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EXECUTIVE
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UNITED
STATES
ATTORNEYS

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COMMENDATIONS

Assistant United States Attorney MYLES E. EASTWOOD, Northern District of Georgia, was commended by Mr. David Caldwell, Regional Director, Office of Personnel Management, Atlanta, Georgia, for the successful defense of the Office of Personnel Management in Moore v. Devine. Assistant United States Attorney EASTWOOD was able, through his discussions, determination, and diligence, to articulate the complexities of the federal personnel system in such a way that made it more meaningful to those not familiar with the personnel arena.

Assistant United States Attorney WILLIAM F. FAHEY, Central District of California, was commended by Assistant Attorney General Stephen S. Trott, Criminal Division, for his outstanding work in the successful prosecution of Edward F. King and Louis A. Klement for conspiracy and substantive violations of the Export Administration Act, which related to the unlawful exportation of high technology computer manufacturing equipment to Bulgaria. Assistant United States Attorney FAHEY was also commended for his successful performance in two other significant high technology export control cases under the Export Administration Act.

Assistant United States Attorney NINA LOREE HUNT, Northern District of Georgia, was commended by Mr. Richard J. Riseberg, Assistant General Counsel for Public Health, Department of Health and Human Services, for her careful and competent preparation of the government's case in United States v. First Georgia Bank. This case involved a trial to determine the 1975 value of a 50-bed nursing home which had been constructed in part with grant funds awarded under the Hill-Burton Act. Assistant United States Attorney HUNT was instrumental in effecting a favorable settlement for the government.

Assistant United States Attorney BARON C. SHELDAHL, District of Oregon, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation (FBI), for his cooperation and assistance to FBI agents in Portland in the investigation of a major cocaine trafficking organization. Assistant United States Attorney SHELDAHL assisted in planning additional investigations necessary to corroborate information the agents had received, provided guidance in planning further logical steps in the investigation, authorized and assisted in the preparation of the affidavit for the Title III Interception, gave advice in arranging the scenario for the delivery of 50 kilos of cocaine to undercover agents, and successfully convinced one of the 13 subjects to become a government witness.

Debt Collection Commendations

Assistant United States Attorney SANDRA L. BERRY, Northern District of California, has been commended by Mr. Joseph M. Hamblin, Deputy Regional Counsel for Operations, Region IX, United States Department of Housing and Urban Development (HUD), for her representation of HUD in a Chapter 11 bankruptcy proceeding resulting in the recovery of nearly $5,000,000 on a defaulted HUD-insured loan. A motion for relief from the bankruptcy proceeding automatic stay was filed by the government requesting the Bankruptcy Court to authorize the foreclosure sale of an apartment building which was owned by the petitioner-in-bankruptcy and encumbered by a HUD-insured mortgage. The motion was granted and the petitioner-in-bankruptcy appealed to the Ninth Circuit Court of Appeals, which affirmed the granting of the motion. Assistant United States Attorney BERRY was assigned to the case soon thereafter. The petitioner-in-bankruptcy managed to avoid the foreclosure sale for several months through extensive legal maneuvering, but the government, as a result of Assistant United States Attorney BERRY'S skillful and persistent efforts, finally prevailed and the property was sold. The foreclosure sale netted $4,875,000, which was returned to the United States Treasury.

Assistant United States Attorney RICHARD L. ROBERTSON, Middle District of North Carolina, has been commended by Mr. David L. Coker, Regional Counsel, Southeast Region, Small Business Administration (SBA), for his exemplary efforts in collecting a November 1978 judgment in favor of the SBA emanating from a defaulted $90,000 SBA-guaranteed bank loan to a corporate borrower. The judgment against the corporate borrower and eight individual guarantors languished, for the most part, until November 1982 at which time Assistant United States Attorney ROBERTSON assumed responsibility for collection. Assistant United States Attorney ROBERTSON commenced vigorous debtor examination procedures; and within four months, several of the judgment creditors submitted a compromise settlement offer of $100,000, representing repayment of the entire principal amount of the loan, plus $10,000 toward the accrued interest. The offer was accepted and $100,000 was received by the SBA. Regional Counsel Coker attributes this outstanding recovery in a difficult and protracted collection case directly to Assistant United States Attorney ROBERTSON'S aggressive and methodical collection efforts.

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

POINTS TO REMEMBER

Allegations of Misconduct Against Assistant United States Attorneys

By memorandum of March 20, 1984, Mr. William P. Tyson, Director, Executive Office for United States Attorneys, reiterated the need for United States Attorneys to promptly report to the Office of Professional Responsibility and the Executive Office for United States Attorneys allegations of misconduct against Assistant United States Attorneys and other Department of Justice employees. Mr. Tyson's memorandum, with attachments, is attached as an appendix to this Bulletin.

(Executive Office)

Notice of Bankruptcy Filings

It has come to the attention of the Debt Collection Section that debt collection personnel in certain districts regularly visit the Office of the Clerk of the Bankruptcy Court to determine whether bankruptcy cases have recently been filed where the United States has been listed as a creditor. In 1982, the Debt Collection Subcommittee of the Attorney General's Advisory Committee of United States Attorneys expressed its concern to the Administrative Office of the United States Courts that Bankruptcy Court clerks were not uniformly providing notice to United States Attorneys of bankruptcy filings where the United States had been named a creditor and that, even where such notice was provided, the creditor was identified only as the United States of America and the appropriate board, bureau, or agency was not specified. The Chief, Division of Bankruptcy, Administrative Office of United States Courts, in response to the concerns of the Debt Collection Subcommittee, sent a memorandum, dated June 30, 1982, to all Bankruptcy Judges, Clerks of Bankruptcy Courts and Deputy Clerks in Charge of Divisional Offices directing them to comply with the notice provisions of the Bankruptcy Rules and provide notice to U.S. Attorneys of bankruptcy filings where the government is listed as a creditor and to identify the creditor agency. Debt collection personnel in districts where proper notice of bankruptcy filings are not provided may wish to direct the attention of the bankruptcy court personnel to the above-referenced memorandum. The Debt Collection Section can supply a copy of the referenced memorandum on request.

(Executive Office)

Partisan Political Activity by Department of Justice Employees

Mr. William P. Tyson, Director, Executive Office for United States Attorneys, by memorandum of March 22, 1984, reissued, as an attachment, the Attorney General's February 13, 1984, memoranda stressing the importance of the Department of Justice and its employees refraining from participation in partisan political activities. In addition to the memoranda from the Attorney General, Mr. Tyson forwarded a copy of a memo prepared by the Counsel to the President, Fred F. Fielding, that interprets 18 U.S.C. §603, which prohibits the making of political contributions by federal employees to their employer or employing authority. Mr. Tyson's memo and attachments thereto are included as an appendix to this Bulletin.

(Executive Office)

The Appellate Staff's Relation To U.S. Attorneys

A statement of the relations between the Appellate Staff, Civil Division, and the United States Atttorneys' offices follows this Section of the Bulletin.

(Civil Division)

Teletypes To All United States Attorneys

A listing of the teletypes sent during the period from March 23 through April 6, 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)

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

The Appellate Staff's Relation to U.S. Attorneys

The Appellate Staff is an office of approximately 40 attorneys who handle appellate litigation in all the diverse subject matters within the jurisdiction of the Civil Division. The Appellate Staff has an important working relationship with U.S. Attorneys' offices in basically two areas: (1) preparation of memoranda to the Solicitor General recommending for or against appeal; (2) the handling of appeals.

1. Memoranda for the Solicitor General. The Solicitor General is the official responsible for determining whether the government will appeal from adverse decisions. He makes his determination on the basis of recommendations received from the Civil Division, the concerned agency, and the U.S. Attorney (in cases handled by the U.S. Attorney). The Appellate Staff prepares the Civil Division's recommendation after studying the recommendations of the agency, the U.S. Attorney, and the Division's trial branch.

The U.S. Attorney's recommendation constitutes a major input into this process. The recommendation should be in the format prescribed by Title 2 of the United States Attorneys Manual, and contain sufficient detail to justify the recommended course of action. Often, when the Appellate Staff is in agreement with the U.S. Attorney's recommendation and the recommendation is in the prescribed format, the Appellate Staff will simply do a brief memorandum of concurrence on behalf of the Civil Division.

Until the Solicitor General makes his decision, the U.S. Attorney is responsible for protecting the government's time limits, e.g. filing a protective notice of appeal, docketing statements, ordering transcripts, etc. Therefore, to avoid unnecessary work, it is important that all steps in the appeal determination process proceed as rapidly as possible. U.S. Attorneys can help eliminate delay in the following ways:

(a) Immediately notify the Appellate Staff and the trial branch of the Division of any adverse decision.[1] Late notification is the chief cause of delay.

1/ The one exception to this rule concerns Social Security disability decisions. Absent a significant legal issue being involved, the adverse decision should be sent only to HHS. The Appellate Staff processes for a Solicitor General determination
(CONTINUED)

(b) Immediately direct the concerned agency to submit its recommendations concerning appeal to the Appellate Staff, with a copy to the Division's trial branch.

(c) Prepare the U.S. Attorney's recommendation letter as soon as possible. The Appellate Staff ordinarily will not forward a recommendation to the Solicitor General in the absence of a recommendation from the U.S. Attorney.

The Civil Division and the Solicitor General are making every effort to eliminate delay on their side of this process. The Solicitor General has recently delegated authority to the Civil Division to determine against appeal in cases where less than $500,000 is involved, all recommendations are unanimously against appeal, and there is no issue of importance which warrants the attention of the Solicitor General. This delegation has greatly expedited the processing of routine no appeal determinations. The Civil Division has authorized all its branch directors to exercise this authority, and it is anticipated that additional expedition will result from this action. U.S. Attorneys can facilitate this procedure by making certain that recommendations are transmitted to both the trial branch and the Appellate Staff of the Civil Division.

2. The Handling of Appeals. Title 2 of the United States Attorney's Manual specifies that the Civil Division may elect to handle particular cases on appeal which were handled in the district court by the U.S. Attorney. This election is made by the Director of the Civil Division's Appellate Staff. In cases where the government prevailed in the district court at the time the adverse party files a notice of appeal, the U.S. Attorney should send to the Appellate Staff a copy of the notice of appeal and the adverse decision. If the U.S. Attorney is not notified to the contrary within two weeks, (s)he may presume that the Civil Division will not exercise its election to handle the appeal. In cases where the government lost in the district court, if the Solicitor General determines that the government will appeal the Appellate Staff will then notify the U.S. Attorney as to the handling of the prosecution of the appeal. Currently the Appellate Staff handles approximately 5% of the appeals where the government prevailed below, and in excess of 50% of the cases where the government lost below.

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[1] (FOOTNOTE CONTINUED)
only those cases where HHS recommends in favor of appeal. It is essential that adverse Social Security disability decisions promptly be sent both to HHS' regional counsel, and its General Counsel's office in Baltimore.

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Acting Assistant Attorney General Richard K. Willard

3. Other Matters. The Appellate Staff, after receiving recommendations from the U.S. Attorney and the concerned agency, is responsibile for preparing the Civil Division's recommendation to the Solicitor General recommending for or against rehearing en banc and certiorari. Due to the limited time allowed for filing a petition for rehearing, it is critical that any adverse court of appeals decision meriting serious consideration for rehearing en banc be sent by express mail to the Appellate Staff. If the U.S. Attorney is recommending in favor of en banc review, (s)he should as promptly as possible send his recommendation to the Appellate Staff and make certain that the agency is aware that it should immediately submit its recommendation to the Appellate Staff. Where the government will be seeking rehearing en banc, the Appellate Staff will determine whether the Civil Division should elect to handle the further proceedings in the case.

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A brief as appellee in support of the appellant in Atchinson, Topeka & Santa Fe Ry. v. National Railroad Passenger Corp. in the Supreme Court on or before March 29, 1984. The issue is whether Section 405(f), of the Rail Passenger Service Act, 45 U S.C. (Supp. V) 565(f) which requires railroads to reimburse Amtrak for free and reduced-rate travel undertaken on Amtrak passenger trains by employees and retirees of the railroads under a formula equivalent to approximately 25% of the cost of an average ticket, impairs the railroads' contract rights in violation of the Due Process Clause of the Fifth Amendment.

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Mathews v. Heckler, ____ U.S. ____ No. 82-1050 (March 5, 1984).
D.J. # 137-1-1108.

SUPREME COURT REVERSES DISTRICT COURT DECISION HOLDING UNCONSTITUTIONAL THE PENSION OFFSET EXCEPTION PROVISION OF THE SOCIAL SECURITY ACT AMENDMENTS OF 1977.

The Social Security Act provides spousal benefits for the widows, widowers, wives and husbands of retired and disabled wage earners. Prior to December 1977, the Act provided that men seeking spousal benefits had to demonstrate dependency on their wage-earner wife; women, on the other hand, could qualify without proving dependency on their husbands.

In March of 1977, the Supreme Court held unconstitutional, on equal protection grounds, the dependency requirement for men's spousal benefits. Califano v. Goldfarb, 430 U.S. 199 (1977). Realizing that governmental retirees were the chief beneficiaries of the Goldfarb decision, Congress added a new provision to the Act requiring that federal or state pensions be offset from spousal benefits. An exception to the pension offset provides that those who would become eligible for a government pension over the next five years (through December 1982) would not be subject to the setoff if they would have been entitled to spousal benefits under the law in effect in January 1977, two months before the Goldfarb decision. The Secretary interpreted this as requiring application of the dependency test for husbands during the five-year grandfather period.

The district court in this nationwide class action decided that the pension offset exception is unconsitutional under Goldfarb.

We filed a direct appeal in the Supreme Court and, in a unanimous decision, the Court has reversed the district court's decision. The Court upheld the constitutionality of the pension offset exception finding that while the provision temporarily revived the gender based eligibility requirements struck down in Goldfarb, the exception was substantially related to an important governmental interest--the protection of the interest of those individuals who had planned their retirements with the expectation of receiving an unreduced spousal benefit. HHS estimates that the

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Court's decision will save in excess of $1 billion dollars through 1986 and an as yet unestimated amount thereafter.

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FTS 633-5459

Otherson v. Department of Justice, No. 82-1761 (D.C. Cir. March 6, 1984), D.J. # 145-12-5423.

D.C. CIRCUIT UPHOLDS SUSPENSION PENDING TRIAL OF INDICTED INS AGENT.

Petitioner, an INS Border Patrol agent who was indicted, convicted and removed from the service (Otherson v. Department of Justice, 711 F.2d 267 (D.C. Cir. 1983)) for conspiring to violate the civil rights of aliens, challenged the agency's action in suspending him without pay pending disposition of the job-related charges against him. He contended that such suspensions violate the due process clause. An Administrative Law Judge held that the penalty of suspension was unreasonable and excessive in his case. The Merit Systems Protection Board reversed, however, and upheld petitioner's suspension.

The D.C. Circuit has now affirmed the MSPB's decision. The court held that petitioner's arguments based on Civil Service Reform Act and due process arguments are controlled by the court's recent decision in Brown and Charest v. Department of Justice, 715 F.2d 662 (1983), in which the court affirmed the pre-trial suspension of two of plaintiff's co-conspirators. The court rejected petitioner's claim that the penalty of suspension was excessive, emphasizing the narrowness of judicial authority to review penalties and deferring to the MSPB'S "conclusion that, because of the nature and seriousness of the crimes charged, and the absence of any alternative penalty that would have protected the employing agency's interests sufficiently. it was not unreasonable to suspend [petitioner] without pay pending the

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outcome of his criminal prosecution." A senior district judge sitting on the panel by designation dissented.

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John S. Koppel
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Investment Company Institute v. FDIC, No. 82-1721 (D.C. Cir. Feb. 28, 1984). D.J. #145-113-172

D.C. CIRCUIT HOLDS FDIC DECISION NOT TO RULE ON PETITION TO INITIATE AGENCY ENFORCEMENT ACTION IS COMMITTED TO AGENCY DISCRETION.

This case arose out of the FDIC's refusal to rule on the merits of a petition to initiate an enforcement action against a bank that allegedly was planning unlawfully to establish, and sell shares in, a mutual fund. The petitioner filed suit under the APA and, in the context of a discovery dispute, the district court entered an order directing the FDIC to rule on the merits of the petition, and to require the bank to desist from its plan until the FDIC had ruled. A subsequent district court order purported to clarify that the court only meant to require the FDIC to take those steps if it chose not to make discovery.

On appeal, a divided panel of the D.C. Circuit ruled that the district court's first order was plainly an unqualified injunction, and that, even if the second order were viewed as modifying the first, the court of appeals had jurisdiction to decide our appeal. Turning to the merits, the court held that the district court had no jurisdiction to order the FDIC to prevent the bank from going ahead with its plan because 12 U.S.C. §1818 implicitly precludes such jurisdiction. Finally, the court ruled that the FDIC's decision not to rule on the merits of a petition to initiate an enforcement action is unreviewable because the decision is committed to agency discretion. The majority of the

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panel rejected as dictum the language in Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), which suggests there is a presumption of reviewability for enforcement matters, and concluded that "a more accurate statement" of the law is that decisions to refrain from enforcement actions generally are unreviewable.

Attorneys: Leonard Schaitman
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United States v. John P. Hannon, No. 83-6070 (2d. Cir. Feb. 16, 1984). D.J. #77-53-464.

SECOND CIRCUIT PERMITS GOVERNMENT TO RENEW LAPSED JUDGMENT AND TO OBTAIN INTEREST UNDER 28 U.S.C. §1961 BASED UPON BOTH PRINCIPAL AND ACCUMULATED POST JUDGMENT INTEREST OF FORMER JUDGMENT.

This action to renew a money judgment originally obtained by the United States in 1968, the lien of which had lapsed in 1978 under New York law (applicable because of 28 U.S.C. §1962), was separately commenced in 1982. The district court declined to enter judgment upon the former judgment, primarily because this would result in an award of "interest upon interest" in asserted violation of 28 U.S.C. §1961, and dismissed the renewal suit.

The Second Circuit recently reversed, holding that the government is never barred, by limitations or otherwise, from seeking renewal of its lapsed judgments, and that this can be accomplished by new suit based upon the former judgment. The resulting renewed judgment can properly bear post-judgment interest, under the amended 28 U.S.C. §1961, based upon both the unpaid principal of the former judgment and accumulated post judgment interest previously accruing thereon. The case was remanded for establishment and calculation of the pertinent monetary amounts.

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In a concurring opinion, Judge Newman suggested that it "remains to be determined in subsequent cases whether a judgment creditor can gain either an increased interest rate or more than annual compounding by securing entry of a second judgment."

Attorneys: C. William Lengacher
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David V. Seaman
FTS 724-7296

United States v. Onslow County Board of Education, Nos. 83-1573 and 1574 (4th Cir. Feb. 29, 1984). D.J. #145-15-1477.

FOURTH CIRCUIT HOLDS THAT SCHOOL DISTRICTS CANNOT MAKE UP LOST FEDERAL AID BY CHARGING CHILDREN OF MILITARY PERSONNEL TUITION TO ATTEND PUBLIC SCHOOLS.

In 1980, Congress enacted two statutes to provide relief to local communities affected by a large influx of military personnel--20 U.S.C. §631 which provides communities with funds to build school facilities and 20 U.S.C. §236 to meet the yearly operating expenses needed as a result of the increased federal activities. Onslow County Board of Education applied for and received financial assistance under both statutes.

As a result of federal budget cuts, the Board adopted a resolution which would have required military dependents to pay $245 in tuition for their public schooling. The United States filed suit challenging the tuition plan adopted by the Board, and the state statute under which it was adopted, arguing that (1) the plan constitutes a breach of contract between the Board and the United States; (2) it has been pre-empted by the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. §501, et seq.; (3) it is a tax on the federal government and therefore void under the Supremacy Clause; and (4) it violates the Equal Protection Clause because it impermissibly discriminates against non-domiciliaries.

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On cross-motions for summary judgment, the district court rejected the government's contract and pre-emption arguments. However, the court found that, as applied, the ordinance and underlying statute intentionally discriminated against the federal government and accordingly was prohibited by the Supremacy Clause. The Board and State appealed.

The Fourth Circuit has now affirmed the decision, accepting all of our arguments.

Attorneys: Michael F. Hertz
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Bertrand v. United States, No. 83-3628/3766 (9th Cir. Feb.21, 1984). D.J. # 147-61-11.

NINTH CIRCUIT UPHOLDS A ONE-YEAR DISQUALIFICATION OF A RETAIL GROCER FOR VIOLATIONS OF THE FOOD STAMP ACT.

Ray's Groceries was disqualified from the Food Stamp Program for one year because of numerous violations of program regulations at the store. A one-year disqualification sanction was imposed by the Department of Agriculture pursuant to regulations, on the basis that the violations were due to "store policy," and the store had previously been warned about the possibility of violations. In this suit seeking review of the agency action, the district court held that the one-year sanction was invalid because the warning letter given to Ray's Groceries was "stale" since it was sent sixteen months before the charged violations occurred and the agency's guidelines, were invalid because they assertedly "amended," rather than interpreted the regulations.

The court of appeals has reversed, in a unanimous opinion. The court held that once the charged violations are established in a de novo trial, or conceded, review of an administrative sanction under the Food Stamp Act is limited to a determination of whether the sanction is "arbitrary or capricious." The court further held

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that the agency's guidelines were a "reasonable" and "cogent" interpretation of the regulations, and that the facts of this case justified a determination of "store policy" as interpreted in the guidelines. Finally, the court concluded that the warning letter was not "stale," noting that the Guidelines consider a warning to be inadequate only if sent more than three years before the violations charged. The court admonished that retail grocers are business entities which "should be capable of complying with relatively simple regulations without repeated monitoring by the government."

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Calder v. Crall, No. 83-3744/3782 (9th Cir. Feb. 24, 1984). D.J. # 157-81-245.

NINTH CIRCUIT BARS CIVIL TORT ACTION BY A CIVILIAN EMPLOYEE OF THE ARMY AND AIR FORCE EXCHANGE SERVICE AGAINST AN ACTIVE DUTY SERVICEMAN.

A civilian employee of the Army and Air Force Exchange Service (AAFES) obtained a jury verdict against an active-duty serviceman, a civilian employee of the Air Force for personal injuries. Representing the serviceman in his individual capacity, we argued on appeal that this action was barred by the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §9339(i). The court of appeals agreed and in a unanimous opinion, reversed the judgment below. The court of appeals noted that plaintiff had received a workmen's compensation award for her injury under the LHWCA, and that the LHWCA includes an exclusivity provision barring a personal injury action against "persons in the same employ." 33 U.S.C. §933(i). The court of appeals upheld this argument, and accepted our position that AAFES employees are employees of the United States, notwithstanding that they are paid out of AAFES funds, and receive workmen's compensation under the LHWCA, and not the FECA. Thus, the court held, the LHWCA was plaintiff's exclusive remedy.

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Marie Lucie Jean, v. Alan C. Nelson, No. 82-5772 (11th Cir. Feb. 28, 1984). D.J. # 39-18-495.

ELEVENTH CIRCUIT, SITTING EN BANC, HOLDS THAT HAITIAN PLAINTIFFS IN CLASS ACTION CHALLENGING GOVERNMENT'S PAROLE POLICY, AND OTHER PRACTICES, HAVE NO CONSTITUTIONAL RIGHTS WITH RESPECT TO THEIR APPLICATIONS FOR ADMISSION TO THE UNITED STATES.

This case involves a challenge by a class of Haitian aliens to the government's policy of detaining--rather than paroling--excludable aliens pending completion of their exclusion hearings, and to a variety of other government practices. The district court held the government's parole/detention policy void and ordered the release of the 1800 class plaintiffs then in detention. On cross-appeals, a panel of the Eleventh Circuit held that the government had violated the Haitian plaintiffs' Fifth Amendment equal protection rights by discriminating on the basis of nationality. The court of appeals also ruled that the government's failure to provide notice of a right to seek asylum violated the class plaintiffs' due process rights.

The full court of appeals, on rehearing en banc, has just issued a far-reaching decision reaffirming the exceedingly broad authority wielded by the Executive Branch with regard to excludable aliens and absolving the government of any constitutional violations. In an 8-to-4 decision, the en banc Eleventh Circuit held that the Haitian plaintiffs, who are "excludable" rather than "deportable" aliens, "have no constitutional rights with respect to their applications for admission, asylum, or parole" (slip op. 54). The court further indicated that "high-level executive officials such as the President and the Attorney General have the authority under the [Immigration and Nationality Act] to draw distinctions between classes of aliens" (slip op. 55), including distinctions on the basis of nationality. With regard to the asylum notice issue, the court accepted our argument that "plaintiffs do not have a right to be notified of

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the opportunity to seek asylum provided by the Refugee Act of 1980" (slip op. 41).

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

City of Alexandria v. Helms, Nos. 83-1944, 83-1967 (4th Cir. Feb. 28, 1984) D.J. # 90-1-4-2640.

DISTRICT COURT LACKED JURISDICTION TO ENJOIN FAA'S ORDER AUTHORIZING THE "SCATTER PLAN TEST" FROM NATIONAL AIRPORT. TEMPORARY ORDER NOT SUBJECT TO SECTION 553 OF THE APA.

FAA's appeal from a preliminary injunction (which had been stayed by the Fourth Circuit on October 13, 1983) preventing a 90-day test of a change in the flight patterns of jets departing National Airport ("the Scatter plan test") was consolidated with a petition for review of the FAA order authorizing the test. The Fourth Circuit first held that the district court lacked jurisdiction to issue an injunction since 49 U.S.C. §1486 vests review of FAA orders exclusively with the court of appeals. The court noted that the decision to conduct the test was an order for purposes of section 1486 since it was based on an administrative record adequate to support review. The court rejected Alexandria's contention that this case was not a final order since it only authorized a temporary test and its contention that NEPA provides an independent basis for district court jurisdiction. The court then held that the order violated neither NEPA nor the APA. The court found FAA's determination that an EIS was unnecessary was not an abuse of discretion in view of the limited duration of the test and the careful consideration given in the environmental assessment to possible environmental consequences of this test. While rejecting FAA's argument that this change in flight patterns was not a rule and thus, notice and comment procedures of section 553 of the APA were inapplicable, the court found that this rule was a procedural rule, not a substantive one, and thus, was exempt from section 553 procedures since it did not make "a substantial impact on the rights and duties of the persons subject to regulation." The court suggested that had this been a permanent change in flight patterns, its holding with respect to section 553 rulemaking might well have been different.

Attorneys: J. Carol Williams
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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General F. Henry Habicht, II

United States v. Riverside Bayview Homes, Nos. 81-1405, 81-1498 (6th Cir. March 7, 1984) D.J. # 90-5-1-1-702.

CORPS' PROHIBITION AGAINST FILLING WETLAND OVERTURNED BASED ON DEFINITION OF WETLAND IN PREAMBLE TO CORPS' REGULATION.

The court vacated an injunction to prohibit filling of a wetland and vacating a declaratory judgment declaring a Corps regulation unconstitutional. The issue presented to the court was whether, in the absence of a direct hydrological connection between the wetland area and a waterway, the property was an adjacent wetland. The court ignored the Corps regulations defining adjacency and instead interpreted only the Corps regulation defining wetland. The court focused on language in the preamble which excluded from the definition areas which are not aquatic but experience an abnormal presence of aquatic vegetation and on the regulation language that the area must be inundated. The court concluded that "in the absence of evidence that the property as it exists now is frequently flooded and that the flooding causes aquatic vegetation to grow there [the property is not a wetland]" (emphasis added). The court emphasized that "wetland-type vegetation on the land was 'abnormal' in the sense that it was supported not by inundation but by unusual soil conditions." The opinion also suggests that the water flooding a wetland must flow from the adjacent stream in order to come within the Clean Water Act's definition of water. Because a broad interpretation of the wetlands definition creates a potential taking problem, the court held that a narrow interpretation was necessary. Further review by rehearing or certiorari is being considered.

Finally, the court vacated as moot the United States' appeal of a judgment invalidating a Corps regulation which prohibits acceptance of an after-the-fact permit during the pendency of an enforcement action. The issue was moot because of (1) the determination of the jurisdictional issue; (2) an after-the-fact permit has been processed; and (3) the regulation has been changed.

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OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MARCH 15, 1984 - MARCH 29, 1984

HIGHLIGHTS

Precious Metals Frauds. The Senate Permanent Subcommittee on Investigations held hearings Monday and Wednesday on the proliferation of commodities fraud activity involving precious metals. These fraud schemes, referred to as "boiler-room operations" have cost many citizens their life savings. The two "hotspots" for this species of commodities fraud have been South Florida and Los Angeles. Through a major enforcement effort, we have made a great number of criminal cases in recent months. At the March 21 hearing, U.S. Attorney Stan Marcus of the Southern District of Florida represented the Department of Justice and described how these fraud merchants work and what the Department is doing to curb such activity. The Subcommittee seemed satisfied with the Department's efforts, but feels that the Securities and Exchange Commission and the Commodity Futures Trading Commission have not been sufficiently aggressive in pursuing precious metals fraud.

Immigration. On March 21, the Subcommittee on Immigration, Refugees and International Law of the House Judiciary Committee held a hearing on Budget Authorization for the Immigration and Naturalization Service for FY 1985. Alan Nelson, Commissioner, Immigration and Naturalization Service, Roger Brandemuehl, Assistant Commissioner, Border Patrol, and Alan Eliason, Chief Patrol Agent, Border Patrol, Chula Vista, California, represented the Department.

On March 22, the Subcommittee on Immigration, Refugees, and International Law of the House Judiciary Committee held a hearing concerning the Administration's plan for consolidating the primary inspection and land patrol functions of the Immigration and Naturalization Service and the Customs Service. Alan Nelson, Commissioner, Immigration and Naturalization Service, testified on behalf of the Department.

D.C. Parole Board. On Tuesday, March 27, the Senate Appropriations Subcommittee on District of Columbia chaired by Senator Arlen Specter held a hearing on the D.C. Parole Board. U.S. Attorney Joseph diGenova testified at the hearing. Mr. diGenova had no prepared testimony for the hearing, but was asked to respond to questions regarding specific cases involving the D.C. Parole Board.

Bureau of Prisons. On March 29, the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, chaired by Representative Robert Kastenmeier, held an oversight hearing on the Bureau of Prisons. BOP Director Norman Carlson testified at the hearing.

Mr. Carlson stated that the most critical issues facing the Bureau today are to reduce the current 28 percent level of overcrowding and to keep pace with projected future increases in the inmate population. He discussed the recent murders of three BOP correctional officers which occurred since October 1983, at the U.S. Penitentiary in Marion, Illinois, and Oxford, Wisconsin.

The Subcommittee's questions centered on the incident in Marion, Illinois, and the lockdown which has been in effect since the murders. Mr. Carlson was questioned on whether he felt that the rights of the inmates had been violated as a result of the continued lockdown. He was also asked to comment on alleged beatings of inmates at Marion which have been reported by the press. Mr. Carlson responded to the question by stating that the allegations were investigated and the prison guards responded professionally and used force when it was necessary. With regard to questions involving prisoner's rights and violations of those rights by the current lockdown at Marion, Mr. Carlson responded that he would welcome the opportunity to have a federal court consider the issue, adding that the lockdown is necessary to decrease the level of violence.

Social Security Disability Benefits. On March 27, the House passed H.R. 3755, the proposed Social Security Disability Benefits Reform Act, by a vote of 410 to 1. The Department has opposed a provision in H.R. 3755 (and in the original version of the Senate counterpart, S. 476) requiring the Social Security Administration (SSA) to accept, as precedent, all unfavorable appellate court decisions. In letters to the Chairman of the House Ways and Means Committee and the Senate Finance Committee, we pointed out that because the SSA administers a nationwide program, while court of appeals jurisdiction is only regional, a requirement that the SSA obey the court of appeals may simply be unworkable as a practical matter. Such a national program will certainly be hampered by following different rules in different judicial districts.

The Department was also concerned about a provision in both the House and Senate bills which would broadly apply Administrative Procedures Act (APA) procedures to all Social Security cases.

S. 476 has been revised in light of the Department's concerns and is now acceptable to the Department. The provision regarding APA procedures has been narrowed considerably. The requirement

that the SSA accept all unfavorable appellate court decisions has been changed to require simply that the Secretary of HHS notify the cognizant House and Senate Committees, within 60 days of any unfavorable appellate court decision, whether or not the Secretary chooses to acquiesce in such decisions "and the specific facts and reasons in support" of the Secretary's position. This provision may be further modified to require a report only when the decision is not to acquiescence in the decision.

It is the Department's understanding that Senators Cohen and Levin may offer the most recent version of S. 476 as an amendment to a tax bill scheduled to come to the Senate Floor sometime soon.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

Defendant was sentenced to two consecutive five-year prison terms after he pled guilty to four counts of an eleven count indictment. In his motion to vacate judgment and sentence, defendant contends that Rule 11 (which prohibits a court from accepting a guilty plea from a defendant who does not understand the consequence of his plea or who was coerced into entering a guilty plea) was violated when the prosecutor required that all defendants plead guilty or there would be no agreement. Defendant further contends that he anticipated a shorter sentence than the one he received and was unaware that sentences could be imposed consecutively. The government asserts that the only pressure which could have arisen as a result of the plea agreement was from the co-defendants and therefore there was no violation of the Rule.

In denying the defendant's motion, the District Court held that coercion by co-defendants is not recognized as a violation of Rule 11. In addition, the fact that the defendant anticipated a shorter sentence did not invalidate his guilty plea since the sentencing court did, as required by the Rule, apprise the defendant in open court of the mandatory minimum and possible maximum sentence. The court further noted that neither Rule 11 nor the due process clause requires a court to alert a defendant to possible consecutive sentences under a multi-count indictment before he pleads guilty.

(Motion to vacate denied.)

United States v. Andrew Theodorou, 576 F. Supp. 1007 (N.D. Ill. Dec. 30, 1983)

VOL. 32 APRIL 6, 1984 NO. 7

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

MAR 20 1984

MEMORANDUM FOR All United States Attorneys

FROM William P. Tyson
Director

SUBJECT: Allegations of Misconduct Against Assistant United States Attorneys

"DOES NOT AFFECT TITLE 10"

It has come to my attention that some United States Attorneys are failing to report to the Office of Professional Responsibility allegations of misconduct against Assistant United States Attorneys and other Department of Justice employees. The Attorney General, in a memorandum dated February 16, 1982 (copy attached), directed all United States Attorneys to report to the Office of Professional Responsibility all allegations of misconduct against all employees of their offices. In addition, such reporting is required by 28 C.F.R. 0.39a. United States Attorneys should also report to the Office of Professional Responsibility all allegations of misconduct by Department of Justice employees not employed by their offices. In addition, allegations against special agent investigators, Border Patrol agents, etc., should also be reported. I am also requesting that all United States Attorneys send a copy to the Executive Office of all reports of allegations of misconduct made to the Office of Professional Responsibility regarding United States Attorney personnel. Even those allegations of misconduct which appear to be without merit must be reported as outlined above.

In particular, we are concerned that there have been instances of the courts finding prosecutorial misconduct which were not promptly reported to the Department of Justice. Even if such findings are appealed and even if they are ultimately reversed, it is imperative that both the Office of Professional Responsibility and this office be apprised of the allegations. Prompt reporting will provide the Office of Professional Responsibility and this office with sufficient time to take appropriate action.

If you have any questions regarding this policy, do not hesitate to contact Mr. Michael E. Shaheen, Jr., Counsel of the Office of Professional Responsibility (FTS 633-3365) or myself (FTS 633-2121).

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Attachment

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

February 16, 1982

MEMORANDUM TO: Heads of All Offices, Bureaus, Boards, Divisions and All United States Attorneys

FROM: William French Smith
Attorney General

SUBJECT: Notification of Misconduct by Employees of the Department of Justice

The Department's Office of Professional Responsibility, which reports directly to me, or in appropriate cases, to the Deputy Attorney General, the Associate Attorney General, or the Solicitor General, is responsible for overseeing investigations of allegations of criminal or ethical misconduct by all employees of the Department of Justice. As head of that Office, the Counsel's function is to ensure that Departmental employees continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency. For this Office to perform its function properly, it must be promptly notified whenever allegations of serious misconduct against any employee of the Department are received.

It has come to my attention that such prompt notification has not been made in all instances and that confusion may exist as to the responsibilities of the heads of all Offices, Boards, Bureaus, Divisions and the United States Attorneys in this regard. All allegations against Departmental employees, legal and nonlegal, involving violations of law, Departmental regulations, or Departmental standards of conduct, must immediately be brought to the attention of the Office of Professional Responsibility. That Office will then either monitor the conduct of the investigation into those allegations, or, in appropriate situations, will participate in or direct those investigations. Internal inspections units of the

Department should continue to submit monthly reports to the Counsel detailing the status and results of their current investigations. You are also reminded that Department employees have the option of reporting allegations of misconduct directly to the Office of Professional Responsibility, as opposed to their own internal inspection unit (or where there is no specific unit, any individual discharging comparable duties).

Please arrange for the distribution of a copy of this memorandum to each employee under your supervision. In addition, you should, at least semi-annually, remind your employees of the purpose and function of the Office of Professional Responsibility and of the reporting obligations set forth above.

VOL. 32 APRIL 6, 1984 NO. 7

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

MAR 22 1984

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: William P. Tyson
Director

SUBJECT: Partisan Political Activity by Department of Justice Employees

"DOES NOT AFFECT TITLE 10"

By memorandum dated February 13, 1984, Attorney General William French Smith reiterated the importance of the Department of Justice and its employees refraining from participation in partisan political activities. The Attorney General also reissued his memorandum of July 9, 1982, setting forth the policy of the Department of Justice.

I join the Attorney General in stressing the significance of this policy in an election year and request that the Attorney General's directive and his July 9, 1982, memorandum be distributed to all employees under your supervision. Copies of both documents are attached.

Additionally, I am forwarding a memorandum prepared by the Counsel to the President, Fred F. Fielding, interpreting 18 U.S.C. §603. Section 603 of Title 18 prohibits the making of political contributions by federal employees to their employer or employing authority. Mr. Fielding's memorandum warns federal employees that contributions to the President's campaign may be prohibited by this statute. This memorandum should also be distributed to all employees.

Specific questions regarding political activity should be directed to the Legal Services Section of the Executive Office for United States Attorneys (633-4024), prior to engaging in the political activity.

Attachments

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

February 13, 1984

MEMORANDUM TO ALL OFFICES, BOARDS,
DIVISIONS AND BUREAUS

RE: Partisan Political Activity By
Department of Justice Employees

I have periodically reminded Department of Justice employees of the importance to the Department's mission that officials and employees of the Department not engage in partisan political activities.

Particularly in this election year, it is important that the Department of Justice and its employees refrain from participation in partisan politics. The American people must be assured that the administration of justice is not a partisan matter. Accordingly, I take this opportunity to reiterate a long standing policy of this Department which is fully set forth in my memorandum of July 9, 1982, and is repeated in the attached memorandum. This policy applies to all Department employees. Please take the steps necessary to ensure that all employees under your supervision are aware of its contents.

William French Smith
Attorney General

Attachment

VOL. 32 APRIL 6, 1984 NO. 7

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

February 13, 1984

MEMORANDUM TO ALL OFFICES, BOARDS
DIVISIONS AND BUREAUS

RE: THE HATCH ACT

The Hatch Act, 5 U.S.C. §§ 7324 et seq., restricts the ability of Federal employees to participate actively in partisan political management and partisan political campaigns. The Department of Justice has maintained a longstanding policy requiring compliance with the Hatch Act by all of its officers and employees, including those who are exempt from coverage by the statute. See 5 U.S.C. § 7324(d). I want to take this opportunity to reaffirm that policy, and to remind you of some of the substantive restrictions on political activity that apply to Federal employees.

Generally, the Hatch Act prohibits employees from using their official authority or influence to interfere with or affect the result of an election and from taking an active part in partisan political management or campaigns. You should be aware that the prohibitions of the Hatch Act are in effect whether an employee is on or off duty, and that they apply to employees on leave, including employees on leave without pay.*/ The following list of prohibited and permissible activities was developed from the Hatch Act regulations published by the Office of Personnel Management. 5 C.F.R. §§ 733.111 and 733.122.

Employees should raise questions concerning political activities and the Hatch Act with their Deputy Designated Agency Ethics Officials, See Attorney General Order No. 1045-84 February 7, 1984 who may consult with the Office of the Special Counsel to the Merit Systems Protection Board as necessary and appropriate.

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*/ Most municipalities and political subdivisions in the Washington, D.C. vicinity have been exempted from certain of the Hatch Act's restrictions. These are listed in 5 C.F.R. § 733.124. Employees who reside in these localities may take an active part in political management or in political campaigns in connection with partisan elections for local offices, so long as the participation is as, on behalf of, or in opposition to an independent candidate. Generally, independent candidates are ones who have not been nominated by a political party.

Permissible Activities

Each employee retains the right to --

(1) Register and vote in any election;

(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge, or button in situations that are not connected to his official duties;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organizaton, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with the restrictions set forth below;

(6) Attend a political convention, rally, fundraising function, or other political gathering;

(7) Sign a political petition as an individual;

(8) Make a financial contribution to a political party or organization; (but see 18 U.S.C. § 603 [dealing with contributions to one's Federal employer.]);

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election in a locality listed in 5 C.F.R. § 733.124 (see footnote on preceding page);

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

Prohibited Activities

Employees may not take an active part in political management or campaigns. Prohibited activities include, but are not limited to the following:

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a candidate in a partisan election or of a political party, or political club;

(5) Taking an active part in managing the political campaign of a candidate for public office in a partisan election or a candidate for political party office;

(6) Becoming a candidate for, or campaigning for, an elective public office in a partisan election;

(7) Soliciting votes in support of or in opposition to a candidate for public office in a partisan election or a candidate for political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or a candidate in a partisan election;

(9) Driving voters to the polls on behalf of a political party or a candidate in a partisan election;

(10) Endorsing or opposing a candidate for public office in a partisan election or a candidate for political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

William French Smith
Attorney General

THE WHITE HOUSE

WASHINGTON

February 14, 1984

MEMORANDUM FOR THE HEADS OF ALL DEPARTMENTS AND AGENCIES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: 18 U.S.C. § 603

Section 603 of title 18 makes it a felony for any officer or employee of the United States to give a political contribution to any other officer or employee of the United States who is the "employer or employing authority" of the contributor. */ Although the issue is not free from doubt, this provision may prohibit any Federal employee from contributing to the authorized campaign committee of the President (Reagan-Bush '84).

Although such interpretation **/ would raise grave constitutional concerns, prudence requires that any ambiguity in the language of this statute be resolved against placing any Presidential appointee or other Federal employee in the position of inadvertently violating Federal law. Hence, in the absence of any judicial interpretation of this provision or any legislative clarification of it, all Federal employees should be advised that this statute may preclude them from contributing to Reagan-Bush '84, the authorized campaign committee of the President.

I regret that such advice may inhibit Federal employees from the full exercise of their First Amendment rights; nevertheless, in the interest of maintaining strict compliance with all Federal statutes, every Federal employee should be made aware of the language and potential restrictions of this statutory provision.

Your cooperation in disseminating this advice will be greatly appreciated.

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*/ The terms "contribution" and "authorized committee" are used as they are defined in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431(8) and 432(e)(1).

**/ This interpretation would be personal to the employee only, and would not apply to his or her spouse or family, and would be applicable only to contributions to Reagan-Bush '84.

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

Teletypes To All United States Attorneys

03/27/84--From Roger M. Olson, Deputy Assistant Attorney General, Tax Division, through Mr. William P. Tyson, Director, Executive Office for United States Attorneys, re: "Request for Information."

03/29/84--From Henry Dargan McMaster, United States Attorney, District of South Carolina, re: "Illegal Electronic Poker Machines."

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