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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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COMMENDATIONS

Assistant United States Attorneys DANIEL A. CLANCY, DANNY L. NEWSOM, and SIDNEY P. ALEXANDER, Western District of Tennessee, and First Assistant United States Attorney WILLIAM M. COHEN, Middle District of Tennessee, were commended by Mr. Dale W. Gardner, Regional Inspector, Internal Revenue Service, Atlanta, Georgia, for the successful prosecution of numerous cases stemming from the improper and illegal receipt of unemployment benefits by Internal Revenue Service employees in Tennessee. Assistant United States Attorney Clancy, involved in the investigation almost from its inception, was particularly commended for his involvement in all aspects of the investigation and personal prosecution of all but three of the eighty cases.

Assistant United States Attorney DAVID S. EISENBERG, Eastern District of New York, was commended by Mr. S. Richard Brock, Regional Inspector General for Investigations, Department of Health and Human Services, for the successful investigation of certain employees of the South Brooklyn Health Center, Inc. The result of the investigation was a 63-count indictment filed in the Eastern District of New York charging certain employees of embezzling more than $310,000 from the Center. The accused employees pleaded guilty, and are now being evaluated for sentencing. Assistant United States Attorney Eisenberg was congratulated for the excellent direction he provided to the investigating agent, and for his attention to particularity regarding procedural detail in this criminal prosecution.

Assistant United States Attorney STEVEN GERBER, District of New Jersey, was commended by Mr. Benjamin J. Redmond, Regional Inspector, Internal Revenue Service, for the high caliber of service rendered in the recent prosecution of United States v. Richard Caruso, a case involving the embezzlement of $1.6 million in federal tax deposits by a bank teller. This was the largest embezzlement involving a bank teller in New Jersey in over 20 years. Through the efforts of Assistant United States Attorney Gerber, the government stands to receive a substantial amount of tax dollars which may otherwise have been lost and also saved the government considerable time and money in prosecuting this case.

Assistant United States Attorney SHERRY P. HERRGOTT, District of Arizona, was commended by Mr. John J. Hinchcliffe, Special Agent in Charge, Federal Bureau of Investigation, for her part in the investigation of Edward Hernandez. Assistant United States Attorney Herrgott offered beneficial suggestions which effectively guided investigatory operations and preparation of search warrants which contributed to the successful conclusion of the investigation.

Assistant United States Attorney CHARLES F. HYDER, District of Arizona, was commended by Mr. Howard A. Tokheim, Postal Inspector in Charge, Phoenix, Arizona, for the prosecution of United States v. Keith Williams. Assistant United States Attorney Hyder's hours of preparation, professional interest, attitude, and attention to detail were quite impressive, and an example of the close working relationship between the United States Attorney's office and the United States Postal Service.

Assistant United States Attorney GALE McKENZIE, Northern District of Georgia, was commended by Mr. Lawrence K. York, Special Agent in Charge, Federal Bureau of Investigation, Atlanta, Georgia, for her outstanding work in the prosecution of the "Ricky Alan Ramsey" case. This case involved a racial incident in which a group of blacks were allegedly threatened while visiting the Chattahoochee National Park.

Assistant United States Attorney RHONDA L. REPP, District of Arizona, was commended by A.M. Statham, Assistant Inspector General for Investigations, for her successful prosecution of United States v. Esquibel and United States v. Sowards. Assistant United States Attorney Repp's thorough and aggressive prosecution of these cases was a major factor in bringing them to a successful conclusion.

Assistant United States Attorneys PAUL ALAN SPRAWLS and JAMES T. McMANUS, Western District of Louisiana, were commended by Mr. K. H. Fletcher, Chief Postal Inspector, for their thorough preparation and successful prosecution of a mail fraud case involving the submission of falsified bids to obtain government contracts. The case involved an intricate scheme to ascertain the amount of the lowest bid for a government contract for maintenance services at Fort Bliss, Texas, and then, using a previously postmarked envelope, submitted a lower bid.

Assistant United States Attorney ANDREW M. WOLFE, Eastern District of California, was commended by Mr. Edwin W. Thomas, Regional Administrator, General Services Administration, San Francisco, for his excellent and outstanding work in Van Holzschuh v. Gerald P. Carmen. Assistant United States Attorney Wolfe's work was directly responsible for the court's favorable order dismissing this case for lack of standing.

Debt Collection Commendations

United States Attorney CHRISTOPHER K. BARNES, Southern District of Ohio, and his debt collection staff were commended by Richard K. Willard, Acting Assistant Attorney General, Civil Division, for their persistence and dedication in the recent collection of a

$25,000 criminal fine. The defendant in the case had been convicted, fined $25,000, and incarcerated. The convicted fine-debtor then transferred his 1979 Mercedes to his mother as a "gift." The United States Attorney's office determined that this was a fraudulent conveyance under the Ohio Uniform Fraudulent Conveyances Act and obtained a writ of attachment for the Mercedes--worth well in excess of the $25,000 fine. When the United States Marshal attempted to seize the automobile, the fine-debtor's mother presented him with a cashier's check for the full amount of the fine. Acting Assistant Attorney General Willard cited the collection as an outstanding example of this Administration's commitment to collect the millions of dollars in debts owed the United States.

United States Attorney W. HUNT DUMONT, District of New Jersey, and his debt collection staff were commended by Attorney General William French Smith for their success in collecting $7.5 million in criminal fines, bond forfeitures, and civil debts during Fiscal Year 1983. The Fiscal Year 1983 total represents a 10-fold increase over Fiscal Year 1982. The Attorney General's letter is published to underscore this Administration's continuing commitment to an aggressive program to collect debts owed to the United States, and to illustrate the dramatic increases which may be achieved by such a program.

Office of the Attorney General
Washington, D.C. 20530

February 9, 1984

Honorable W. Hunt Dumont
United States Attorney
Federal Building
970 Broad Street, Room 502
Newark, New Jersey 07102

Dear Hunt:

Richard Willard recently brought to my attention the outstanding results your debt collection efforts achieved last fiscal year. I understand that in Fiscal 1983, you and your people collected over $7.5 million in criminal fines, bond forfeitures, and civil debts; a ten-fold increase over your total FY 1982 collections.

I commend you for your exemplary results. I would appreciate it if you would personally convey my appreciation and congratulations to all of the people working in your Collection Unit for a job well done.

Your Office's performance sets a high standard for your fellow U.S. Attorneys. Results such as you and your people reported last year are making my goal of an aggressive debt collection program a reality for this Administration.

Sincerely,

Bill

William French Smith
Attorney General

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

CLEARINGHOUSE

INS Outline, "Crimes Involving Moral Turpitude"

The Immigration and Naturalization Service recently distributed an outline entitled "Crimes Involving Moral Turpitude," prepared by Mr. Patrick T. McDermott, Chief Legal Officer, San Diego, California. The purpose of this document is to list some of the crimes which the courts or the Board of Immigration Appeals have recognized as crimes involving moral turpitude. The list is made to assist prosecutors in recognizing crimes which may have a direct effect on an alien's immigration status in this country.

Copies of the outline can be obtained from Legal Services Section, Executive Office for United States Attorneys (FTS 633-4024.) Please ask for Publication No. CH-2.

(Executive Office)

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

POINTS TO REMEMBER

Coordination of United States Attorneys' Offices Surveys

By order of the Attorney General (DOJ Order No. 2810.1, June 13, 1980), surveys or questionnaires from persons or organizations outside the Department of Justice, including the private sector, other U.S. Government offices, Congress members or committees or General Accounting Office, or from other Department of Justice offices, boards and divisions, which appear to be part of a survey addressed to other United States Attorneys or officials as well, should be sent to the Executive Office for United States Attorneys for further coordination, in order to conserve the resources and time of United States Attorneys' offices personnel and prevent unnecessary duplication of research and survey efforts. The Executive Office for United States Attorneys will review and coordinate all survey requests and will directly request the participation of all or selected United States Attorneys in surveys deemed to be appropriate.

United States Attorneys should not respond to any surveys or questionnaires not sent from or endorsed by the Executive Office for United States Attorneys, but should refer the request to the Executive Office for appropriate consideration.

A copy of the Order and additional instructions are contained in Title 1 and Title 10 of the United States Attorneys' Manual (USAM 1-5.700, 1-8.000, 10-6.310, and 10-6.340). For assistance, please contact the office of the Assistant Director for Legal Services, Executive Office for United States Attorneys, to whom all surveys without Executive Office for United States Attorneys endorsement should be referred (633-4024).

(Executive Office)

Office of Legislative and Intergovernmental Affairs

In an effort to manage more effectively the ever increasing role of the Department with responsibility to intergovernmental affairs, the Attorney General has charged the Department's Office of Legislative Affairs with the direct responsibility of coordinating the Department's intergovernmental affairs and has renamed that office the Office of Legislative and Intergovernmental Affairs. Order 1054-84, dated February 24, 1984.

(Executive Office)

Personnel Changes

On March 14, 1984, United States Attorney Sarah Evans Barker's appointment for United States District Judge for the Southern District of Indiana was confirmed by the Senate. She is scheduled to be sworn in March 30.

On March 23, 1984, Robert C. Bonner will be sworn in as the Presidentially-appointed United States Attorney for the Central District of California.

(Executive Office)

Teletypes To All United States Attorneys

A list of the teletypes sent during the period from March 9 through March 23, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A brief amicus curiae in support of the State on or before March 8, 1984, in State of Ohio v. Johnson, No. 83-904. The issue addressed by the United States was whether the Double Jeopardy Clause prohibits a defendant from being tried on charges of murder and aggravated robbery after his guilty plea is accepted by the trial court, over the State's objection, to lesser included charges contained in the same indictment.

A petition for a writ of certiorari with the Supreme Court on or before March 12, 1984, in INS v. Olivas-Monorrez. The issue is similar to that in INS v. Lopez-Mendoza, No. 83-491 (whether the exclusionary rule applies in civil deportation proceedings).

A petition for a writ of certiorari with the Supreme Court on or before March 18, 1984, in Block v. Payne. The issue is whether a government agency may be equitably estopped from enforcing regulations establishing eligibility conditions for a government loan program by its failure to comply with its own regulations requiring publicity of that loan program.

A petition for a writ of certiorari with the Supreme Court on or before March 20, 1984, in Commissioner of Internal Revenue v. Estate of Van Horne. The issue is whether events occurring after the decedent's death may be considered in determining the validity and amount of "claims against the estate," which may be deducted under Code Section 2053(a)(3).

A brief amicus curiae in support of petitioners on or before April 6, 1984, in Alexander v. Jennings, No. 83-727. The issues are whether a disparate impact test is appropriate in suits brought under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794); and whether respondents established a disparate impact on the handicapped by showing that the Tennessee Medicaid Program reduced the number of hospital days covered by Medicaid from 20 to 14 per year per individual.

The Solicitor General has deauthorized the filing of a certiorari petition in United States v. Rubio. The issue on which certiorari was authorized was whether references to an indictment in an "indicia" search warrant establish the requisite nexus between the things to be seized and the alleged criminal activity.

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

EEOC v. Hernando Bank, Inc., No. 82-4298 (5th Cir. Feb. 13,1984).
(Case handled by the Equal Employment Opportunity Commission)

FIFTH CIRCUIT HOLDS THAT INVALID LEGISLATIVE VETO PROVISION IS SEVERABLE FROM REMAINDER OF REORGANIZATION ACT AND UPHOLDS THE PRESIDENT'S TRANSFER OF ENFORCEMENT AUTHORITY UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND THE EQUAL PAY ACT FROM LABOR TO THE EEOC.

In the Reorganization Act, Congress authorized the President to perform certain reorganizations within the Executive Branch, but subject to legislative veto. The President accordingly transferred enforcement authority under the Age Discrimination in Employment Act and the Equal Pay Act from the Labor Department to the EEOC. After the Supreme Court struck down the validity of the legislative veto device, numerous parties challenged the enforcement authority of the EEOC over these two statutes, arguing that it received its authority in an invalid manner. A district court in Mississippi ruled against us and held that the EEOC did not have authority because the Reorganization Act (which is no longer in existence) was unconstitutional. EEOC v. Allstate.

We appealed to the Fifth Circuit, but filed a protective jurisdictional statement with the Supreme Court also. We filed our brief in the Fifth Circuit, arguing among other things that the legislative veto provision was severable from the remainder of the Reorganization Act, making transfers of authority under that statute valid. The court of appeals stayed the appeal, however, pending a ruling by the Supreme Court on the jurisdictional question. In the meanwhile, the Fifth Circuit had before it the Hernando Bank case, another Equal Pay Act case in which the defendant attempted to raise this legislative veto issue quite late in the proceedings. On motion of the EEOC, the Fifth Circuit struck the argument as untimely. Nevertheless, the court has now issued a decision in the Hernando Bank case and has resolved the severability question in our favor.

Attorney: Douglas N. Letter
FTS 633-3427

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Woodard v. United States, No. 82-5374 (6th Cir. Jan. 23, 1984). D.J. # 147-71-13.

SIXTH CIRCUIT REVERSES DISTRICT COURT'S DECISION OVERTURNING AGRICULTURE'S IMPOSITION OF A ONE-YEAR DISQUALIFICATION SANCTION AGAINST A FOOD STAMP RETAILER FOR VIOLATION OF THE FOOD STAMP ACT.

Plaintiff, owner of a grocery store authorized to participate in the Food Stamp Program, filed this action challenging a one-year disqualification sanction against his store imposed by the Department of Agriculture after an investigation revealed that employees in the store were selling ineligible items in exchange for food stamps and were discounting food stamps for cash. Regulations limit one-year sanctions to cases where violations are attributable to "store policy" and a prior warning has been given. After a trial de novo, the district court held that while the violations were supported by the evidence, a one-year sanction was not valid because it ruled that the evidence assertedly failed to show a "store policy" or the giving of a prior warning.

The Sixth Circuit has reversed, with a dissent by Judge Kennedy. In a 1972 decision issued prior to Agriculture's promulgation of detailed regulations governing retailer sanctions, the Sixth Circuit previously held that once a district court finds that violations charged had occurred, it has no authority under the statute to review the length of a sanction which is within the limits imposed by law. Martin v. United States, 459 F.2d §300, cert. denied, 409 U.S. 878 (1972). In the instant case, the Sixth Circuit held that de novo review in district court includes not only review of the fact of the violation, but also whether the sanction complied with administrative regulations. Nevertheless, this court held that the district court's findings on the latter question were "clearly erroneous," and hence reversed the district court's decision. The court of appeals' de novo review of the sanctions issue appears to be at odds with the recent First Circuit decision holding that the trial de novo available under the Food Stamp Act concerns only the existence of the charged violations, and that the validity of the sanction for a proven violation is subject only to limited review on the administrative record under the arbitrary and capricious or abuse of discretion

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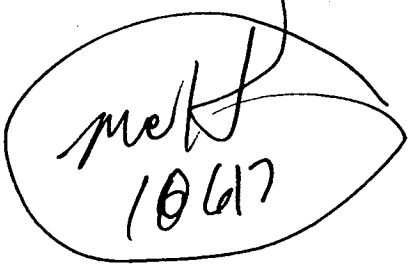
standard. Broad Street Food Market v. United States, 720 F.2d §217 (1st Cir. 1983). To the extent this aspect of the Sixth Circuit's decision and the First Circuit's decision in Broad Street v. United States, supra, conflict, the government will continue to subscribe to the latter view outside the Sixth Circuit.



Attorneys: Michael Kimmel
FTS 633-5714

Carlene V. McIntyre
FTS 633-5459

Alliance to End Repression, et al. v. City of Chicago, et al. and United States Department of Justice, et al., Nos. 83-1853, 83-1854. (7th Cir. Feb. 23, 1984). D.J. # 157-23-1724.

SEVENTH CIRCUIT AFFIRMS DISTRICT COURT DECISION INVALIDATING A PROVISION OF THE ATTORNEY GENERAL'S DOMESTIC SECURITY GUIDELINES IN CHICAGO.

In 1975, several lawsuits were filed challenging certain conduct of the FBI and other intelligence agencies as unconstitutional. The parties settled the lawsuits in 1981 and, as pertinent to the FBI settlement, agreed that future guidelines governing various FBI activities must be consistent with the general principles of the settlement agreement. In 1983, Attorney General Smith issued new domestic security investigation guidelines, and plaintiffs immediately challenged several provisions of the new guidelines as inconsistent with the agreement. The district court permanently enjoined only the "advocacy provision" of the 1983 guidelines, finding that it permitted the FBI to initiate investigations based on First Amendment activity in contravention of the agreement. In reaching this conclusion, the district court interpreted the settlement agreement to prohibit any investigation based on advocacy that itself could not be punished or prohibited under a criminal statute.

On our appeal, a divided panel of the Seventh Circuit affirmed the district court's construction of the settlement agreement and agreed that the advocacy provision is inconsistent

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with the agreement. Accordingly, the FBI is precluded, in Chicago, from initiating a domestic security investigation or inquiry based on advocacy of crime or violence even for the purpose of determining whether such advocacy is purely rhetorical or potentially a serious threat to public safety. We are presently preparing a petition for rehearing en banc.

Attorneys: William Kanter
FTS 633-1597

Freddi Lipstein
FTS 633-4825

Woods v. United States, No. 83-1659. (9th Cir. Feb. 3, 1984). D.J. # 147-11E-26.

NINTH CIRCUIT HOLDS THAT SECRETARY OF AGRICULTURE HAS A COMMON LAW RIGHT TO RECOUP FROM THE STATE OF CALIFORNIA LOSSES CAUSED BY SAN FRANCISCO'S VIOLATION OF THE FOOD STAMP ACT.

Section 10(d) of the Food Stamp Act of 1964 prohibits states and local subdivisions from decreasing welfare grants as a consequence of a welfare recipient's participation in the Food Stamp Program. This case arose in response to San Francisco County's 1976 ordinance which set the cash assistance level for welfare recipients at $149 a month, but paid recipients only $107 in cash and relied upon their added purchasing power from participation in the food stamp program for the remaining $42. The district court upheld the Department of Agriculture's contention that the ordinance violated the Food Stamp Act and caused a loss to the federal treasury because the lowered cash assistance level meant that food stamp recipients paid less than they would otherwise have paid for their food stamps. The district court also held that Agriculture could recover such losses pursuant to Section 10(g) of the Act which allows Agriculture to recover from the state losses caused by the state's gross negligence in the certification or issuance of food stamps.

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California appealed, and, in a unanimous opinion, the court of appeals affirmed. The court adopted our argument that a violation of Section 10(d) is actionable since compliance with that provision constituted a condition of the state's participation in the food stamp program and that San Francisco indirectly misspent food stamp funds by collecting less than the appropriate purchase price for the stamps. The court also adopted our argument, made for the first time on appeal, that despite the lack of express statutory language authorizing the government to recover damages due to a violation of section 10(d), the government had a common law right, independent of statute, to recoup its excessive payments from the state for the county's violation. Finally, the court also accepted our argument that this remedy was an integral part of Agriculture's ability to effectively administer the Act and that the absence of fault on the state's part did not preclude recovery for the violation.

Attorneys: Anthony J. Steinmeyer
FTS 633-3388

Carlene V. McIntyre
FTS 633-5459

Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., Nos. 82-3152, 82-3182, (9th Cir. Feb. 17, 1984). D.J. # 27-8223.

EN BANC NINTH CIRCUIT SUSTAINS THE CONSTITUTIONALITY OF THE CONSENSUAL REFERENCE PROVISIONS OF THE MAGISTRATES ACT.

The Magistrates Act of 1979 permits district courts to refer civil cases to magistrates for trial and entry of judgment with the consent of the parties. In August 1983, a panel of the Ninth Circuit sua sponte requested the parties to address the constitutionality of the consensual reference provisions of the Magistrates Act, and, relying on the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., unanimously held that they were unconstitutional. Subsequent to the panel's decision, the United States intervened and successfully sought rehearing en banc on the constitutional question.

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The en banc court, in an 8-3 decision, has just joined the Third Circuit (Wharton-Thomas v. United States), and sustained the constitutionality of the consensual reference provisions of the Magistrates Act.

As had the Third Circuit, the en banc court first found that although parties could not consent to subject-matter jurisdiction, they could waive whatever due process rights they had to an Article III judge, and consent to the mode of trial and the judicial officer within the court to hear a case that by statute was within the jurisdiction of the court. The en banc court then determined that the power of Article III judges in appointing and removing magistrates, and the district court's power to refer a case, not refer a case, or withdraw a previous reference to a magistrate, had the effect of preserving the essential attributes of judicial power in Article III judges.

The Ninth Circuit's en banc decision should be helpful in the numerous other circuits where the issue remains pending, including the First and Second Circuits which have already heard oral argument, and the Eighth Circuit which sua sponte set the issue for en banc consideration after a panel heard oral argument.

Attorneys: Michael F. Hertz
FTS 633-3602

Peter R. Maier
FTS 633-3926

Harold J. Krent
FTS 633-5684

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Lehman v. Trout, ____U.S.____ No. 83-706 (Feb. 27, 1984).
D.J. # 170-16-631.

SUPREME COURT GRANTS OUR CERTIORARI PETITION, SUMMARILY VACATES THE COURT OF APPEALS' DECISION, AND REMANDS A SEX DISCRIMINATION CASE FOR POSSIBLE PRESENTATION OF NEW EVIDENCE AND RENEWED CONSIDERATION OF STATISTICAL EVIDENCE IN LIGHT OF CORRECT LEGAL PRINCIPLES.

This case involves an allegation that the Navy discriminated against a class of women technical employees performing computer-related tasks. The case turns largely on evaluation of statistical evidence presented by both sides. The district court ruled that the Navy had discriminated in both initial grade placement and promotions. The D.C. Circuit reversed in part, ruling that the class was not entitled to relief for discriminatory initial placement decisions because other federal agencies (primarily the Civil Service Commission) were responsible for those decisions. The court of appeals also ruled that the district court wrongly permitted the inclusion of pre-Act statistics in plaintiffs' analysis. Nevertheless, the court of appeals refused to disturb the district court's conclusion that plaintiffs had established a prima facie case of discrimination in promotions and that defendants had not rebutted that case. Our petition for rehearing en banc was denied.

We filed a petition for a writ of certiorari asking the Supreme Court to summarily vacate the decision of the court of appeals on the ground that the district court had relied on a statistical analysis that, in critical part, was based on evidence that did not relate to employment decisions actionable under the court of appeals' substantive rulings regarding Title VII, i.e, that defendants could not be held liable for the effects of pre-Act employment decisions or of initial placement decisions. The Supreme Court accepted our arguments totally. Not only did it vacate the court of appeals decision, but, in accord with our request, directed that the case be remanded to

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the district court for "findings of fact, based on new evidence, if necessary, on the question of what evidentiary value respondents' and petitioners' statistical evidence has in light of the Court of Appeals' conclusions of law concerning employment decisions that are not actionable in this case."

Attorneys: Robert E. Kopp
FTS 633-3311

John C. Hoyle
FTS 633-3547

Margaret Heckler v. Sandra Turner, ____S.Ct.____No. 83-1097.
D.J. # 145-16-2113.

SUPREME COURT AGREES TO DECIDE WHETHER 1981 OBRA AMENDMENTS CHANGED THE METHOD BY WHICH INCOME IS CALCULATED UNDER THE AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM.

The Supreme Court has granted the government's petition for a writ of certiorari in Heckler v. Turner. The case presents the question whether the term "income" in 42 U.S.C. §602(a)(7) is properly regarded as gross or net income for the purpose of determining eligibility and benefits under the AFDC program. The government's position is that, after the OBRA amendments of 1981, the term means net income and does not include mandatory payroll deductions such as taxes. The Ninth Circuit decision under review held that the term was intended by Congress to mean gross income. This decision conflicts with cases decided by the Third, Fourth and First Circuits.

Attorneys: William Kanter
FTS 633-1597

Richard A. Olderman
FTS 633-4052

CIVIL RIGHTS DIVISION
Assistant Attorney General Wm. Bradford Reynolds

United States v. Perez Casillas, No. 84-70 (D. Puerto Rico. Feb. 6, 1984). D.J. # 144-65-408.

FEDERAL GRAND JURY RETURNS 44-COUNT INDICTMENT AGAINST POLICE OF PUERTO RICO OFFICERS.

A federal grand jury returned a 44-count indictment against ten Police of Puerto Rico police officers charging a conspiracy to obstruct justice and numerous substantive counts of perjury and subornation of perjury. The victims, two alleged terrorists, were killed during an attempted sabotage of a TV transmittal tower. They were accompanied by an undercover policeman, who had alerted the authorities that the attempt would be made. A local police investigation found that the victims fired at the officers first, and were killed when the officers returned their fire. This matter was previously closed after a lengthy federal grand jury investigation. It was reopened when allegations surfaced indicating that persons who appeared before the grand jury had committed perjury. The statute of limitations on the underlying homicides expired in July 1983.

Attorney: Howard Feinstein (Civil Rights Division)
FTS 633-4147

United States v. Fulton, No. CRG 84-12 (N.D. Miss. Feb. 16, 1984). D.J. # 166-40-20.

SIX DEFENDANTS PLEAD GUILTY BEFORE GRAND JURY PROCEEDINGS COMMENCE.

Before grand jury proceedings commenced, all six defendants, Dwayne Fulton, Jr., John Fulton, John Rutledge, Randall Dorman, Miles McWilliams, and John Overby pled guilty to one count each of violating 18 U.S.C. §245(b)5. A sentencing date has not yet been set. William Dillard, a white farmer in Humphreys County, openly supported a black candidate in a local election for county supervisor. The election was held on August 23, 1983, and the black candidate defeated his white opponent. In the week preceding the election, a series of incidents occurred to increase racial tensions in the Town of Louise. After the election results were known, the six subjects

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Assistant Attorney General Wm. Bradford Reynolds

gathered at a bar and then went to a metal workshop owned by one of their fathers, who was the defeated candidate. There it was decided to build and burn a cross in Mr. Dillard's yard. All six subjects helped build and transport the cross in a pick-up truck. The cross was ignited and the six subjects fled. The burnt cross was discovered the next day by an employee of Mr. Dillard.

Attorney: Amy Hay (Civil Rights Division)
FTS 633-4152

United States v. Marler, No. CR 83-292-N (D. Mass. Mar. 1, 1984). D.J. # 144-36-1013.

FORMER POLICE OFFICER CONVICTED IN CASE INVOLVING DEATH OF ALCOHOLIC THROWN OFF PIER INTO OCEAN.

Trial in this case began on February 21, 1984. The defendant, Sgt. William T. Marler, a former Lynn Police Department officer, was convicted of violating 18 U.S.C. §242 with death resulting. Sentencing is scheduled for April 3, 1984. The victim, Lawrence Brown, a 43-year-old white alcoholic, died after being thrown off a pier into the ocean by the defendant.

Attorney: Theodore Merritt (Civil Rights Division)
FTS 633-3858

United States v. Mussry, No. 83-5093 (9th Cir. Mar. 1, 1984). D.J. # 50-12C-15.

NINTH CIRCUIT ACCEPTS GOVERNMENT'S POSITION AND REVERSES JUDGMENT OF LOWER COURT IN INVOLUNTARY SERVITUDE CASE.

The Ninth Circuit Court of Appeals issued its opinion in this case, reversing the judgment below. The court reinstated 24 counts alleging violations of the involuntary servitude

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Assistant Attorney General Wm. Bradford Reynolds

statutes (18 U.S.C. §§1581, 1583, and 1584) and related portions of the conspiracy count, and remanded them for trial. The court held, as we had argued, that the coercion requisite for a "holding" in involuntary servitude can be accomplished without the use or threatened use of physical force or imprisonment, stating: "A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor." The court ruled that the allegations of the indictment and bill of particulars--that the defendants, with the requisite intent, brought indigent, non-English-speaking Indonesians into the United States illegally, retained their passports and return airline tickets, worked them long hours for little or no pay, and took other steps which together effectively foreclosed them from either returning home or subsisting here if they left their employment--are sufficient to charge such coercion.

Attorney: Louise A. Lerner (Civil Rights Division)
FTS 633-3779

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General F. Henry Habicht, II

Merrell v. Block; Save Our Ecosystems v. Clark, Nos. 83-3887 and 83-3908 (9th Cir., Jan. 27, 1984) D.J. # 90-1-4-2337; 90-1-4-2158.

HERBICIDE SPRAYING ENJOINED UNTIL FOREST SERVICE CONDUCTS RESEARCH INTO HUMAN HEALTH EFFECTS CAUSED BY THEIR USE AND CONDUCTS A WORST-CASE ANALYSIS.

The Ninth Circuit, in these two herbicide spraying cases arising out of Oregon, affirmed that both the BLM and the Forest Service were required to conduct site specific research into the health impacts caused by herbicide spraying (Merrell) and that a worst case analysis prepared for an herbicide spraying program must include a range of possibilities, including an assumption that the herbicides cause cancer at any dose, even when the agency concludes that there is no credible evidence to support the claimed possible impact (Save Our Ecosystems).

In Merrell the district court enjoined the Forest Service and the BLM from aerial spraying of herbicides until the agencies conducted site specific research into the human health effects caused by the use of the herbicides. The Ninth Circuit affirmed, finding that: (1) the agencies could not rely either on the fact that the herbicides were registered by EPA under FIFRA or on the data collected by EPA to support the registration; (2) both agencies were required to do their own research if no adequate data exists.

In Save Our Ecosystems, the Ninth Circuit affirmed the district court's conclusion that a worst case analysis must include a discussion of the possibility that the herbicides may cause cancer at any dose. The court rejected our arguments that an agency need not prepare a worst case analysis for an impact which is not proven to be possible. The court also expanded the district court's judgment by requiring the agency to analyze a range of possibilities in a worst case analysis, similar to the required discussion of the range of alternatives in an EIS.

In both cases, the court expanded the scope of the district court's injunction by preventing all use of herbicides by the two agencies in Oregon and Washington. In so doing, the court apparently rejected our contention,

based on Weinberger v. Romero-Barcelo, 456 U.S. §305, that a district court has the discretion to tailor an injunction, for violation of an environmental statute, to the facts of the particular case. The court also awarded attorneys' fees in the district court, apparently reversing, without the benefit of briefing or oral argument, the district court's conclusion that the government's position was substantially justified.

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New England Coalition on Nuclear Pollution v. NRC, No. 82-1581 (D.C. Cir., Feb. 7, 1984) D.J. 90-1-4-2457.

NRC'S RULE ELIMINATING NEED FOR APPLICANTS FOR LICENSES WHO ARE ELECTRIC UTILITIES TO ESTABLISH FINANCIAL QUALIFICATIONS INVALID.

The NRC issued a proposed rule to eliminate the need for applicants for licenses who are electric utilities to establish their financial qualifications. The proposed rule was based on two premises: first, that regulated electric utilities or those able to set their own rates would be able to meet the costs of safe construction and operation of a nuclear facility and, second, that there was no demonstrated relationship between financial qualifications and safety, direct inspection being a more effective means of achieving safety. The court found that the NRC proposed rule was based on the agency's view that financial qualification requirements were of questionable effectiveness and, combined with the peculiar characteristics of public utilities that assure solvency, arguably justify elimination of the requirements for that particular category of applicant. After receiving comments, some directed to the premise that a public utility's regulated status assures adequate funding, NRC finalized the rule, saying that it found it unnecessary to consider the general ability of utilities to finance construction of new facilities. The court of appeals found that this was an abandonment of "what seems to us the only rational basis enunciated for generally treating public utilities differently for the purpose at hand." The court found, then, that the NRC rule did not comply with 5 U.S.C. §553(c) in that it was not

supported by an adequate statement of basis and purpose. The proceedings were remanded to NRC.

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United States v. 65.0 Acres, Wasatch County, Utah (Wash-Mar Investment Co.), No. 82-1707 (10th Cir., Feb. 14, 1984) D.J. #33-46-257-142.

CONDEMNATION; ADDITIONAL LAND TAKEN NOT ENTITLED TO ENHANCED VALUE UNDER SCOPE-OF-THE-PROJECT RULE.

The Strawberry Reservoir Project began with an earlier condemnation action, in which the government acquired 515 acres of a 580-acre parcel. At that time, the government contended that the just compensation due the landowners should be reduced to take into account the enhancement in value the 65-acre remainder would enjoy because of the project.

The jury in that first case, however, refused to assign an enhanced value to the remainder, finding that the remainder was actually damaged by the project. Subsequently, the government initiated this condemnation proceeding to acquire the remaining 65 acres. After trial, the district court valued the 32.5 acres which had appeared on the original project map as if the acres were not adjacent to the project, consistent with U.S. v. Miller. The remaining 32.5 acres were valued as enhanced by the project. On this appeal, the landowners argued that the entire 65 acres should have been valued at the enhanced rate. The Tenth Circuit affirmed, rejecting landowners' contentions that (1) Miller does not apply because the government should have included the 32.5 acres in the original condemnation action and its failure to do so placed the 32.5 acres beyond the scope of the project; (2) the government's attempt in the first trial to enhance the value of the 32.5 acre remainder effectively removed the property from the scope of the project; and (3) the district court erred in denying landowners' motion to reopen the trial to accept evidence of market interest rates.

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Bayshore Resources Co., Inc. v. United States, No. 83-1216 (Ct. Cl., Feb. 16, 1984) D.J. # 90-1-23-2503.

JURISDICTION; CLAIMS COURT LACKS JURISDICTION OVER ACTION TO REVIEW INTERIOR'S DETERMINATION THAT MINING CLAIMS WERE INVALID.

Affirming, in an opinion not for publication, the Claims Court judgment that it lacked jurisdiction over plaintiffs' complaint seeking, inter alia, $300 billion based on allegations that the Secretary of the Interior wrongfully and in bad faith challenged, and then invalidated, large numbers of unpatented mining claims on public land. The court held that plaintiffs' action to review Interior's determinations was outside the Claims Court's Tucker Act jurisdiction because (1) this was a routine APA case; (2) plaintiffs had failed to establish an implied contractual relation with the government; and (3) the government had not breached any fiduciary duty to plaintiffs.

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SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

FEBRUARY 29, 1984 - MARCH 15, 1984

HIGHLIGHTS

Victim Compensation. On March 13, Attorney General William French Smith sent to the Congress the Administration's bill, "Victims of Crime Assistance Act of 1984." The Administration's bill implements many of the recommendations made by President Reagan's Task Force on Victims of Crime. The legislation proposes that a Crime Victims' Assistance Fund be established in the Treasury for the purpose of providing federal financial assistance to state victim compensation programs. The principal source of funding is the total of all criminal fines collected from convicted federal defendants, including antitrust fines. Under the bill, the Federal Government will provide money to the states to enable them to effectively run their own programs.

The Judiciary Subcommittee on Criminal Justice chaired by Congressman John Conyers, Jr., held a hearing on H.R. 3498 and the Administration's bill, "The Victims of Crime Assistance Act of 1984," on March 15. Deputy Associate Attorney General William R. McGuiness and Assistant Attorney General Lois Haight Herrington testified at the hearing. Mr. McGuiness provided the Subcommittee with an overview of Administration initiatives in the victim assistance area and discussed the current implementation of the "Victim and Witness Protection Act of 1982" by the Department. Mrs. Herrington discussed the Administration's recently introduced legislation, "The Victims of Crime Assistance Act of 1984" and how it compared to H.R. 3498 (Rodino-Berman bill).

Export Administration Act - S. 979. The Department submitted to the Senate Banking Committee an amendment to the Export Administration Act Reauthorization, S. 979, which would permit warrantless searches at the border in order to inspect goods scheduled for export. The language as reported by the Committee would require a standard of reasonable cause in order to inspect goods at the border. Without the adoption of the amendment, enforcement of the Act will be deterred.

Office of Juvenile Justice and Delinquency Prevention. The authorization for the JJDP Act expires this year, and the Administration opposes the reauthorization of Title II, the portion extending the Office of Juvenile Justice and Delinquency Prevention. We propose, instead, to authorize the proposed Office of Justice Assistance, passed by the Senate as part of the Comprehensive Crime Control bill, to perform these functions. The Administratin does, however, support legislation to deal with the national problem of missing children.

On March 7, Alfred Regnery, Administrator of OJJDP, testified before the House Education and Labor Committee, Subcommittee on Human Resources. A myriad of organizations and local governments, many of whom receive significant money from the OJJDP grants, testified in support of reauthorization of OJJDP, including the National Governor's Association and the National Association of Counties.

Los Angeles Olympic Hearing. Congressman Edward R. Roybal, Chairman, Subcommittee on Treasury, Postal Service and General Government, House Committee on Appropriations, and Senator Dennis DeConcini, in his capacity as a member of the Senate Appropriations Committee, held a hearing in Los Angeles on March 16 and 17 on security facilities for the Olympics. The Department was requested to provide witnesses from INS and the FBI. Howard Ezell, Regional Commissioner of INS from San Pedro and Richard T. Bretzing, Special Agent in Charge, Los Angeles Office of the FBI, appeared on Friday, the 16th. Other witnesses were invited from the Secret Service, Customs, ATF, GSA, the military, Air Transport Association, Los Angeles Police Department and the Los Angeles Olympic Committee.

National Innovation and Productivity Act. On March 12, J. Paul McGrath, Assistant Attorney General, Antitrust Division, appeared before the Senate Judiciary Committee to discuss S. 1841, the National Innovation and Productivity Act. The Committee was considering Title II of S. 1841, which would amend the antitrust laws and provide an incentive to joint research and development ventures. This legislation was submitted last fall to the Congress by the President and represents a major initiative to improve the national efficiency and productivity. Mr. McGrath stressed the Department's strong support for Title II and stated that the Department would have no objection to severing the remaining provisions of the bill so that Congress could study them further. The legislation was on the March 15 Executive

Session agenda but the meeting lost its quorum before it reached any legislative proposals due, in part, to the Joint Session with the Prime Minister of Ireland. Considerable staff interest within the Administration and on the Hill surrounds the proposal.

Government Contractor Indemnification. On March 14, Richard K. Willard, Acting Assistant Attorney General, Civil Division, appeared before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee to discuss H.R. 4083 and H.R. 4199, two bills which would provide a comprehensive system for indemnification of government contractors for liability arising out of contracts with the United States. The Department opposes strongly both of these proposals as they would waive essential limitations on the government's liability without a specific showing of the need for such waiver. A substantial drain on the Treasury would also result.

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

Teletypes To All United States Attorneys

03/09/84--From William P. Tyson, Director, Executive Office for United States Attorneys, by Edward H. Funston, Assistant Director, Debt Collection Section, re: "Lock Box Procedures for Direct Deposit of Cash Collections, Order OBD 2110 (Final Draft 1/31/84)."

03/12/84--From Richard E. Carter, Director, Office of Legal Education, re: "Civil Trial Advocacy Course April 26-May 11, 1984."

03/12/84--From William P. Tyson, Director, Executive Office for United States Attorneys, by Susan A. Nellor, Assistant Director, Legal Services, re: "New Statute re Forgery and Trafficking in Stolen or Forged Government Securities."

03/12/84--From William P. Tyson, Director, Executive Office for United States Attorneys, by Richard E. Carter, Director, Office of Legal Education, re: "1984 Victim and Witness Protection Act Seminar, Washington, D.C., April 24-25, 1984."

03/15/84--From George L. Phillips, United States Attorney, Southern District of Mississippi, re: "Investigative Agencies Subcommittee of the Attorney General's Advisory Committee."

03/15/84--From William P. Tyson, Director, Executive Office for United States Attorneys, by Edward H. Funston, Assistant Director, Debt Collection Section, re: "Change in Federal Civil Postjudgment Interest Rate."

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