefinite suspensions based on criminal indictments; instead, they contended, an agency must demonstrate by a preponderance of the evidence that indicted employees actually committed the acts alleged in the indictment, in order to suspend them. Petitioners also asserted that suspensions based on indictments violate due process. The MSPB rejected these arguments, and petitioners sought review of the MSPB's decision by the D.C. Circuit.

The D.C. Circuit, in this case of first impression, has now endorsed our arguments and affirmed the decision of the MSPB. The court agreed that 5 U.S.C. 7513(b)(1) authorizes suspensions based on indictments, stating that "if 'reasonable cause to believe the employee has committed a crime' were not a substantive basis for suspension, it would be superfluous to include a special notice provision for that situation." The court further held that the requisite "reasonable cause to

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

believe," is supplied by the indictment itself, which is based upon "probable cause," and that the suspension does not violate the presumption of innocence, because the agency is simply safeguarding its legitimate interest in the preservation of public confidence. The court did add that an acquitted employee is entitled to reinstatement and backpay, unless the agency chooses to remove the employee and meets its burden of demonstrating the employee's guilt by a preponderance of the evidence in the MSPB proceedings.

Attorneys: Robert S. Greenspan (Civil Division)
FTS (633-5428)

John S. Koppel (Civil Division)
FTS (633 5684)

State Of South Carolina v. Block, ____ F.2d ____ No. 83-1511 (4th Cir. Sept. 9, 1983). D.J. # 145-8-1558.

FOURTH CIRCUIT REVERSES DISTRICT COURT DECISION AND UPHOLDS THE ACTION BY THE SECRETARY OF AGRICULTURE IMPOSING A DEDUCTION ON ALL MILK MARKETED COMMERCIALLY.

Reacting to a dairy price support that has been too high, the American dairy industry has been producing far too much milk, resulting in a milk price support program which costs the taxpayers over $2.5 billion per year. As a means of attempting to remedy the problems of overproduction and the high cost of the program, Congress authorized the Secretary of Agriculture to impose a deduction on all milk marketed commercially in the United States. The Secretary decided to implement the deduction program, and his decision was challenged by a number of dairy farmers and groups of dairy farmers. The district court initially found that the Secretary had failed to follow Administrative Procedure Act procedures, and, rather than appeal this ruling, the Secretary redid the rulemaking process, reimposing the deduction in April 1983. (The program collects approximately $60 million per month for the Government.) The plaintiffs again challenged the deduction program, and the district court again enjoined it. The court found that the Secretary did not follow APA procedures once more, and that his action was arbitrary and capricious. We appealed, and the Fourth Circuit has now reversed, accepting all of our arguments. The court found that the Secretary did consider the relevant factors

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Assistant Attorney General J. Paul McGrath

identified by Congress before imposing the deduction. It also noted that many of the factors mentioned by the district court which the Secretary had not fully taken into account had been considered by Congress itself, relieving the Secretary of the burden of reconsidering them. In addition, the court found that the Secretary had fairly apprised interested persons of the proposed rule and that he had adequately responded to comments received. Therefore, APA requirements were fulfilled. Finally, while the district court had not reached this issue, the Fourth Circuit held that the case could finally be resolved because the constitutional arguments raised were without merit. (The court ruled that the deduction was not an illegal tax, was within Congress' Commerce Clause Power, and was not an undue delegation of power.)

Attorneys: Leonard Schaitman (Civil Division)
FTS (633-3441)

Douglas N. Letter (Civil Division)
FTS (633-3427)

Nicholas S. Zeppos (Civil Division)
FTS (633-5431)

Sara Greenberg (Civil Division)
FTS (633-3738)

Rivera v. Becerra, ____ F.2d ____ Nos. 81-4473 etc.
(9th Cir. Aug. 29, 1983). D.J. # 83-11-152.

NINTH CIRCUIT HOLDS THAT AGENCIES NEED NOT USE PUBLIC RULEMAKING PROCEDURES WHEN ISSUING INTERPRETATIVE RULES THAT HAVE SUBSTANTIAL IMPACT.

The Secretary of Labor announced interpretative rules explaining what he believed Congress meant in a 1980 Federal Unemployment Tax Act amendment concerning offset of pension benefits from unemployment benefits. The district court enjoined enforcement of the Secretary's rules on procedural grounds because they had "substantial impact" on rights of unemployment claimants and had been issued without compliance with APA public participation rulemaking procedures (5 U.S.C. 553). The district court also set aside on the merits the Secretary's interpretation

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

that Social Security pension benefits must be offset whenever the recent or terminating employer contributes to Social Security. These two rulings of the district court have been followed by other district courts and appeals were filed by the Secretary in three circuits. The Ninth Circuit has now joined the D.C. Circuit (Cabais v. Egger, 690 F.2d 234), holding that, in light of the express APA exemption for "interpretative rules" and the Supreme Court's opinion in Vermont Yankee, courts may not impose rulemaking procedures on agencies when they issue interpretative rules simply because such rules have "substantial impact." The Ninth Circuit further held that the Secretary's interpretation concerning offset of Social Security pension benefits from unemployment benefits was correct. The court in addition (in response to plaintiff's cross-appeal) upheld the constitutionality of the 1980 amendment and ruled that it was not impermissibly retroactive.

Attorneys: Michael Kimmel (Civil Division)
FTS (633-5714)

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(e). The Grand Jury. Recording and Disclosure of Proceedings.

In two cases arising in the 11th Circuit the targets of grand jury investigations alleged violations by the Government of Rule 6(e) and offered prima facie evidence that agents of the Government had disclosed "matters occurring before the grand jury" to the media. The district court in each case sought to remedy the abuse by, inter alia, requiring the Government to disclose to targets' attorneys the names of all Government personnel involved in the proceeding. The Government appealed on the ground that the relief ordered was too extensive.

The court of appeals consolidated the cases and held that the district courts had erred in making the requested information available to targets' counsel. Once a prima facie case of a violation of Rule 6(e) has been made the court should conduct an in camera review of the Government's information to determine if a violation has in fact occurred. The court may then provide targets' attorneys with the identity of any violators and permit them to play a proper role in subsequent hearings to impose contempt sanctions on Government employees.

(Reversed and remanded.)

United States v. Lance E. Eisenberg (In re Grand Jury Proceedings), 711 F2d 959 (11th Cir. July 25, 1983).

U.S. Department of Justice

Office of the Deputy Attorney General

VOL. 31 SEPTEMBER 30, 1983 NO. 19 605

Associate Deputy Attorney General Washington, D.C. 20530

MEMORANDUM July 27, 1983

TO: William F. Baxter
Assistant Attorney General
Antitrust Division

J. Paul McGrath
Assistant Attorney General
Civil Division

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

F. Henry Habicht, II
Acting Assistant Attorney General
Land and Natural Resources Division

Glenn L. Archer, Jr.
Assistant Attorney General
Tax Division

FROM: Timothy J. Finn TJF
Associate Deputy Attorney General

SUBJECT: Multi-Agency Awards Under the Equal Access to Justice Act

The attached memorandum from the Office of Management and Budget (OMB) establishes procedures to determine the allocation among agencies of payments of attorneys fees awarded under the Equal Access to Justice Act in cases where more than one agency is liable for the award and there is a dispute among the agencies as to the proper allocation of the award. In such cases, the procedures provide that the Department of Justice will submit a report recommending an allocation of the awarded fees among the liable agencies, which will become the final allocation unless disapproved by the Director of OMB.

Accordingly, when a multi-agency EAJA attorneys fee award is made and a dispute arises among the agencies over the payment, the litigating division responsible for the case is requested to forward to the Deputy Attorney General for his signature a draft report to OMB summarizing the relevant facts of the case and recommending an allocation of fees awarded among the liable agencies.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

VOL. 31 SEPTEMBER 30, 1983 NO. 19

MEMORANDUM TO: HEADS OF DEPARTMENTS AND AGENCIES

FROM: JOSEPH R. WRIGHT, JR. Joe Wright
DEPUTY DIRECTOR

SUBJECT: MULTI-AGENCY EQUAL ACCESS TO JUSTICE ACT AWARD PROCEDURE

The Equal Access to Justice Act (28 U.S.C. 2412(d)(A), "EAJA") authorizes a court to award attorney fees and expert witness costs to a prevailing party in certain civil actions brought by or against the United States. Such awards are required if the position of the United States was not substantially justified.

Awards may be made against more than one agency. The following procedure has been established to determine the allocation of payments when there is a dispute among the agencies subject to a multi-agency EAJA award.

The Deputy Attorney General will prepare a report on disputed multi-agency award or proposed settlements to be submitted to the Director of the Office of Management and Budget and to the agencies involved. This report will contain a recommended allocation of the award payment among those agencies.

The recommendation shall be final within 15 days of the receipt by the Director, unless he determines otherwise. Notice of the allocation determination will be made to the agencies involved by the relevant Budget Division of the Office of Management and Budget.

U.S. ATTORNEYS' LIST EFFECTIVE July 29, 1983

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Alabama, S	J. B. Sessions, III
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Arkansas, W	W. Asa Hutchinson
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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