U.S. Department of Justice

Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys
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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136, Universal Building North, 1875 Connecticut Avenue, N.W., Washington, D. C. 20009.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

Carroll Andre, III (Tennessee, Western District), was awarded a Certificate of Appreciation from the Office of the Regional Inspector, Internal Revenue Service, Southeast Region, Atlanta, Georgia, for his valuable contribution to the Internal Security Division.

Peter H. Barrett (Mississippi, Southern District), by Wayne Taylor, Special Agent in Charge, FBI, Jackson, for his successful prosecution of a kidnapping case.

Patti Bortz and **Caryl Privett** (Alabama, Northern District), by James H. Troy, Director, Office of Program Operations, U.S. Equal Employment Opportunity Commission, for their assistance in obtaining a favorable verdict in an EEOC case.

Patricia Allen Conover (Alabama, Middle District), by Dwight H. Williams, Jr., Bankruptcy Administrator, Middle District of Alabama, for her outstanding presentation at a bankruptcy trustees' workshop. Also, from Tucker Cotten, Office of District Counsel, Veterans Administration, for her excellent representation of a Veterans Administration case.

John Conroy (District of Vermont), by Christopher Graham, Senior Resident Agent, Fish and Wildlife Service, Department of the Interior, Boston, for his successful completion of a Lacey Act prosecution.

William D. Delahoyde (North Carolina, Eastern District), was awarded the Regional Commissioner's Honorary Award as a Distinguished Prosecutor by Walter Jones, Chief, Criminal Investigation Division, Internal Revenue Service, North Carolina, for his effective enforcement of criminal statutes relative to federal tax administration and financial crimes.

Robert E. L. Eaton, Jr. (District of Columbia), by Col. Robert F. Harris, Corps of Engineers, Department of the Army, Detroit, for his excellent representation in a U.S. Claims Court case.

Cathy Goodwin (District of Colorado), by J. R. Kopidlansky, Assistant Regional Commissioner-Examination, Internal Revenue Service, Dallas, for her outstanding presentation on sentencing guidelines at the national meeting for Special Enforcement Program managers in Denver.

Richard H. Goolsby (Georgia, Southern District), by William Clancy, Jr., Assistant Special Agent in Charge, FBI, Savannah, for his success in prosecuting a criminal case.

Mary Grad (California, Eastern District), by Col. Seymour Copperman, Chief, General Litigation Division, Office of The Judge Advocate General, Department of the Air Force, Washington, D.C., for her outstanding representation of the Air Force in a military personnel case.

John R. Haley (District of South Carolina), by Charles Gillum, Inspector General, U.S. Small Business Administration, Washington, D.C., for his successful prosecution of a white collar crime case.

Phillip L.B. Halpern (California, Southern District), by John R. Bolton, Assistant Attorney General, Civil Division, Department of Justice, Washington, D.C., for his outstanding efforts in the prosecution of a large counterfeit drug operation and steroids distribution conspiracy. Mr. Halpern was awarded a Special Citation from the Commissioner of the Food and Drug Administration, Dr. Frank Young, for his achievement.

H. Manuel Hernandez (Florida, Middle District), by James G. Richmond, U.S. Attorney, Northern District of Indiana, for his important contribution in a case involving indictments of 63 persons on various drug charges.

Charles Hyder and **Joanne Benites**, Legal Secretary (District of Arizona), by Henry Spomer, Agency Special Officer, Bureau of Indian Affairs, Department of the Interior, Sacaton, Arizona, for their valuable assistance to the investigators at Pima Agency Law Enforcement Services.

Sharon Jones (Illinois, Northern District), by Paul A. Adams, Inspector General, Department of Housing and Urban Development, Washington, D.C., for her major contribution to the success of many investigations involving HUD's housing programs in Chicago.

Anthony A. Joseph (Alabama, Northern District), by Timothy Halfman, Acting Special Agent in Charge, U.S. Secret Service, Birmingham, for obtaining a conviction in a counterfeit currency case.

Roberta Klosiewicz and **Terry Zitek** (Florida, Middle District), by Albert H. Davis, Jr., Supervisory Special Agent, Regional Office of Investigations, and Renald P. Morani, Acting Inspector General, Veterans Administration, Atlanta, for their outstanding leadership in two VA projects over the past three years.

Lawrence B. Lee (Georgia, Southern District), by Col. Barry P. Steinberg, Office of the Judge Advocate General, Department of the Army, Washington, D. C., for his excellent representation on behalf of the Army in a civil case.

Peter Loewenberg (Florida, Middle District), by John P. McCambridge, Counsel for the Military Sealift Command, Atlantic Military Ocean Terminal, Department of the Navy, Bayonne, New Jersey, for reaching favorable settlement in a sex discrimination case.

John McCann and **Paul Silver** (New York, Northern District), by Joseph Reinbold, Regional Inspector, Internal Revenue Service, Albany, for their successful prosecution of a tax case.

Stanley Patchell (District of Arizona), by John L. Smythe, Supervisory Special Agent, FBI, Phoenix, for his outstanding representation in the prosecution of a major fraud case.

Richard Andrews and **Robert Prettyman** (District of Delaware), by Neil Wise, Chief, Hazardous Waste Branch, Environmental Protection Agency, Philadelphia, for their valuable assistance in carrying out a Superfund removal action in Christiana, Delaware.

Julie Robinson (District of Kansas), by Richard Whitburn, Chief, Criminal Investigation Division, Internal Revenue Service, Wichita, for her outstanding performance in prosecuting a complicated tax shelter case.

Frank H. Santoro (District of Connecticut), was awarded the General Counsel's Certificate of Appreciation by Terry S. Coleman, Acting General Counsel, Department of Health and Human Services, for his significant contributions to the Office of the General Counsel.

D. Broward Segrest (Alabama, Middle District), by Colonel Larry S. Bonine, Corps of Engineers, Department of the Army, Mobile, for his expertise in the prosecution of a condemnation case.

Francis D. Schmitz (Wisconsin, Eastern District), by Special Agent in Charge Peter Mastin, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, St. Paul, Minnesota, for his successful prosecution of a criminal case under the provisions of the Armed Career Criminal Act.

Stewart C. Walz and **David Schwendiman** (District of Utah), by Robert M. Bryant, Special Agent in Charge, FBI, Salt Lake City, for their outstanding efforts and professional conduct in a murder trial.

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PERSONNEL

On August 12, 1988, Dick **Thornburgh** took the oath of office as Attorney General of the United States.

Effective August 31, 1988, **Peter K. Nunez** resigned as United States Attorney for the Southern District of California. **Nancy Worthington** has assumed the position of Acting United States Attorney.

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POINTS TO REMEMBER

Career Oppportunity

The Environmental Crimes Section of the Land and Natural Resources Division, Department of Justice, Washington, D.C. is seeking experienced criminal trial attorneys. The responsibilities of this Section encompass prosecutions of felony violations of major environmental statutes and related federal offenses, including conduct of grand jury investigations and trials throughout the country. This is a unique opportunity combining traditional white collar crime prosecution techniques with the enforcement of environmental statutes. Applicants must have a J.D. degree and active membership in a state bar. Salary and grade will be commensurate with experience and current salary, and will be in the GS 13-15 range. The Section is an equal opportunity employer.

Inquiries and resumes should be directed to Joseph G. Block, Assistant Chief, Environmental Crimes Section, P.O. Box 23985, Washington, D. C. 20026, FTS 272-9877, or (202) 272-9877.

(Land and Natural Resources Division)

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Civil Division Attorneys With Expertise In Designated Areas

To assist the United States Attorneys' Offices in the performance of their day-to-day activities, attached at the Appendix of this Bulletin is an updated list of Civil Division attorneys with expertise in designated areas.

(Civil Division)

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International Parental Child Abduction

From time to time, United States Attorneys receive requests for assistance from parents involved in child custody disputes wherein the absconding parents have taken the children to foreign countries. There is no basis for investigations of such matters under the federal kidnapping statute, 18 U.S.C. §1201, because that statute specifically exempts parental abductions of minor children. Federal involvement may be possible under the unlawful flight to avoid prosecution statute, 18 U.S.C. §1073, provided the absconding parent has been charged with a state felony offense, probable cause exists to believe the absconding parent fled the state with intent to avoid prosecution, and the state authorities are committed to extraditing and prosecuting the fugitive.

As a general rule, unlawful flight warrants should not be sought when the whereabouts of a fugitive is known. In such circumstances, an FBI fugitive hunt obviously is not needed. Moreover, an unlawful flight warrant does not provide a basis for international extradition. If an absconding parent is to be extradited from abroad, extradition will have to be based on the underlying state felony offense. However, for a variety of reasons, extradition rarely occurs in child custody cases. Thus, it is highly unlikely that invoking the criminal justice system will compel the return of an absconding parent from abroad. Moreover, even if an absconding parent is extradited, it will not necessarily result in the return of the child from abroad. In some circumstances, however, the issuance of an unlawful flight warrant may be appropriate even when the whereabouts of an absconding parent in a foreign country is known. If, for example, the absconding parent might be expected to reenter the United States, the existence of an unlawful flight warrant would facilitate the fugitive's apprehension and ultimate prosecution on the underlying state felony charge. We must emphasize that the purpose of the unlawful flight statute is to assist the states in the apprehension of fleeing felons for the purpose of state criminal prosecution. In our view, it would be improper to authorize an unlawful flight complaint solely to permit the FBI to request revocation of an absconding parent's passport, or to otherwise use unlawful flight process solely to induce compliance with child custody decrees.

You should be aware that civil remedies may be available to left-behind parents in some international parental abduction matters. On July 1, 1988, The 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention) entered into force in the United States. The provisions of the Convention have been implemented by the International Child Abduction

Remedies Act, 102 Stat. 437, Pub. L. No. 100-297. Essentially, the Convention and its implementing legislation establish certain legal rights and procedures for the prompt return of children to their country of habitual residence if they have been wrongfully removed or retained, as well as for securing the exercise of parental visitation rights. In addition to the United States, the Convention presently is in force in Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, and the United Kingdom.

The Convention requires each participating nation to designate a Central Authority to discharge its responsibilities under the Convention. The Department of State (Office of Citizens Consular Services) will be designated the United States Central Authority. The responsibilities of the Central Authority include taking appropriate measures to discover the whereabouts of a wrongfully removed or retained child, to secure voluntary return of the child or to bring about an amicable resolution, and to facilitate judicial proceedings with a view to obtaining return of the child.

The courts of the States and United States District Courts will have concurrent original jurisdiction of actions arising under the Convention. The United States will not be a party to such proceedings, and the parties will be expected to bear the expense of litigation.

In addition to undertaking the duties and responsibilities of United States Central Authority under the Convention, the Office of Citizens Consular Services also provides other services on behalf of parents of abducted children abroad. These services include health and welfare inquiries and referrals for legal assistance in the foreign country. Further information concerning the Convention and other assistance available through the Department of State may be obtained from:

Office of Citizens Consular Services
2201 C Street, N.W., Room 4817
Washington, D. C. 20520
(202) 647-3666

Any questions concerning the unlawful flight to avoid prosecution statute, 18 U.S.C. §1073, should be directed to the General Litigation and Legal Advice Section of the Criminal Division (FTS 786-4805).

(Criminal Division)

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Review Of INS Undercover Operations Proposals

In 1984 the Attorney General instituted a series of guidelines which govern undercover operations conducted by the Immigration and Naturalization Service (INS). These guidelines provide that certain undercover operation proposals must be approved by an Undercover Operations Review Committee comprised of officials from INS and the Criminal Division of the Department of Justice. As part of this approval process, INS must submit written proposals to the Review Committee. These written undercover operation proposals also must contain "[a] statement that the United States Attorney. . .is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed."

As a general rule, INS agents are instructed to obtain the concurrence of the United States Attorney in the form of a letter stating that he or she knows of the proposed operation; concurs with the proposal, its objectives and its legality; and agrees to prosecute any meritorious cases which result from the operation. This written concurrence is an important part of the review process and helps to ensure that the proposal has received careful review before it is forwarded to the Undercover Operations Review Committee for its consideration. This procedure also promotes close coordination of INS undercover investigations with the responsible United States Attorneys' offices.

By promptly reviewing INS undercover operation proposals and providing INS with written concurrence in all appropriate cases, you ensure that these goals are met and greatly assist the Review Committee in performing its task. Also, when considering any proposed INS undercover operation, you are encouraged to review the draft written proposal which INS has prepared for submission to the Undercover Operations Review Committee. Reviewing this draft proposal permits you to make an assessment of the merit of any operation on the basis of the same material which is submitted to the Review Committee. You should be aware, however, that these draft proposals are sensitive investigative records which should not be distributed outside INS.

Prosecutors with questions concerning their role in the INS undercover operation review process are encouraged to contact Criminal Division attorneys Roger Cubbage (FTS 786-4805) or Martin Carlson (FTS 786-4813).

(Criminal Division)

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LEGISLATION

Borrowing Authority For Federal Prison Industries

On August 2, 1988, the House Judiciary Committee approved H.R. 4994, a bill which amends Title 18, United States Code, to permit Federal Prison Industries (FPI) to borrow from the Treasury. The bill, introduced by Representatives Kastenmeier and Moorhead, is the Administration's proposal to increase the capability of FPI to provide work-related activities in new and renovated prisons.

On June 17, 1988, the Senate passed S. 2485, a bill which makes minor substantive and technical amendments to Title 18, United States Code, and contains the Senate language to permit FPI to borrow from the Treasury. Easy passage is expected in the House; however, due to differences with the Senate bill, a conference will be necessary. At this point, the Department favors the language in the House bill.

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Federal Employees Liability Reform And Tort Compensation Act

On August 3, 1988, the Senate bill, S. 2500, was held over by the Senate Judiciary Committee. The bill now includes an amendment that would add the employees of the Tennessee Valley Authority to the coverage of the bill, even though TVA is not covered by the Federal Tort Claims Act (FTCA). The bill was polled out of the Subcommittee on Courts and Administrative Practice on August 2, 1988. The Department of Justice drafted this legislation to protect federal employees from personal liability for ordinary torts committed within the scope of their employment. By its terms, the exclusive remedy in such cases would be suit against the United States under the FTCA. This result would overrule the Supreme Court decision in Westfall v. Erwin (January, 1988). The bill was introduced on June 13, 1988 by Senator Grassley, and Senators Heflin, Trible, Stevens and Mikulski are now co-sponsors.

On June 28, 1988, the House passed H.R. 4612, the companion bill, under Suspension of the Rules. The bill was introduced by Congressman Barney Frank, Chairman of the Judiciary Subcommittee on Administrative Law and Governmental Relations, with bipartisan co-sponsorship. The Department will continue to work closely with Subcommittee staff through the hearing and markup process on this legislation.

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Federal Debt Collection Act

On August 9, 1988, S. 1961, the Federal Debt Collection Act, as amended, was unanimously voted out of the Senate Subcommittee on Courts and Administrative Practice. The bill was amended pursuant to negotiations with representatives of the New York State Bar Association and the American Bankruptcy Conference. The only substantive changes occurred in Title II of the Act, which contains amendments to other legislation. Also, several bankruptcy provisions were deleted that were objectionable to the Bankruptcy Conference as drafted. Title I, which sets forth the new uniform federal collection scheme, remained intact. Full Committee action is anticipated shortly, and the Department remains optimistic that passage of this legislation will be achieved in the remaining days of this session.

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International Securities Enforcement

On August 3, 1988, the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce held a hearing on H.R. 4945, the International Securities Enforcement Cooperation Act of 1988. This SEC bill would expand the authority of the SEC to conduct an investigation in response to the request of a foreign regulatory authority. It also would exempt certain confidential documents received from foreign authorities from mandatory disclosure under the Freedom of Information Act, while providing explicit authority to the SEC to permit foreign authorities access to nonpublic documents and other information. Unlike the Senate companion, this bill does not contain a requirement that foreign authorities must agree to provide the United States with investigative assistance in order to obtain assistance that the SEC is authorized to provide by the bill. In the Senate, S. 2544 was ordered to be reported by the Senate Banking Committee on July 28, 1988, with an amendment offered by Senator D'Amato. This amendment is currently under review.

The concerns of the Department about the impact of this legislation on the Department's criminal investigative authority have been resolved by agreement with the SEC. The Department submitted a statement for the record of the Senate hearing in June, 1988, and a similar statement is being prepared for the House Subcommittee. This legislation appears to be moving quickly with no significant opposition.

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CASE NOTES

CIVIL DIVISION

D.C. Circuit Orders Public Disclosure Of Voice Tape Of NASA Space Shuttle "Challenger" On Ground That It Is Not A "Similar File" Under The Personal Privacy Exemption Of FOIA

The District Court in this Freedom of Information Act suit ordered NASA to make public the voice tape of the space shuttle "Challenger" notwithstanding NASA's invocation of the personal privacy exemption of FOIA, holding that the exemption is inapplicable since the tape is not a "similar file" within the coverage of the exemption. The D.C. Circuit has just affirmed on the "similar files" issue, without regard to the potential adverse impact of disclosure on personal privacy interests.

New York Times Co. v. NASA, No. 87-5244 (D.C. Cir. July 29, 1988). DJ # 145-177-113.

Attorney: Leonard Schaitman, FTS 633-3441

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Government Participation On Behalf Of District Court Judges On Appeals Of Sanctions Orders In Non-Government Cases

In a non-government case, the Solicitor General determined against Department of Justice participation in the court of appeals on behalf of a district court judge in support of a sanctions order he imposed upon private counsel. The Solicitor General concluded that such participation was not in the interest of the United States where the judge was not a named party to the appeal, where all that was involved was the defense of a sanctions order, and where the ordinary standards for government amicus participation were not met. In these circumstances, the Solicitor General concluded that the exercise of judicial power could adequately be vindicated in the course of the normal appellate process without Department of Justice participation. The decision is an important precedent for future cases in which the Department is requested by members of the judicial branch in non-government cases to participate in the court of appeals on their behalf in support of the validity of court orders which do not involve personal liability on the part of the judge(s) in question.

Attorneys: Douglas Letter, FTS 633-3602
John S. Schnitker, FTS 633-2786

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Third Circuit Orders FOIA Disclosure Of Employees' Names and Home Addresses To Union Monitoring Davis-Bacon Act Compliance But Withholds Disclosure Of Social Security Numbers

Plaintiff union filed a Freedom of Information Act request for the names, home addresses, and Social Security numbers of employees of a non-union electrical subcontractor on a federally funded construction project. The union asserted that it wanted to monitor HUD's enforcement of wages required by the Davis-Bacon and Copeland Acts to be paid to all workers on federally funded projects. HUD had given the union redacted payroll records with personal identifying information deleted. The district court held that Exemption 6 of FOIA did not justify the withholding on privacy grounds of the employees' names, home addresses, or Social Security numbers.

The Third Circuit has affirmed in part and reversed in part. The court held that Social Security numbers should be exempt from disclosure. This appears to be the first appellate decision involving FOIA disclosure of Social Security numbers and is a solid affirmation of the privacy interests involved. The court, however, ordered disclosure of names and home addresses on the grounds that the union needed these in order effectively to monitor HUD's enforcement of the wage laws. It criticized the Sixth Circuit's view, in Heights Community Congress v. VA, 732 F.2d §526 (6th Cir.), cert. denied, 469 U.S. §1034 (1984), that merely "monitoring" the operation of a federal program was not a sufficient public interest to justify the invasion of privacy in disclosing names and home addresses.

IBEW Local Union No. 5 v. HUD, No. 87-3656 (3d Cir. July 20, 1988). DJ # 145-17-4194.

Attorneys: Leonard Schaitman, FTS 633-3441
Robert Rasmussen, FTS 633-3424

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Third Circuit Holds That Government May Prevent Bankrupt Defense Contractor From Assuming Contract And That Automatic Stay Must Be Lifted to Permit Government To Terminate Contract

The government sought to terminate a defense contract with a bankrupt supplier. West Electronics was awarded a "sweetheart" contract to produce missile launcher power supply units for the Air Force. West fell far behind in delivery. After an investigation revealed West's accounting system to be in shambles, the Air Force sent a "show cause" notice that it would terminate the contract. West responded by filing for bankruptcy protection. The bankruptcy and district courts held that the automatic stay provisions of the bankruptcy code, 11 U.S.C. §362, prevented the termination.

The Third Circuit reversed and remanded with instructions that the stay be lifted so that the contract can be terminated. Moreover, the Court held that despite the ostensibly interlocutory character of the bankruptcy and district courts' decisions (the courts below said they would reconsider the motion to lift the stay later in the bankruptcy proceedings) the rulings below amounted to a final decision on a discrete controversy under the "pragmatic" standard of review. This case is the first appellate decision holding that a bankruptcy petition cannot be used to frustrate the government's desire to terminate contracts of this kind.

In The Matter of West Electronics, No. 87-5782 (3d Cir. July 19, 1988). DJ # 77-48-1945.

Attorneys: Leonard Schaitman, FTS 633-3441
Dwight Rabuse, FTS 633-3159

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Seventh Circuit, Reversing District Court, Holds That Economic Development Administration Need Not Honor $3.1 Million In Loan Guarantees Because The Lending Bank Materially Breached The Guaranty Agreements

In 1981, the Department of Commerce's Economic Development Administration agreed to guaranty 90% of each of two loans totaling approximately $3.1 million made by Citizens Bank to Weber Tackle Co. Weber defaulted on the loans and later went out of business. Citizens demanded that EDA honor its guarantees. The EDA refused, contending that the Bank had materially breached the guaranty agreements in several respects. The trial court concluded that the Bank had not materially breached the guarantees and, alternatively, EDA was estopped from challenging the Bank's practices either because it acquiesced in those practices or followed the same practices in its direct loan program.

The Seventh Circuit reversed, holding that the guaranty provision requiring the Bank to act in a "reasonable and prudent" manner was an "essential" provision and the Bank had materially breached that provision by, inter alia, making the loans in the first place when a recent financial report showed that Weber could not repay the loans. The appellate court then addressed the district court's findings concerning "estoppel." It concluded that the fact that EDA personnel monitoring the loans "turned a blind eye" to the Bank's imprudence did not mean that EDA had to honor the guarantees because: (1) the contract did not require the EDA to be vigilant, and (2) low level EDA personnel had no authority to modify the terms of the agreement. The appellate court also concluded that EDA had made no "promises, misrepresentations, or misleading silences, and there was no reliance by the Bank," thus the Bank could not even meet the traditional test for estoppel.

Citizens Marine National Bank v. United States Department of Commerce, et al., Nos. 87-2705 and 87-2789 (7th Cir. August 8, 1988). DJ # 105-86-132.

Attorneys: John F. Cordes, FTS 633-3380
Mary K. Doyle, FTS 633-3377

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En Banc Seventh Circuit Holds That 38 U.S.C. §211(a) Does Not Preclude Judicial Review Of Claims That The Veterans Administration Violated The Constitution In The Course Of Processing Benefit Claims

Plaintiff, a veteran dissatisfied with the level of disability benefits he obtained from the Veterans Administration (VA), brought this action in the district court, alleging inter alia that the VA violated his procedural due process rights in the processing of his claim. The district court dismissed the case for lack of subject matter jurisdiction under 38 U.S.C. §211(a). Plaintiff appealed, and after the panel heard initial argument, the Seventh Circuit sua sponte ordered the case reargued en banc, because the court was considering overruling two recent decisions holding that 38 U.S.C. §211(a) does not preclude review of constitutional claims. The en banc court has now reaffirmed those decisions and concluded that the statute does not bar constitutional challenges to the VA's processing of benefit claims.

The court of appeals opinion relies heavily upon the Supreme Court's recent decision in Traynor v. Turnage, 108 S.Ct. §1372 (1988), that §211(a) does not preclude review of a veteran's claim that a VA policy violates the Rehabilitation Act, and the Court's decision in Webster v. Doe, 56 U.S.L.W. §4568 (June 15, 1988), that 50 U.S.C. §403(c), the CIA employment termination statute, does not preclude review of a former CIA employee's claim that the CIA violated the Constitution in terminating him. The court further stated that 38 U.S.C. §211(a) is designed to preclude review of the VA's "application of any particular provision of the VA statute to a specific set of facts," not to prevent the courts from reviewing "substantial claims of unconstitutional agency action," such as plaintiff's assertion that the VA grants or denies claims on the basis of "an arbitrary quota system."

Marozsan v. United States, No. 86-1954
(7th Cir. July 25, 1988). DJ # 151-26-435.

Attorneys: William Kanter, FTS 633-1597
John S. Koppel, FTS 633-5459

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Tenth Circuit Holds Waiver Of Sovereign Immunity In EAJA Permits Assessment Of Attorney's Fees Against The United States Under Rule 11 And Remands On Cross-Appeal For Reconsideration Of Class Certification Under Rule 23(b)(2) Of Action Alleging Secretary's Non-Acquiescence With Treating Physician's Rule In Tenth Circuit

In this action seeking review of the denial of Social Security disability benefits, after finding there was not a "scintilla of evidence" supporting the administrative denial of benefits, the district court ordered the award of benefits, and also plaintiff attorney's fees against the United States under Rule 11, Federal Rules of Civil Procedure, for the Secretary's having filed an answer. We appealed the sanction, asserting both sovereign immunity and the inappropriateness of the sanction. The Court of Appeals, however, held that the waiver of sovereign immunity expressly contained in the Equal Access to Justice Act, 28 U.S.C. §2412, "would appear on its face to be sufficiently broad to waive the government's immunity from fee awards pursuant to the Federal Rules of Civil Procedure." The court also was of the view that in Section 5 of the original EAJA (94 Stat. §2330) Congress "manifested its broader intent that the United States be subject to fee sanctions under all of the federal rules to the same extent as private parties." Finally, the court concluded that the 1980 EAJA waiver was also "intended to encompass current law and subsequent changes," thus bringing the 1983 amendment of Rule 11, at issue herein, within the waiver. The Court of Appeals then affirmed the Rule 11 sanction on the ground that the facts were not "sufficient to allow the Secretary to defend the agency ruling in objective good faith as being supported by 'substantial evidence.'"

On plaintiff's cross-appeal of the district court's refusal to certify a class action, the Court of Appeals, construing the complaint as having sought class certification under Rule 23(b)(2), remanded for "consideration anew" because the district court improperly used the standard applicable to certification under Rule 23(b)(3) -- whether common questions of law or fact predominate -- rather than the standard applicable to Rule 23(b)(2).

Adamson v. Bowen, Nos. 85-2387, 85-2396 (10th Cir. August 15, 1988). DJ # 137-13-253.

Attorneys: William Kanter, FTS 633-1597
Edward R. Cohen, FTS 633-5089

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Tenth Circuit Holds That Reversal Of A Social Security Decision For Lack Of Substantial Evidence Does Not Automatically Mean That The Agency Was Not Substantially Justified For Purposes of EAJA

In one of the first Equal Access to Justice Act cases decided after Underwood, the Tenth Circuit has just reversed a district court decision that had found HHS liable for EAJA attorney's fees solely because the agency's decision on the merits had been set aside for lack of substantial evidence. In line with the approach in Underwood, the court of appeals refused to follow language in the House Report on the 1985 Amendments, and held that "a lack of substantial evidence on the merits does not necessarily mean that the government's position was not substantially justified".

Hadden v. Bowen, No. 87-1469 (10th Cir. July 20, 1988). DJ # 137-77-108.

Attorneys: William Kanter, FTS 633-1597
Jeffrey Clair, FTS 633-4027

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Eighth Circuit Invalidates Regulations Requiring Foster Care Payments To Be Counted As Income In Determining Food Stamp Eligibility

The Eighth Circuit has invalidated regulations that require federally subsidized foster care payments to be counted as unearned income for purposes of determining eligibility for food stamps. The payments at issue are authorized by the Adoption Assistance and Child Welfare Act and are made to families who agree to care for foster children in their homes. The Department of Agriculture determined that these foster children become part of the family's food stamp "household" and concluded that the federally funded payments must therefore be counted as household income for purposes of food stamp eligibility. The Eighth Circuit, however, held that foster children fell within the terms of a regulatory exception for "boarders." This boarder exception permits a food stamp family to exclude from food stamp income sums received from individuals who live with the family and pay compensation for meals. In so holding, the court agreed with a recent decision of the Second Circuit, which invalidated the regulation on similar grounds.

Murray v. Lyng, No. 87-5331 (8th Cir. August 16, 1988). DJ # 147-39-73.

Attorneys: Robert S. Greenspan, FTS 633-5428
Jeffrey Clair, FTS 633-4027

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Justice O'Connor Denies Application For Stay Pending Appeal Of Preliminary Injunction Barring Federal Bureau Of Prisons From Implementing Random Drug Testing Program For Bureau Employees

In response to numerous instances of drug use, drug dealing, and other drug-related problems in federal prisons, the Federal Bureau of Prisons decided to implement a drug testing program, which included random drug testing, for all its employees. After the Union filed suit challenging the program on Fourth Amendment grounds, the United States District Court for the Northern District of California issued a preliminary injunction barring the Bureau from implementing the program. The Bureau filed a notice of appeal with respect to the preliminary injunction and a motion for stay pending appeal in the Ninth Circuit. The motion argued that the District Court had ignored the unique security and safety concerns that exist in prisons, overestimated the extent of the privacy interests of prison employees in that highly regulated environment, and ignored evidence of serious drug problems that have already occurred in prisons. After the Ninth Circuit denied the motion, the Bureau filed an application for a stay pending appeal in the Supreme Court, which Justice O'Connor has now denied without an opinion.

Edwin Meese, III v. American Federation of Government Employees, No. A28 (S.Ct. July 26, 1988). DJ # 145-12-7810.

Attorneys: Leonard Schaitman, FTS 633-3441
Lowell Sturgill, FTS 633-3159

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CIVIL RIGHTS DIVISION

Supreme Court Defines Standards Governing "Disparate Impact" Cases Under Title VII Of The Civil Rights Act Of 1964

On June 29, 1988, the Supreme Court issued its opinion in Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988), a case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The question presented in Watson was whether decisions resulting from a subjective promotion process are subject to challenge under the disparate impact theory described in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In an 8-0 decision, the Court (per O'Connor, J.) held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." (Justice Kennedy did not take part in the decision.) A plurality of four Justices (O'Connor, joined by Rehnquist, White, and Scalia) further issued instructions on remand concerning the application of burden allocation and evidentiary standards in disparate impact cases. Three Justices (Blackmun, joined by Brennan and Marshall) disagreed with the plurality's instructions. One Justice (Stevens) thought it unnecessary to reach these issues.

Both the opinion of the Court and the plurality opinion address fundamental issues of Title VII law, which are of considerable interest to the Department of Justice as an enforcer of Title VII, as counsel to federal agencies that are or may be defendants in Title VII actions, and as a covered employer. Of particular importance to the Department are Parts IIC and IID of Justice O'Connor's plurality opinion, which delineate the allocation of burdens of proof and production and the controlling evidentiary standards in a Title VII disparate impact case. It seems prudent to treat the plurality's opinion as defining the current state of the law on these matters. While it is not an opinion for the Court, it does reflect the views of a majority (four) of the Justices to reach the issue here, and could be adopted by a majority in a related case that will be taken up next Term. See also Stevens' concurrence, 108 S.Ct. at 2797 (endorsing part of plurality opinion); Blackmun's concurrence, id. at 2792 n.2, 2797 n.10 (same).

The plurality opinion addresses the plaintiff's burden in establishing a prima facie case (108 S.Ct. at 2788-2790), the defendant's rebuttal burden (id. at 2790-2791), and the plaintiff's burden on surrebuttal (id. at 2790). In discussing the defendant's burden, the plurality emphasized that, after the plaintiff has made out a prima facie case, the defendant has the burden of production (but not the burden of proof); that the defendant must "produc[e] evidence that its employment practices are based on legitimate business reasons"; and that, even for challenged standardized or objective tests, the defendant is not required to introduce "formal 'validation studies' showing that particular criteria predict actual on-the-job performance" (id. at 2790).

Watson v. Fort Worth Bank & Trust,
108 S.Ct. §2777 (1988). DJ # 170-73-115.

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* * * * *

Second Circuit Upholds Contempt Citations Against City Of Yonkers and Four City Councilmen In Fair Housing Dispute

On August 26, 1988, the Second Circuit unanimously affirmed the district court's rulings in United States v. City of Yonkers (Nos. 87-6178, etc.), holding the City of Yonkers and four members of the Yonkers City Council in civil contempt for failing to enact zoning legislation necessary to put into effect the Long Term Housing Plan called for in the original 1986 Housing Remedy Order. The Housing Plan required Yonkers to provide incentives for developers to develop subsidized housing outside the City's southwest quadrant. The City had agreed to enact the legislation in a January 1988 consent decree.

The court of appeals held that, in light of the consent decree, the district court had the authority to order the City to enact and the Council members to vote for the legislation, that the district court did not abuse its discretion in imposing contempt sanctions for noncompliance, and that legislative immunity did not shield the Council members from sanctions. The court of appeals also rejected the City's "impossibility defense" that, because only the City Council could enact the legislation, the City itself was powerless to comply with the district court's orders. However, the court of appeals put a cap on the fines imposed upon the City so that they will not exceed $1 million per day. Issuance of the mandate was stayed for seven days to give the contemnors time to seek a stay from the Supreme Court.

On September 1, 1988, the Supreme Court denied the City's motion for a stay, but granted the stay motions filed by the four Council members. Justices Marshall and Brennan filed an opinion concurring in the denial of the City's motion and dissenting from the grant of the Council members' motions.

United States v. City of Yonkers,
Nos. 87-6168, etc. DJ # 169-51-22.

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* * * * *

Fourth Circuit Affirms Judgment Holding Leader Of White Patriot Party In Criminal Contempt For Operating Paramilitary Organization In Violation Of Court Order

The Fourth Circuit recently affirmed the conviction of Glenn Miller, the leader of the White Patriot Party in North Carolina, for criminal contempt of a court order that prohibited him from operating a paramilitary organization and doing certain other acts prohibited by North Carolina law. The case was prosecuted by the United States Attorney with the assistance of Morris Dees, the attorney for the plaintiffs in the underlying civil litigation. On appeal, Miller argued that Dees' participation in the prosecution, which consisted of handling the examination and cross-examination of most witnesses, was inconsistent with the Supreme Court's recent decision in Young v. U.S. ex rel. Vuitton Et Fils S.A., 107 S.Ct. §2124 (1987). In that case, the Supreme Court held that counsel for a party who is a beneficiary of a court order could not be appointed to prosecute a contempt action alleging a violation of that order.

In rejecting Miller's argument, the Fourth Circuit held that while Young prohibited turning over the conduct of a prosecution to a private interested counsel, it also indicated that private counsel could assist a disinterested prosecutor in pursuing the contempt action. The court held that such assistance is permissible as long as it (1) has been approved by government counsel, (2) consists solely of rendering assistance in a subordinate role to government counsel, and (3) does not rise in practice to the level of effective control of the prosecution. In applying this standard, the court rejected Miller's argument that Dees' examination of more witnesses meant that he was in control of the

prosecution. The critical inquiry, the court held, was whether government counsel was "effectively in a position and manifestly prepared to exercise control over the critical prosecution decisions -- most critically, whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." Given the presumption of regularity that attaches to official conduct, and the absence of evidence to disprove that presumption, the court found that government counsel had retained effective control over these decisions.

Person v. Miller, (No. 86-3882, August 16, 1988). DJ # 144-54M-908.

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* * * * *

CRIMINAL DIVISION

Federal Rules of Evidence

Rule 404(b). Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts.

Rule 104(a). Preliminary Questions. Questions of Admissibility Generally.

Rule 104(b). Preliminary Questions. Relevancy Conditioned on Fact.

At defendant's trial for possessing and selling stolen videotapes, the District Court allowed the Government to introduce evidence of "similar acts" under Rule 404(b) that defendant had engaged in the sale of televisions he knew to be stolen and that they were acquired from the same source as the videotapes. Rule 404(b) provides that evidence of other acts is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of knowledge. Defendant was convicted of possession of stolen videotapes and he appealed, contending that the jury should not be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Rule 104(a) that he committed the similar act and that the Government did not prove that the televisions were stolen. The Court of

Appeals for the Sixth Circuit reversed and remanded, but on rehearing affirmed the conviction. The Court noted that the Government's similar acts evidence was properly admitted and that the probative value of the evidence was not outweighed by its potential prejudicial effect. Certiorari was granted.

The Supreme Court held that: A) Before a court admits similar acts evidence under Rule 404(b), it must make a threshold inquiry as to whether the evidence is probative of a material issue other than character. B) The district court is not required by Rule 104(a) to make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits "similar acts" evidence to jury. Only relevant evidence is admissible under Rule 404(b) and questions of relevance conditioned on fact are dealt with under Rule 104(b), which provides that the trial court simply examine all evidence in a case and decide whether the jury could reasonably find the conditional fact (that the televisions were stolen) by a preponderance of the evidence. C) The jury could reasonably conclude (from the evidence of defendant's prior involvement in the sale of other stolen merchandise, the low price sought for the televisions, large quantity offered for sale, and defendant's inability to produce a bill of sale) that the evidence was sufficient to support a finding that the televisions were stolen, and the trial court properly allowed the evidence to go to the jury.

Affirmed. Guy Rufus Huddleston v. U.S., 108 S.Ct. §1496.

* * * * *

Rule 104(a). Preliminary Questions, Questions of Admissibility Generally.

See Rule 404(b) above, for syllabus.

Guy Rufus Huddleston v. U.S., 108 S.Ct. §1496.

* * * * *

Rule 104(b). Preliminary Questions. Relevancy Conditioned on Fact.

See Rule 404(b) above, for syllabus.

Guy Rufus Huddleston v. U.S., 108 S.Ct. §1496.

* * * * *

TAX DIVISION

Second Circuit Holds That IRS Summonses Should Be Enforced Against Attorney/Executor Of Decedent's Estate

United States v. White (2d Cir.). In this case, the United States sought enforcement of summonses of the records of White's activities as attorney and executor of a decedent's estate in order to ascertain the correctness of the deduction for attorney's fees and executor's commissions claimed on the estate tax return. White opposed enforcement of the summonses on the ground that the New York Surrogate Court had approved his executor's commissions and attorney's fees. He urged that the Surrogate's determination was binding on the Government insofar as the deduction of these fees on the estate tax return was concerned. The district court found that the Surrogate had passed on the facts on which deductibility depends, and held that the IRS was bound by the Surrogate's determination because it did not make a prima facie showing that the Surrogate's decision was motivated by impermissible factors "such as fraud, overreaching, or excessiveness by the attorney or the Surrogate." We appealed.

The Association of the Bar of the City of New York, the New York State Bar Association, and the Monroe County Bar Association filed amicus briefs supporting White's position. On August 2, 1988, the Second Circuit reversed, and held that the summonses should be enforced. The court reaffirmed that under United States v. Powell, 379 U.S. §48 (1964), the Government is entitled to enforcement of a summons upon making a minimal showing that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; (3) the information sought is not already within the Commissioner's possession; and (4) the administrative steps required by the Code have been followed. The court held that the Government had met that minimal burden here, and that the district court had erred in requiring the IRS to make a prima facie showing of fraud, overreaching, or excessiveness by the attorney or the Surrogate. It further held that a decision by a state trial court, such as the Surrogate Court, is not binding on the IRS, and that the IRS is entitled to make an independent assessment of the validity of White's fees under applicable state law as determined by the state's highest court. Finally, it held that federalism and comity did not constitute a substantial countervailing policy justifying a requirement that the IRS make an advance showing of fraud, overreaching, or excessiveness by the attorney or the Surrogate Court prior to obtaining enforcement of its summonses.

* * * * *

Tax Division Recommends Supreme Court Review Of Decision Requiring That Government Furnish Commercial Tax Reporting Services With Copies Of Court Orders and Decisions

Tax Analysts v. Tax Division, United States Department of Justice (D.C. Cir.). On August 25, 1988, the Tax Division forwarded to the Solicitor General its recommendation that a petition for a writ of certiorari be filed in this Freedom of Information Act case. The District of Columbia held that the FOIA required the Tax Division to make available to Tax Analysts copies of district court orders and decisions, notwithstanding the fact that these are public documents. It thereafter denied our petition for rehearing en banc. We maintain that they are not "agency records" subject to the FOIA, and that even if they are, they have not been improperly withheld from the requester. Although there is no square conflict in the circuits, the issue is one of great administrative importance. If allowed to stand, the D.C. Circuit's ruling will impose a severe financial and administrative burden on virtually every agency of the Government that engages in litigation, for its rationale cannot be limited to Tax Analysts and the Tax Division.

* * * * *

Seventh Circuit Allows Deduction For "Ceding Commissions" In Insurance Case

Merit Life Insurance Co. v. Commissioner (7th Cir.). On August 11, 1988, the Seventh Circuit affirmed the Tax Court's decision in favor of the taxpayer in this case involving the deductibility of "ceding commissions" paid by Merit Life, as the indemnity reinsurer, to the initial insurer as consideration for the right to share in the future earning from a block of life insurance policies issued by the initial insurer. The court's decision that the ceding commissions were currently deductible creates a square conflict with the recent decision of the Fifth Circuit in Colonial American Life Insurance Co. v. Commissioner (April 26, 1988), and with the Eighth Circuit's decisions in Modern American Life Insurance Co. v. Commissioner (1987), and Prairie States Life Insurance Co. v. United States (1987). Both the Fifth and Eighth Circuits held that such ceding commissions are nondeductible capital expenditures.

A petition for a writ of certiorari has been filed in Colonial American. We are considering whether to acquiesce in that petition, and whether to petition for certiorari in Merit Life.

* * * * *

Ninth Circuit Holds That Press Releases Summarizing Information Disclosed In Judicial Proceedings Do Not Violate Code Section 6103

Lampert v. United States; Peinado v. United States; and Figur v. United States (9th Cir.). The issue in all three cases was whether press releases issued by Government officials that report tax information disclosed in judicial proceedings constitute unauthorized disclosures of such information in violation of Section 6103 of the Internal Revenue Code. In Figur, the United States Attorney's Office had issued a press release summarizing the charges in a criminal information. In Peinado, the United States Attorney's Office had issued two press releases, first announcing Peinado's guilty plea to tax evasion, and then reporting his sentencing. In Lampert, the Justice Department and the Internal Revenue Service had issued separate press releases on the day the Government filed a complaint to enjoin the promotion and sale of abusive tax shelters. The taxpayers brought these suits for damages pursuant to Code Section 7431, alleging that the press releases constituted unauthorized disclosures inasmuch as Section 6103 does not contain any authorization for press releases.

By a published opinion on August 12, 1988, the Ninth Circuit disagreed with Rodgers v. Hyatt, 697 F.2d §899 (10th Cir. 1983), and Johnson v. Sawyer, 640 F.Supp. §1126 (S.D. Tex. 1986), and determined that once information is lawfully disclosed in court proceedings, as was the case here, the mandate of Section 6103(a) to keep return information confidential is "moot." Accordingly, the court held that a later disclosure of such information by means of a press release does not violate the statute.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES
(as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate
01-16-87	5.75%	11-20-87	6.93%
02-13-87	6.09%	12-18-88	7.22%
03-13-87	6.04%	01-15-88	7.14%
04-10-87	6.30%	02-12-88	6.59%
05-13-87	7.02%	03-11-88	6.71%
06-05-87	7.00%	04-08-88	7.01%
07-03-87	6.64%	05-06-88	7.20%
08-05-87	6.98%	06-03-88	7.59%
09-02-87	7.22%	07-01-88	7.54%
10-01-87	7.88%	07-29-88	7.95%
10-23-87	6.90%	08-29-88	8.32%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

* * * * *

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* * * * *

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David M. Cohen (Federal Circuit, Claims Court, & International Trade Litigation)	**724-7691**
Michael Hertz (Fraud Litigation)	**724-7179**
Vito J. DiPietro (Patent, Trademark and Copyright Litigation)	**724-7223**
J. Christopher Kohn (Bankruptcy, Foreclosures and General Commercial Litigation)	**724-7450**

DIRECTOR, OFFICE OF FOREIGN LITIGATION:

David Epstein	**724-7455**

AREAS OF EXPERTISE

BANKRUPTCY:

a. Generally	**Tracy Whitaker (724-7154)** **Ken Oestreicher (724-8418)**
b. Government Procurement	**Ken Oestreicher (724-8418)** **John Stemplewicz (724-7408)**
c. Chapter 12	**Terry Thomas (724-7332)**
d. Chapter 13	**Frank Carbiener (724-6819)**
AFFIRMATIVE CONTRACT ACTIONS:	**John W. Showalter (724-7174)** **James G. Bruen, Jr. (724-7453)**
FEDERAL CIRCUIT, CLAIMS COURT JURISDICTION & TRANSFER OF CASES TO THOSE COURTS:	**Thomas W. Petersen (724-7232)** **M. Susan Burnett (724-7232)** **Robert A. Reutershan (724-7237)** **Mary Mitchelson (724-7691)** **David M. Cohen (724-7691)**

FEDERAL TORT CLAIMS ACT LITIGATION

Joanne Marvin, CPT 724-9334	Army issues
Laura D. Millman 724-9318	Vaccines
Rupert Mitsch 724-8205	Radiation; Vaccines
Eileen O'Brien 724-9874	Toxic Torts; Vaccines
Patricia Reedy 724-9335	Medical Malpractice
Thomas Rees 724-9870	Bank Litigation
Sally Rider 724-9330	Regulatory Torts
Evelyn D. Sahr 724-9312	Bank Litigation; AIDS
Joanne I. Schwartz 724-9888	Medical Malpractice; Contractor Issues; Damages
Sophie Smyth 724-9331	Recreational Use Statutes; Bank Litigation
Leon B. Taranto 724-9314	Radiation; Discretionary Function Exception
Jay H. Tidmarsh 724-9891	Toxic Torts; Indemnity
James G. Touhey 724-9333	Radiation; Dram Shop Acts
Heidi Weckwert 724-9326	28 U.S.C. §2680(c)
Colette Winston 724-8368	Discretionary Function Exemption; Medical Malpractice
Julie Zatz 724-9325	Foreign torts; AIDS

Case Locator
Linda Kirk
724-7122

TORTS BRANCH

FEDERAL TORT CLAIMS ACT LITIGATION

Jeffrey Axelrad Director 724-9875	Federal Tort Claims Act
Roger D. Einerson Assistant Director 724-9311	Medical Malpractice
Paul F. Figley Assistant Director 724-9877	Feres issues; Contractor issues; Drivers Act
Ralph H. Johnson Assistant Director 724-9892	Radiation; Toxic Torts
Phyllis J. Pyles Assistant Director 724-9879	Toxic Torts; Assault Battery; Discretionary Function Exception
Lawrence A. Klinger Assistant to the Director 724-9886	Settlements; Medical Care Recovery Act

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Dina L. Biblin 724-7932	Bank Litigation
Jo Brooks 724-9310	Toxic torts; Misrepresentation Exception
Nikki Calvano 724-7910	Bank Litigation; Physicians' Immunity Statutes; AIDS
Nancy E. Friedman 724-9890	Affirmative Tort suits
Brenda M. Green 724-9313	Vaccines
Mary M. Leach 724-9893	Vaccines; Medical Malpractice
Veronica Platt Longstreth 724-9320	Radiation
Jerome A. Madden 724-9319	Bank Litigation; Toxic Torts; Assault & Battery