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Executive Office for United States Attorneys

United States Attorneys' Bulletin

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For the use of all U.S. Department of Justice Attorneys

Laurence S. McWhorter, Director

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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VOLUME 37, NO. 5 THIRTY-SIXTH YEAR MAY 15, 1989

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COMMENDATIONS

The following **Assistant United States Attorneys** have been commended:

Jerry Albert, Reese Bostwick, Jon R. Cooper, Joelyn Marlowe, and **David Kern** (District of Arizona), by John C. Poole, Patrol Agent in Charge, U.S. Border Patrol, Immigration and Naturalization Service, Nogales, for their valuable contribution to the success of a recent training session for Border Patrol Agents on federal laws and the presentation of cases.

David L. Allred (Alabama, Middle District), was awarded a Certificate of Appreciation from the Director, Regional Office, Veterans Administration, Montgomery, for his excellent representation in the litigation of a discrimination case.

Greg Anderson (Texas, Western District), by Howard Goetsch, Assistant Director, Federal Law Enforcement Training Center, Glynco, Georgia, for his participation in the development of an Operation Alliance Training videotape entitled "Federal Firearms Laws Against Narcotics Traffickers."

Barbara A. Bailey (District of Connecticut), by Drew C. Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C. for her demonstration of legal skills and expertise in a complicated extradition case.

Andrew Baker (Indiana, Northern District), by Donald A. Carr, Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D.C., for his outstanding success in an environmental case resulting in the highest penalty imposed by a federal court.

Mark Barrett (Texas, Western District), by Commander Brian Mills, Defense Logistics Agency, San Antonio, for his excellent representation of the Defense Contract Administration Services Management Area in a contract fraud case.

Michael Carey (West Virginia, Southern District), by Walter Biondi, United States Marshal, Charleston, for his successful litigation of a major criminal case involving several members of a motorcyle club.

Patricia Allan Conover (Alabama, Middle District), by Barry Teague, former United States Attorney for the Middle District of Alabama, for her outstanding success in the prosecution of a bankruptcy fraud case.

Gerald Coraz (Indiana, Southern District), by C.B. Faulkner, Regional Counsel, Federal Bureau of Prisons, Kansas City, for his excellent representation of the Bureau of Prisons in a tort claims case.

Kenneth Fimberg and **Catharine Goodwin** (District of Colorado) by Robert L. Pence, Special Agent in Charge, FBI, Denver, for their successful prosecution of a bankruptcy fraud and conspiracy case.

Thomas E. Flynn (California, Eastern District), by John C. Kelley, Jr., Director, Strategic Investigations Division, U.S. Customs Service, Washington, D.C., for his participation in the 1989 EXODUS Enforcement Conference held in San Francisco.

Lorraine Gallenger (District of Montana), by Kelly Acton, M.D., Director, Chronic Disease Prevention/Health Promotion, Billings Area Indian Health Service, for her valuable assistance in the prosecution of a medical malpractice case.

Margaret C. Gordon (Illinois, Northern District), by James Turner, Acting Assistant Attorney General, Civil Rights Division, for her exceptional service to Civil Rights Division attorneys during the past nine years in the prosecution of cases involving violations of federal civil rights laws in employment, housing, and voting.

William T. Grimmer, Rick L. Jancha, and **Richard Kallenbach**, (Indiana, Northern District), by Raymond L. Vinsik, Special Agent in Charge, Drug Enforcement Administration, Hammond, for their outstanding success in the trial of Operation Family Affair, a drug trafficking case.

Kathleen A. Haggerty (New York, Eastern District, now Assistant Director, Financial Litigation Staff, Executive Office for United States Attorneys), by F.G. McGrath, Assistant Inspector General for Investigations, Federal Emergency Management Agency, Washington, D.C., for obtaining a large settlement in a False Claims Act case. Also, for her success in collecting restitution stemming from a RICO case involving 39 defendants and $3.1 million in civil liabilities.

Patrick J. Hanley (Ohio, Southern District), by William R. Britt, Chief, Criminal Investigation Division, IRS, Cincinnati, for obtaining plea agreements in two income tax protester cases.

Bernard Hobson (District of Colorado), by William Sessions, Director, FBI, for his outstanding efforts in an investigation leading to the arrest of six individuals and the seizure of 14 ounces of tar heroin. Also, by the Denver Police Department for his valuable assistance in the investigation and prosecution of an organization responsible for the manufacture and trafficking of "speed" throughout the country.

Stanley J. Janice and **Thomas Ziolkowski** (Michigan, Eastern District), by Richard Hoglund, Special Agent in Charge, U.S. Customs Service, Detroit, for their outstanding success in the prosecution of Operation C-Chase, an international money laundering case.

Points To Remember (Cont'd.)

Please send any name or address changes to:
The Editor, United States Attorneys' Bulletin
Room 6419, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530
FTS/202-272-5898

Grant C. Johnson (Wisconsin, Western District), by Lawrence Nelson, Special Agent in Charge, FBI, Milwaukee, for his legal skills and expertise in the prosecution of a multi-count embezzlement case.

Thomas E. Karmgard (Illinois, Central District), by X.S. Harrison, Postal Inspector in Charge, St. Louis, for his outstanding representation in a criminal case involving the distribution of drugs by a postal employee.

Wallace Kleindienst and **Linda Akers** (District of Arizona), by John E. Peterson, Acting District Director, Department of Labor, Los Angeles District, for their successful prosecution of an embezzlement case involving a labor union.

Daniel S. Linhardt (California, Eastern District), by Joseph Pogar, Jr., District Counsel, Comptroller of the Currency, San Francisco, for his excellent representation in the litigation of a major bank fraud case.

James P. Loss (District of Arizona), by Davis Bernstein, Chief, Pesticides and Toxics Branch, Environmental Protection Agency, San Francisco, for his presentation on liability concerns of federal employees at the Annual Pesticide Inspector Training Conference.

Bernard J. Malone, Jr. (New York, Northern District), by Robert M. Stutman, Special Agent in Charge, DEA, for his successful prosecution of an 11-defendant cocaine factory case.

Mark H. Marshall (Texas, Western District), by Richard F. de la Garza, Jr., District Director, Department of Labor, Houston, for his excellent representation in a labor organization embezzlement case.

Kim I. Martin and **Emily B. Metzger** (District of Kansas), by Michael J. Pulice, Supervisory Senior Resident Agent, FBI, Wichita, for successfully prosecuting a fraud by wire and mail fraud case.

Emily B. Metzger (District of Kansas), by William C. Hendricks, III, Chief, Fraud Section, Criminal Division, Department of Justice, Washington, D.C., for her legal skill and expertise in the trial and appeal of a complicated 19-count wire and bank fraud case.

Joseph Mirsky (Texas, Southern District), by Donald L. Ivers, Acting General Counsel, Veterans Administration, Washington, D.C., for his excellent representation on behalf of the Department of Veterans Affairs in a civil action and for obtaining settlement of the judgment debt.

Brad Murphy (Illinois, Central District), by Thomas J. Tantillo, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for settling a complex health care program fraud case.

Ronald K. Noble (Pennsylvania, Eastern District), by William Sessions, Director, FBI, for his successful prosecution of three Medical Center officials on charges of fraud against the Department of Health and Human Services.

Thomas M. O'Rourke (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, IRS, Denver, for his excellent presentation to the Mesa County Peace Officers Association on the Arayan Nation problems in Colorado and his role in the Alan Berg murder trial.

Leon J. Patton (District of Kansas), by J.W. Winegar, Postal Inspector in Charge, Kansas City Division, for successfully prosecuting three Express Mail narcotics cases involving four defendants and six kilos of cocaine.

Yvette Rivera (New York, Eastern District), by Lt. Col. William A. Aileo, Chief, Litigation Division, Office of the Judge Advocate General, Department of the Army, Washington, D.C., for her excellent representation of the U.S. Army in a Second Circuit Court of Appeals case and for obtaining a favorable decision.

James Russell (District of Colorado), by Commander Ronald Scholz, Deputy Assistant Judge Advocate General, U.S. Navy, Alexandria, Virginia, for the valuable assistance he provided a Naval officer on temporary assignment in Colorado. Also, by Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Denver, for his participation in an Asset Seizure Seminar conducted in Denver and Albuquerque.

Yesmin E. Saide (California, Southern District), by William Sessions, Director, FBI, for her successful conclusion of an investigation and trial of a savings and loan conspiracy case in San Diego.

Kieran J. Shanahan (North Carolina, Eastern District), was presented the Director's Award by Paul J. Lyon, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Charlotte, in recognition of his outstanding service in the investigation and prosecution of violations of federal explosive and arson laws.

L.A. Smith, III (Mississippi, Southern District), by Rear Admiral W. J. Ecker, U.S. Coast Guard, St. Louis, for his excellent representation and favorable verdict in a tort claims case on behalf of the Coast Guard.

Michael Smythers and **W. Neil Hammerstrom, Jr.** (Virginia, Eastern District), by Joseph Davis, Assistant Director-Legal Counsel, FBI, for their participation in the New Agents' Moot Court held at the FBI Academy.

Howard Stewart (Pennsylvania, Eastern District), by Robert Palmer, President, Philadelphia National Bank, for his legal skill and professionalism in the ligitation of a bank fraud case.

Robert L. Stephenson (New York, Southern District), by Francis DeGeorge, Inspector General, Department of Commerce, Washington, D.C., for successfully prosecuting an export licensing officer for bribery, extortion, and lying to a federal agent.

Wistar D. Stuckey (District of South Carolina), by Fred W. Harris, Jr., Regional Attorney, Office of General Counsel, Department of Agriculture, Atlanta, for his valuable assistance in obtaining a favorable ruling in a complicated rural housing foreclosure case.

James Warden (Indiana, Southern District), was awarded a plaque by Wayne Beausoleil, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense Inspector General, Dayton, for his assistance in the prosecution of a defense contract fraud case.

James Eldon Wilson, United States Attorney (Alabama, Middle District), by Tandy Little, Jr., Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, for conducting two 1-week courses on the investigation and prosecution of drug cases for the Enforcement Division of the ABC Board consisting of 80 ABC agents.

James Eldon Wilson, United States Attorney (Alabama, Middle District), by Michael L. Mitchell, Special Agent in Charge, Department of Defense Inspector General, Marietta, Georgia, for his leadership in the prosecution of a major defense fraud case which resulted in a global settlement in the government's favor.

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Special Commendation For The Northern District Of Illinois

FBI Director William S. Sessions recently commended Assistant United States Attorneys John F. Podliska, Thomas Scorza, and Barbara Lazarus and former Assistant United States Attorneys Patrick Deady and Susan Bogart, for the successful prosecution of Chicago El Rukn gang leader Jeff Fort and seven other members of the El Rukn organization in two prosecutions in 1987 and 1988.

Jeff Fort and four high ranking members of the El Rukns, one of the nation's most notorious street gangs, were convicted in 1987 of conspiring to commit terrorist acts in the United States as part of a scheme to obtain $2.5 million from the Libyan government of Moammar Gadhafi. The verdict marked the first time that American citizens were found guilty of plotting to conduct terrorist acts in the United States to obtain money from a foreign government. In addition to conspiracy, the defendants, including Alan Knox, Reico Cranshaw, Leon McAnderson, and Roosevelt Hawkins, were convicted of interstate travel and use of interstate facilities to promote arson, attempted receipt of a LAW rocket explosive device, and unlawful possession of unregistered firearms. From at least as early as March 1986, until September, 1986, the schemers plotted to bomb airplanes and government buildings and to kill a public official and at least one law enforcement agent. The case was tried amid tight security over a seven-week period. Shortly after the trial began, the jury was sequestered and five of its members were excused after several jurors received threatening telephone calls. Four relatives of government witnesses were shot at during the course of the trial and three of them were wounded. The bond of the only unincarcerated defendant was revoked during the trial when he and several other El Rukns attempted to tamper with the jury.

In December, 1987, the defendants were sentenced to a total of more than 250 years in prison and fined nearly $1 million. Jeff Fort, who was convicted of all 49 counts of the indictment, was sentenced to 80 years in prison and fined $255,000. He was ordered to serve a minimum of 25 years in prison without parole. The sentences were some of the most severe ever imposed in the Northern District of Illinois. In 1988, three additional El Rukn members were prosecuted, convicted, and sentenced to 20 years in prison for witness intimidation in connection with the shooting of relatives of government witnesses during the 1987 trial. The convictions of all defendants are presently on appeal in the Seventh Circuit. One defendant from the 1987 case, Melvin Mays, evaded arrest and is now a fugitive on the FBI's Ten Most Wanted List.

United States v. Jeff Fort, et al., No. 86 CR 575 (N.D. Ill. 1987); United States v. Victor Johnson, et al., No. 88 CR 555 (N.D. Ill. 1988)

Attorneys: John Podliska, FTS/312-353-5330
Thomas Scorza, FTS/312-886-0663
Barbara Lazarus, FTS/312-353-1413

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PERSONNEL

On April 19, 1989, **William P. Barr** was appointed Assistant Attorney General for the Office of Legal Counsel. Mr. Barr was formerly a partner in the law firm of Shaw, Pittman, Potts and Trowbridge, Washington, D.C.

On April 17, 1989, **Wayne A. Budd** was appointed United States Attorney for the District of Massachusetts. Since 1979, Mr. Budd was the founder and President of Budd, Wiley & Richlin, P.C., New England's largest minority law firm.

On May 1, 1989, **E. Bart Daniel** was appointed United States Attorney for the District of South Carolina. Prior to entering the private practice of law in 1985, Mr. Daniel was an Assistant United States Attorney in charge of the Charleston office.

On May 16, 1989, **Mark R. Davis** became Acting United States Attorney for the District of Alaska.

On May 1, 1989, **Thomas M. Larson** was appointed Interim United States Attorney for the Western District of Missouri.

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Robert G. Ulrich
Judge, Missouri Court Of Appeals

On April 28, 1989, United States Attorney Robert G. Ulrich was sworn in as a judge on the Missouri Court of Appeals. During his tenure as United States Attorney for the Western District of Missouri, he served as Chairman of the Attorney General's Advisory Committee for three consecutive terms. In addition, he served on the Department's Resource Board and Department of Justice Personnel Management Board.

Judge Ulrich described his role as Chairman and that of the Advisory Committee to encompass three tenets: 1) to serve the Attorney General; 2) to serve the United States Attorneys; and 3) to assist the divisions and agencies of the Department of Justice in the performance of their duties. In his farewell message, he stated, "It is my belief that, during the last three years I have served as Chairman, the Advisory Committee has been faithful to these three goals and that the United States Attorneys have contributed significantly to the administration of justice to the benefit of the American people, not only in the district in which they serve, but also through the Advisory Committee." Members of the Advisory Committee passed a resolution on April 27, 1989, thanking Judge Ulrich for his hard work and endless dedication on behalf of the United States Attorneys.

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Attorney General's Advisory Committee

On April 27, 1989, James G. Richmond, United States Attorney for the Northern District of Indiana, was unanimously elected as Chairman of the Attorney General's Advisory Committee of United States Attorneys. Mr. Richmond is replacing Robert G. Ulrich who has been appointed a Judge on the Missouri Court of Appeals. J.B. Sessions, III, United States Attorney for the Southern District of Alabama, was elected to serve as Vice Chairman. Other members of the Committee are:

Stephen M. McNamee, District of Arizona, Vice Chairman
Robert C. Bonner, Central District of California
William C. Carpenter, District of Delaware
Deborah J. Daniels, Southern District of Indiana
Henry E. Hudson, Eastern District of Virginia
Charles W. Larson, Northern District of Iowa
David F. Levi, Eastern District of California
Andrew J. Maloney, Eastern District of New York
K. Michael Moore, Northern District of Florida
Anton R. Valukas, Northern District of Illinois
John Volz, Eastern District of Louisiana
Joseph M. Whittle, Western District of Kentucky
Jay B. Stephens, District of Columbia, ex officio

(Executive Office for United States Attorneys)

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ASSET FORFEITURE ISSUES

Anti-Drug Abuse Act Amendments Of 1988

Michael Zeldin, Director, Asset Forfeiture Office, Criminal Division, (FTS/202-786-4950) has prepared an Update on Anti-Drug Abuse Act Amendments of 1988, which is attached for your information at the Appendix of this Bulletin as Exhibit A.

* * * * *

Attorney Fee Forfeiture Update

An Attorney Fee Forfeiture Update has been prepared by Harry Harbin, Associate Director, Asset Forfeiture Office, Criminal Division, (FTS/202-786-4950) and is attached for your information at the Appendix of this Bulletin as Exhibit B.

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Money Laundering Forfeiture Amendments 18 U.S.C. §§981 and 982

An Update on Amendments to the Money Laundering Forfeiture provisions has been prepared by Michael Zeldin, Director, Asset Forfeiture Office, Criminal Division, (FTS/202-786-4950) and is attached for your information at the Appendix of this Bulletin as Exhibit C.

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Equitable Sharing In Forfeiture Cases

On May 4, 1989, Attorney General Dick Thornburgh issued a memorandum to all United States Attorneys concerning the approval levels from equitable sharing in forfeiture cases. The Attorney General stated as follows:

> In order to expedite the processing of state and local law enforcement sharing requests, the prior approval levels for equitable sharing are hereby revised to read as follows:
>
> 1) Judicial and administrative forfeitures in cases involving under $1 million: Final sharing decisions are to be made by the pertinent United States Attorney in the case of a judicial forfeiture or by the head of the seizing agency in the case of an administrative forfeiture;
>
> 2) Judicial and administrative forfeitures in cases involving $1 million or more: Final sharing decisions are to be made by the Assistant Attorney General, Criminal Division.
>
> These revised approval levels are to take effect immediately except that cases in final processing by the Criminal Division are to be completed under the prior guidelines to avoid the delay inherent in returning them to the originating United States Attorney or agency. Investigative and prosecutive offices are urged to coordinate closely regarding all sharing decisions. More detailed guidance with respect to this and other forfeiture issues will be forthcoming in the near future.

(Executive Office for United States Attorneys)

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DRUG ISSUES

Office of National Drug Control Policy

On May 3, 1989, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, reminded all United States Attorneys of Attorney General Dick Thornburgh's memorandum dated February 8, 1989, appointing Dick Weatherbee as liaison between the Department of Justice and the Office of National Drug Control Policy. It states as follows:

> The Anti-Drug Abuse Act of 1988 created an Office of National Drug Control Policy within the Executive Office of the President. President George Bush has nominated former Education Secretary William Bennett to serve as the Director of this new office. In his capacity as "drug czar", Mr. Bennett will have, upon confirmation, statutory responsibility for coordinating the federal war on drugs, including both supply and demand reduction programs. He will be the President's chief advisor on the organization, management and budget requirements of the federal agencies charged with implementing these programs. The Director's primary responsibilities will fall within two broad categories: preparation of a consolidated national drug control program budget for each fiscal year, and the annual development of the national drug strategy, including a state and local component.
>
> Because many elements of this Department are directly or indirectly involved in drug control efforts, the extent of our success will, to a large degree, be a measure of the Federal Government's overall success. I have, therefore, pledged our full cooperation and support to Bill Bennett in carrying out the mandates of his office. Toward that end, I have asked Dick Weatherbee of my staff to serve as the liaison between this Department and the Office of National Drug Control Policy to facilitate our responses to and liaise with Mr. Bennett and his staff. Please ensure that your communication with the Office of National Drug Control Policy (ONDCP) and meetings with Mr. Bennett and his staff are coordinated through Mr. Weatherbee.
>
> Dick Weatherbee's address and telephone number are:
>
> Office of the Attorney General
> Room 5125, Department of Justice
> Washington, D. C. 20530 -- FTS/202-633-2927
>
> (Executive Office for United States Attorneys)

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POINTS TO REMEMBER

Bicentennial Of The United States Attorneys

The Executive Office for United States Attorneys is preparing a "Bicentennial Bulletin" to commemorate the 200th birthday of the Office of United States Attorneys. This publication will feature items of historical interest on each of the 94 districts. A pictorial display is also being planned.

Please forward any historical material you may have, including significant cases and events, photos, anecdotes, and any information on previous United States Attorneys who have served in your State, to the Executive Office for United States Attorneys, Department of Justice, Room 1618, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, Attn: Laurence S. McWhorter, Director. In addition, please identify a contact person in your office who will be working on this matter.

If you are unable to gather any historical data or need assistance, please contact David Downs (FTS/202-633-3982) or Judy Beeman (FTS/202-272-5898).

(Executive Office for United States Attorneys)

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Department of Justice Representation Requests By United States Attorney's Office Personnel

Pursuant to 28 C.F.R. §50.15, when a United States Attorney's office employee believes he/she is entitled to Department of Justice representation in a proceeding, a written request should be submitted to the immediate supervisor. The United States Attorney's Office should then send the employee's request, a statement containing findings as to whether the employee was acting within the scope of their employment, and pleadings to the Legal Counsel, Executive Office for United States Attorneys, for forwarding to either the Civil or Criminal Division. The Executive Office is responsible for the final endorsement of United States Attorney personnel.

It has been noted that some United States Attorney's offices are continuously submitting representation requests directly to the Torts Branch, Civil Division. This procedure is incorrect and, in some instances, results in the loss of valuable time. A copy of 28 C.F.R. §50.15 is attached at the Appendix of this Bulletin as Exhibit D. If you have any questions, please contact the Legal Counsel staff at FTS/202-633-4024.

(Executive Office for United States Attorneys)

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Fact Witness Voucher, OBD-3

The General Accounting Office (GAO) recently directed the Department of Justice to review and reiterate its procedures for certification of OBD-3, Fact Witness Voucher. Following that mandate, the Justice Management Division prepared and distributed revised fact witness forms, along with a draft of a new order entitled "Procedures and Forms for Processing the Fees and Allowances of Fact Witnesses" which specifically delegates the responsibility for expense verification and certification to the United States Attorneys. The Justice Management Division distributed the order as a draft to allow Department of Justice components to review and comment on it. Some United States Attorneys were telephonically surveyed by a budget analyst on the Financial Management Staff of the Executive Office for United States Attorneys concerning the existing fact witness certification process in your district. Others submitted written comments in response to a request at the Administrative Officers Conference in New Orleans in December, 1988, and subsequent teletypes concerning the status of the order. Based on the information received, the Executive Office for United States Attorneys is negotiating for continuance of computation and certification by U.S. Marshals Service personnel.

Until the order is officially released, please continue to follow the procedures which are currently in place within your district. You will be notified as soon as a final decision on the fact witness certification is made.

(Financial Management Staff, Executive Office for United States Attorneys)

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Firearms Policy: Deputation Of United States Attorney Personnel

On May 11, 1989, Joe D. Whitley, Acting Associate Attorney General, issued a memorandum to all United States Attorneys setting forth Department of Justice policy for deputation of United States Attorneys, Assistant United States Attorneys, and Special Assistant United States Attorneys to carry firearms for their personal protection. The purpose of the firearms policy was to fill a need created by the limited resources of United States Marshals in providing protection for those at risk. The policy was not intended to relieve the Marshals of responsibility for providing protection in those situations where the facts warrant protection, nor to authorize the carrying of firearms by United

States Attorneys and Assistant United States Attorneys in circumstances where protection by the Marshal would not be appropriate. Accordingly, deputation of United States Attorney personnel should be authorized only in extraordinary situations where the facts establish that it is warranted.

Specific criteria for deputation set forth in the firearms policy are as follows:

1. The attorney or members of his/her immediate family are in imminent danger, or the facts warrant a reasonable determination that the attorney or family is threatened with serious bodily harm or there is a history of danger associated with the occupancy of the attorney's position; or

2. The attorney is required to perform a substantial amount of his/her official duties in geographical areas which pose physical danger to the attorney; or

3. The attorney's duties require him/her to address types of criminal activity (e.g., organized crime, illegal drug distribution, etc.) that may generate a level of risk of physical danger to the attorney warranting the carrying of a firearm for self-protection/; or

4. A threat of physical harm has been communicated specifically or implicitly, and considering the totality of the circumstances, there is a reasonable possibility that the threat is real in the assessment of a federal law enforcement agency.

On May 31, 1989, all current deputations expire and those individuals designated as Special Deputy United States Marshals must re-apply to the Department for continuing authorization to carry firearms. It is the position of the Associate's office that the nature of an individual's case load or the locale in which he or she works do not operate by themselves to justify the carrying of firearms. In the future, without factual information indicating an immediate threat of physical danger to the individual requesting deputation, applications will no longer be approved.

If you have any questions, please call Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, at FTS/202-633-4024.

(Executive Office for United States Attorneys)

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Lock Box Procedures For Direct Deposit Of Cash Collections

On May 1, 1989, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, requested all United States Attorneys to review the Department's policy and procedures of Departmental Order No. OBD 2110.19, Lock Box Procedures for Direct Deposits of Cash Collections, to ensure that each office is in compliance. Failure to follow the procedures in the Order creates opportunities for loss or theft of cash or checks that may come into your office as debt payments or bonds, etc. Unfortunately, an incident of missing money was recently discovered in one United States Attorney's Office. This situation was the subject of a lengthy cash audit by the Justice Management Division which was performed at the request of the United States Attorney.

During the past eight years, $2.5 billion was deposited through the Lock Box system. The vast majority of this money was collected by the United States Attorneys' offices. The Department now has an Inspector General's Office which will be responsible for the audit function. We can anticipate that this office will be looking into the internal controls and integrity of your money-handling function.

Copies of OBD 2110.19, Lock Box Procedures for Direct Deposit of Cash Collections, are available by calling Judy Beeman, Editor, or Audrey Williams, Editorial Assistant, United States Attorneys' Bulletin, at FTS/202-272-5898.

(Executive Office for United States Attorneys)

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Major Fraud Act Of 1988

An Overview of the Major Fraud Act of 1988 has been prepared by William C. Hendricks, III, Chief, Fraud Section, Criminal Division, and is attached for your information as Exhibit E at the Appendix of this Bulletin.

(Criminal Division)

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Report On Convicted Prisoners By United States Attorneys

All United States Attorneys, Assistant United States Attorneys, and Criminal Division attorneys are required to complete Form 792, "Report on Convicted Prisoners by United States Attorney" when a parole eligible (offense occurred prior to November 1, 1987) defendant has been sentenced for over one year.

A copy of Form 792 is attached as Exhibit F at the Appendix of this Bulletin. Instructions on how to complete this form appear in USAM 9-34.220, et seq.

(U.S. Parole Commission)

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Summary Of Recent RICO Decisions

The Organized Crime and Racketeering Section of the Criminal Division has prepared two supplemental sets of legal issues in recent RICO cases. One set lists cases alphabetically, and the other set lists all the categories of RICO issues numerically and sets forth the pertinent holdings of each case in which each issue was addressed. Copies are available by calling Alexander S. White, Organized Crime and Racketeering Section, Criminal Division, at FTS/202-633-1214.

(Criminal Division)

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Concurrent State Jurisdiction On Federal Enclaves Over Juveniles

It has been the practice to proceed in federal court against juveniles alleged to have committed an act of juvenile delinquency on an enclave under the exclusive jurisdiction of the United States. This practice was based on the assumption that the states lacked jurisdiction over juveniles who committed offenses in areas subject to exclusive federal jurisdiction.

Following a review of state and federal case law and the legislative history of the Federal Juvenile Delinquency Act, 18 U.S.C. §§5031 et seq., the Criminal Division has concluded that the release to state authorities of juveniles who are alleged to have committed an act of juvenile delinquency on a United States military base or other federal enclave is not precluded by the fact of the enclave's "exclusive jurisdiction" status. As long as the state is willing to accept jurisdiction over the juvenile and has available programs and services adequate for the needs of juveniles, a juvenile may properly be turned over to the state for non-criminal juvenile treatment. Consequently, this policy would not apply in cases where the offense charged is a crime of violence that is a felony or a drug offense described in Section 841, 952(a), 955, or 959 of Title 21 in which the United States Attorney determines there is a substantial federal interest. See 18 U.S.C. §5032.

Referral of juveniles to state authorities is in accord with Congressional policy recognizing that juvenile delinquency and juvenile correction is "essentially a state and local problem which must be dealt with by the state and local governments." See S.Rep. No. 1011, 93d Cong., 2d Sess. (1974), reprinted at 1974 U.S. Code Cong. & Admin. News, p. 5283. See also S. Rep. No. 98-225, 98th Cong., 1st Sess. p. 386 (1983). The fact that federal law does not deem acts of juvenile delinquency to be "crimes" and that the Federal Juvenile Delinquency Act is designed to remove juvenile offenders from the punitive criminal justice system and provide them instead with a separate system of rehabilitation and treatment also leads to the conclusion that the exercise of jurisdiction over juveniles by the states would be consistent with federal interests in the majority of cases, including those where the act of juvenile delinquency was committed on a federal enclave under the exclusive jurisdiction of the United States. See, e.g., State of New Jersey in the Interest of D.B.S., 137 N.J. Super. 371, 349 A.2d 105 (1975). See also United States v. Deboise, 604 F.2d 648, 650 (10th Cir. 1979). Since rehabilitation and treatment of a juvenile by state authorities is no more than a civil intervention to accommodate the social welfare needs of the juvenile, such state treatment of juveniles shall not preclude the instigation of federal delinquency proceedings in appropriate cases.

Accordingly, when, in the future, a juvenile is charged with committing a violation of federal law on an exclusive jurisdiction enclave (other than one of those violations specified in clause (3) of 18 U.S.C. §5032 as to which the United States Attorney determines there is a substantial federal interest), the United States Attorney should not automatically certify that the State is without jurisdiction. Instead, he or she should determine whether the State (a) is willing to assume jurisdiction over the juvenile, and (b) has adequate juvenile programs available. Such determination may be made on a case-by-case basis after consultation with or application to the local district attorney, or may be based on a general understanding reached with the district attorney regarding the state's willingness to assume jurisdiction over juveniles who commit offenses on federal enclaves.

If the state is willing and able to take the juvenile, arrangements normally should be made to turn the juvenile over to the appropriate authorities. In situations where the state maintains it does not have jurisdiction over the juvenile, the United States Attorney should certify to the court that the state refuses to assume jurisdiction. As a general rule this new policy will not apply to Indian juveniles committing offenses on reservations.

Questions about the specific procedures to follow in these cases should be addressed to the General Litigation and Legal Advice Section, Criminal Division, FTS/202-786-4827.

(Criminal Division)

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Unauthorized Interception Of Satellite Programming

On May 1, 1989, Edward S.G. Dennis, Jr., Assistant Attorney General, Criminal Division, issued a memorandum to All United States Attorneys providing an update on recent legislation on unauthorized interception of satellite programming. Mr. Dennis referred to an earlier memorandum dated October 20, 1988, in which he discussed the growing problem of the theft of satellite programming and the prosecution of those responsible. Specifically addressed were the felony provisions in the Electronic Communications Privacy Act of 1986 which extended the criminal sanctions of 18 U.S.C. §2511 and §2512 to the unauthorized interception of satellite programming and the criminal sanctions of 47 U.S.C. §553 and §605(a).

Recently, Congress' concern regarding the theft of satellite programming has been reflected in new legislation effective January 1, 1989 (Sec. 207 of P.L. 100-667). In response to this piracy problem, Congress has amended 47 U.S.C. §605 to include a new criminal offense and increased the civil and criminal penalties in the existing law. Specifically, Congress added 47 U.S.C. §605(d)(4) to penalize the manufacture, assembly, modification, import, export, sale or distribution of any device that primarily assists in the unauthorized decryption of satellite cable programming or any other activity prohibited by subsection (a) by a fine of not more than $500,000 and imprisonment of not more than five years. Further, Congress amended the existing penalty provisions of 47 U.S.C. §605(d). The penalties for persons who violate subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain have been increased to a fine of not more than $50,000 or imprisonment for two years or both. Therefore, acts that were previously prosecutable as misdemeanors under this section are now felonies. Under the amendments, subsequent convictions are punishable by a fine of $100,000 or imprisonment of not more than five years or both. (See Chapter 227 of Title 18 in determining actual available sentences and fines.) In addition, the new legislation increases liquidated damages and other damages that may be awarded in civil litigation. In passing these new provisions Congress noted that they were addressing what has been identified as potentially the greatest threat to a viable home satellite antenna industry by the unauthorized decryption or interception of satellite cable programming. This new legislation provides another tool in our law enforcement efforts to stem this growing problem.

The Criminal Division's General Litigation and Legal Advice Section is currently monitoring investigations and prosecutions in this field. Prosecutors with questions concerning the application of federal criminal laws to the theft of satellite programming should contact Section Attorney Barbara B. Berman at FTS/202-786-4813. Your continued reporting of any prosecutions which you have undertaken in this field to the General Litigation and Legal Advice Section is encouraged.

(Criminal Division)

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LEGISLATION

Attorney General's Settlement Authority

On May 9, 1989, the House passed H.R. 972 under Suspension of the Rules. This legislation, which the Administration fully supports, would expand the authority of the Attorney General to settle claims for damages arising from law enforcement activity of the Federal Government. It involves claims by innocent third parties who sustain damage from the proper performance of law enforcement duties, which would not be cognizable under the Federal Tort Claims Act. Existing law, 31 U.S.C. §3724, permits settlement only of claims resulting from F.B.I. activities up to the sum of $500. The bill would increase that sum of $50,000 and broaden its application to all law enforcement officers, as that term is defined in 28 U.S.C. §2680(h), who are employed by the Department of Justice.

S. 604, which is similar but not identical to H.R. 972, has been referred to the Senate Judiciary Committee where it has received no action. Committee staff indicate that they are likely to take up one of the bills in the near future.

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Fairness Doctrine

On April 11, 1989, the House Energy Committee approved H.R. 315, which would reinstate the "fairness doctrine" repealed by the FCC in 1987. In general terms, the bill would require that all sides of controversial public issues be aired by broadcasters. The Department of Justice has advised the Committee that it will recommend a veto of the bill should it be passed by Congress, on the grounds that the doctrine is outdated; it unconstitutionally infringes on free speech; and, its effect is to favor print media over broadcasters. President Reagan vetoed an identical bill passed by the 100th Congress.

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Hatch Act Repeal

On April 17, 1989, the House approved H.R. 20, the "Federal Employees' Political Activities Act of 1989," by a margin of 297 to 90. The bill would repeal substantial portions of the Hatch Act which prohibits certain active partisan political activities by federal government employees. We vigorously oppose this legislation because it would result in a significant repoliticization of the federal work force to the detriment of the vast majority of federal employees as well as the public policies and programs that they implement. The Attorney General and the Director of the Office of Personnel Management sent letters to the Committee on Post Office and Civil Service which explain the Administration's position, including notice that, if the bill were presented to the President, his senior advisers would recommend its veto.

The House bill has been referred to the Senate Committee on Governmental Affairs, which also has jurisdiction over a similar Senate bill, S. 135. The Senate version was introduced by Senator Glenn, Chairman of the Committee, with twenty-two co-sponsors. We are currently preparing views on that legislation. No action has been scheduled in the Senate on either bill.

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RICO Reform

On May 4, 1989, John C. Keeney, Deputy Assistant Attorney General, Criminal Division, testified before the House Judiciary Subcommittee on Crime on reform of the Racketeer Influenced and Corrupt Organizations (RICO) provisions of federal law. The bill in issue, H.R. 1046, would limit the recovery of treble damages by private plaintiffs. Mr. Keeney's testimony stressed the need to ensure that the government's ability to use criminal and civil RICO not be adversely affected through legislative initiatives.

The Chairman said that the Subcommittee plans to hold several hearings on RICO reform and to report out a bill. Some members expressed an interest in limiting the use of civil RICO not only by private parties but also by the government. In addition, some voiced an interest in limiting the use of RICO in a criminal context. The Chairman indicated this would be a topic of study. Areas of concern also included the use of temporary restraining orders in RICO cases involving forfeiture and the use of civil RICO to seek trusteeships over labor unions.

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CASE NOTES

ASSET FORFEITURE OFFICE

In Re Application For Warrant To Seize One 1988 Chevrolet Monte Carlo
861 F.2d 307 (1st Cir. 1988)

The Government presented a seizure warrant application and supporting affidavit to the Magistrate, but did not file a complaint in rem prior to or simultaneous therewith (presumably because it sought to forfeit the property administratively). The Magistrate found that the jurisdictional requirements for administrative forfeiture were met and that there was probable cause to support the forfeiture. The Magistrate refused to authorize the warrants due to the lack of a complaint in rem. The District Court upheld the Magistrate's recommendation and the Government appealed.

The Court held (1) that denial was a final order and therefore appealable; and (2) the 1986 Anti-Drug Abuse Act Amendments do not require a complaint to be filed. These amendments track the requirements of Fed.R.Crim.P. 41 (search warrants). This rule does not require the filing of a criminal complaint as a condition precedent to obtaining a search warrant. Thus, where probable cause has been demonstrated, a District Court has authority to grant a seizure warrant for civil forfeiture of personal property despite the absence of exigent circumstances or an earlier forfeiture judgment and the fact that no complaint in rem has been docketed.

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United States v. Reynolds
856 F.2d 675 (4th Cir. 1988)

The Government filed a complaint for forfeiture in rem pursuant to 21 U.S.C. §881(a)(7) against two tracts of real property. The Government alleged that the property was used to facilitate cocaine distribution. After a 2-day trial, the court ruled that the house, driveway, and swimming pool on one of the two tracts facilitated cocaine distribution. It found that the other tract was innocent of illegal activity. The court then ordered the entire 30 acres of the first tract forfeited, and dismissed the forfeiture action as to the other tract. The owners appealed, arguing that only that portion of the 30-acre tract which facilitated the drug deal should be forfeited.

The court held that the language of 21 U.S.C. §881(a)(7)--"interest in the whole of any lot or tract of land which is used or intended to be used, in any manner or part," is dispositive of the question. Forfeiture of the entire 30-acre tract is permissible. Affirmed.

* * * * *

United States v. Santoro
86 F.2d 1538 (4th Cir. 1989)

The defendant property (26 acres) is bisected by a road and has been taxed as two separate parcels; however, the deed on the property describes it as a single undivided tract. On one side of the road is a developed 5-acre tract on which the family home is located. On the other side is the remainder of the property, all of which is unimproved. In 1983, the owners of the property (Mr. and Mrs. Santoro) divorced and Mrs. Santoro was given her husband's half interest in the property as a lump sum child support payment.

On four occasions in May 1986, Mrs. Santoro sold small amounts of cocaine to an undercover police officer (total amount sold altogether equalled 12.8 grams). She eventually pleaded guilty and the Government instituted civil forfeiture proceedings against the entire tract of land. Mrs. Santoro raised several challenges to the statute, none of which were availing.

The court held that (1) 21 U.S.C. §881(a)(7) is not unconstitutionally vague on its face or as applied, because of a lack of definitions for "facilitate" or "use." (2) The repeated sales of drugs on the property, however small, constitutes a substantial connection between the property and the illegal act. (3) The statute states that "all real property, including any right, title and interest, in the whole of any lot or tract of land...is forfeitable." This property, although divided by a road, was legally described on the deed as one undivided tract of land. The duly recorded deed governs, not the owner's subjective view of the property. Therefore, the entire tract is forfeitable. (4) 21 U.S.C. §881(a)(7) is a civil statute; therefore, Eighth Amendment proportionality does not apply. (5) The shifting burden of proof permitted by §881 is not unconstitutional. (6) Mrs. Santoro's children have standing to challenge the forfeiture because of the trust created in the divorce decree (i.e., they have a beneficial interest in the property). The District Court ruling denying them standing was reversed.

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United States v. One Gates Learjet, Serial No. 28004
861 F.2d 868 (5th Cir. 1988)

A Learjet, landing in Texas en route from Mexico, disclosed no contraband after a customs inspection. DEA agents advised that the aircraft was mentioned in a "lookout" but a second search again revealed no contraband. A K-9 brought on board alerted in the cargo area and the aisle. A DEA chemist made a vacuum sweep of the plane and the subsequent microscopic tests revealed 3 to 4 milligrams (10-14/100,000 of an ounce) of cocaine (an amount not visible to the naked eye). On the basis of this evidence, a complaint for forfeiture in rem was filed under 21 U.S.C. §881(a)(4) and (a)(6) and 19 U.S.C. §1595(a). At trial, evidence of the relationship of the owner of the plane with drug kingpin, Caro-Quintero, was discussed by DEA agents who were witnesses, and the results of the chemist's examinations were introduced. The trial court found probable cause and ordered the plane forfeited. An appeal was filed.

The court held that the Government must show probable cause to believe that the Learjet was used or intended to be used to facilitate drug transportation, etc. The Government failed to meet its burden that (1) the DEA suppositions about the owner's relationship with drug traffickers were unsubstantiated by reliable evidence, and no other basis for forfeiture under a proceeds theory was proven; and (2) trace amounts of cocaine without evidence of the plane owner's illegal activity was, by itself, insufficient to support a finding of probable cause. The conviction was reversed.

* * * * *

United States v. Maull
855 F.2d 514 (8th Cir. 1988)

The Government brought a civil forfeiture action in Colorado against real estate alleging that the owner (Maull) purchased the property with drug proceeds. The law firm claimed an interest in the property as a fee. The claimants sought dismissal of the complaint under F.R.Civ.P. 41(b) on the ground of lack of specificity. The District Court ordered the Government to amend its complaint, but the Government refused to comply because to do so threatened its ongoing criminal investigation. The District Court dismissed the complaint per F.R.Civ.P. 41(b). Government appeal of this order was rejected by the Tenth Circuit.

Maull was subsequently indicted and convicted in the State of Missouri of violations of 21 U.S.C. §848 (CCE). As part of the criminal conviction, the court ordered Maull's property, including the Colorado property involved in the prior civil action,

forfeited. The law firm then filed a petition with the Missouri District Court asking that its interest in the Colorado property, a fee for legal services, be exempt from the §853 forfeiture order because of the doctrine of res judicata.

The court determined that United States v. Dunn, 802 F.2d 646 (2d Cir. 1986) (analyzing res judicata in the context of 21 U.S.C. §§881 and 853 forfeitures) did not apply to the facts here. Instead, it found that the Rule 41(b) order of the Colorado District Court was not a final order and, therefore, res judicata was not a bar to a subsequent civil action in Colorado.

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United States v. Ten Thousand Dollars ($10,000) in United States Currency
860 F.2d 1511 (9th Cir. 1988)

Claimant Rahman was caught exiting the United States with over $10,000 in cash without having first filed a Currency and Monetary Interim Report (CMIR). The money was seized and a forfeiture action was commenced. Claimant failed to timely respond to the action although he wrote pro se letters to the court asking for an attorney. In February, the District Court entered a default judgment. In May, claimant again wrote to the court asking that an attorney be appointed and the default judgment be set aside. In June, claimant obtained law student counsel who moved to set aside the default. The Government responded that the forfeiture had been executed and the cash released to the Government. The District Court found that the court was without jurisdiction over the cash and dismissed the action.

The court may treat the claimant's May pro se letter as a request to stay the proceedings pending final execution. It, therefore, held that the exceptions of The Rio Grande, 90 U.S. 458 (1874), may apply; that is, it held that jurisdiction would not be defeated if the removal was by accident, fraud, or improper removal. Here, the court found that the removal could be deemed to be either improper or accidental because claimant's May letter never actually reached the District Court Judge in time for him to act on the request. Accordingly, the court remanded the case for findings on these matters.

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United States v. Tax Lot 1500, Township 38 South, Range 2 East, Section 127, Further Identified as 300 Cove Road, Ashland, Jackson County, Oregon
861 F.2d 232 (9th Cir. 1988)

Appellant was convicted in state court for growing marijuana. The evidence showed that appellant owned a house valued at $95,000. Growing on a 2'x 5' deck over the garage were 143 immature marijuana plants with a value of $1,000 at the time of seizure. The square space used to grow these plants was less than 200 square feet. The United States initiated a civil forfeiture against the home under 21 U.S.C. §881(a)(7). Summary judgment was entered against the entire property. Appellant appealed arguing that: (1) the Eighth Amendment's proportionality of punishment requirement should apply to civil forfeitures; and (2) the District Court erred in failing to exercise judicial restraint to limit the forfeiture to the value of the portion of the property actually used to grow the marijuana.

The court held that (1) proportionality does not apply to civil forfeiture actions notwithstanding the fact that it applies to criminal forfeitures; and (2) although the District Court could properly exercise its judicial restraint powers, it did not err in this case when it refused to limit the forfeiture to the value of property actually used to grow the marijuana.

* * * * *

United States v. One 1985 Cadillac Seville
866 F.2d 1142 (9th Cir. 1989)

Claimant was stopped by Santa Cruz County Sheriffs for erratic driving. The police determined him to be under the influence of drugs and he was arrested. A search of his car revealed cocaine and marijuana, and $434,097 in cash. On March 11, 1985, the State filed a complaint for forfeiture against the cash. Also, on March 11, 1985, the IRS issued jeopardy and termination assessments against the claimant and filed a tax lien in the amount of $665,940. IRS then served a levy on the Santa Cruz Sheriff's office. On August 1, 1985, the United States filed a complaint in forfeiture against the cash and the car. The Government moved for summary judgment. The claimant failed to respond to the motion. Instead, he indicated in a Memorandum of Law that he intended to contest the forfeiture on the grounds that the IRS lien took precedence. The Government's motion for summary judgment was granted and the claimant appealed.

The Court, *sua sponte*, raised the question of whether the Federal Government could assert *in rem* jurisdiction over the same property as to which the state previously asserted *in rem* jurisdiction. The Court determined that the common law rule which

prohibits a court, whether state or federal, from assuming in rem jurisdiction over a res that is already under the in rem jurisdiction of another court applies here. Accordingly, it reversed the summary judgment motion and remanded for further factual determination. Accord, United States v. $79,123.49 in United States Cash and Currency, 830 F.2d 94 (7th Cir. 1987). The Court also held that the claimant lacked standing to assert an interest on behalf of the IRS, vis the forfeiture action.

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CIVIL DIVISION

Second Circuit Upholds Secretary's Efforts To Supervise Administrative Law Judges Not Violative Of Their Decisional Authority

The plaintiff is a veteran Administrative Law Judge (ALJ) with the Social Security Administration. In order to eliminate a backlog of cases in 1975, the Department of Health and Human Services (HHS) instituted a series of reforms, including a "Peer Review Program," which responded to the wide disparity in ALJ decisions. The plaintiff contended that these reforms infringed the "decisional independence" of ALJ's; he also raised a claim concerning the Secretary's non-acquiescence policy. The district court originally dismissed the complaint for lack of standing. That decision was reversed by the Second Circuit in 1980.

Following trial, the district court found in favor of the government and dismissed the complaint. The court of appeals (Feinberg, Newman, Altimari), has now affirmed. The court agreed with the district court that the plaintiff lacked standing to challenge the Secretary's non-acquiescence policy. The court held that the Secretary's efforts to ensure uniformity among ALJ decisions were not only legitimate, but were to be encouraged. Those efforts did not, therefore, infringe the ALJ's decisional independence.

Nash v. Bowen, No. 88-6066 (2d Cir. March 7, 1989).
DJ # 137-53-208.

Attorneys: William Kanter, FTS/202-633-1597
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Fourth Circuit Holds That Rehabilitation Act Prevents Discharge Of Alcoholic Employee Until He Has Been Afforded The Opportunity For In-Patient Hospital

Plaintiffs in these cases were government employees who were intermittently AWOL because of alcoholism. In each case they were warned that they must seek treatment or face losing their jobs. In each case, as a result of this prodding, they enrolled in a counseling program which was ultimately unsuccessful. When the AWOLs resumed, they were sent notices of proposed removal. In response, they enrolled in in-patient treatment, which in one case (Rodgers) was successful, and in the other (Burchell) apparently was not. However, they were fired while in these treatment programs.

The Fourth Circuit held that, under the Rehabilitation Act, "the agency must, before discharging [an alcoholic employee], afford him an opportunity to participate in an in-patient program, using accrued or unpaid leave, unless the agency can establish that it would suffer an undue hardship from the employee's absence." As a result, the employees were ordered reinstated. The court, in reaching this result, was influenced by its construction of a provision of the Federal Personnel Manual.

Rodgers v. Lehman, Burchell v. Army, Nos. 88-2028, 88-2842 (March 9, 1989) DJ Nos. # 145-32-171, # 145-201-17.

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Fourth Circuit Upholds HHS's Interpretation Of Federal Statutes And Regulations As Requiring AFDC Applicants To Include Title II Social Security Payments Received By Sibling, But Rejects Agency's Position That The First $50 Of Child Support Payments Be Included For The Family's Income

Custodial parents of children receiving Title II Child's Insurance Social Security Benefits filed suit challenging HHS regulations requiring inclusion of such benefits in family "income" for AFDC purposes. Assuming such payments were to be included, they also challenged the Secretary's refusal, under a statutory provision excluding the first $50 of "child support payments," to disregard as "income" the first $50 of such benefits. The district court upheld the inclusion of the benefits in family income but found the $50 disregard to be applicable.

The Fourth Circuit (Murnaghan, Chapman, and Butzner) affirmed both of the district court's holdings. The Court agreed with our argument that the inclusion in "income" violated neither the Social Security Act's "anti-alienation" provision, barring the use of any legal process to reach benefits, and barring assignment or transfer of benefits, nor its "representative payee" provision, imposing fiduciary duties on persons receiving benefits on behalf of the child. As for the $50 disregard, the Court reasoned that "it would implicate serious equal protection concerns" to uphold the Secretary in applying the disregard to child support payments and not to Child's Insurance Benefits. It therefore found that both must be disregarded.

Stroop et al v. Bowen, No. 88-2530 (4th Cir. March 29, 1989). DJ No. # 145-16-2940.

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Sixth Circuit Sustains Dragnet Search Of Employee Lockers For Drugs

Acting on reports that drug dealing was taking place at the Columbus Post Office, the Postal Inspection Service staged an unannounced search of over 1600 employee lockers, aided by a police dog. No drugs were found, although one locker was found to have over 500 pieces of stolen mail. The union and several employees brought a class action against the Postal Service and the individual officials involved for damages and injunctive relief. The Sixth Circuit (Krupansky and Kennedy, JJ., Edwards J. concurring) sustained the district court's ruling that there was no violation of the Fourth Amendment, on the ground that Postal Regulations, the collective bargaining agreement, and the form signed by each employee when he obtained the locker, authorized the search. Judge Edwards concurred on the ground that the locker form waived the employee's Fourth Amendment rights; he apparently was unwilling to agree with the majority that these rights could be waived by regulation or by a collective bargaining agreement.

American Postal Workers Union v. United States Postal Service, 6th Cir. No. 8704020, decided March 27, 1989. DJ # 145-5-5693.

Attorneys: Leonard Schaitman, FTS/202-633-3441
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Sixth Circuit Rejects The Tort Claim Of An Injured Recreational User Of Government Land

This case involves a hunting accident which occurred when the Government opened parts of an Army Base to recreational hunting for a fee, but failed to fence the land to keep out poachers. A poacher shot Gary Sivley, who had paid the fee and was lawfully hunting. Sivley sued the United States under the Federal Tort Claims Act. The district court granted summary judgment for the Government. The court of appeals has affirmed on three separate grounds.

First, the court ruled that the United States neither knew nor should have known of the danger of poachers because this was the first hunting accident involving a poacher. Second, the United States, as a landowner, had no duty to warn or to protect Sivley because the danger of injury was as well known to Sivley as to the Government. Sivley's companion had seen the poacher near the Base a day earlier. Third, the precautions taken by the Government were, as a matter of law, reasonable under the circumstances. These precautions, similar to those at many Government recreational areas, included "No Trespassing" signs, area police patrols, distribution of printed rules and a sign in the game warden's office requesting hunters to report poachers and other rule violators. The court of appeals marked its opinion "unpublished," but we are moving for publication on the ground that there are virtually no reported cases dealing with landowners' tort liability to hunters.

Gary Sivley v. United States of America, No. 88-5401 (6th Cir. March 28, 1989). DJ # 157-70-630.

Attorneys: John Cordes, FTS/202-633-3380
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Sixth Circuit Reverses Lower Court And Holds That 1985 Amendments To Food Stamp Act Require Retroactive Application Of Implementing Regulations By Secretary of Agriculture

This is the third in a series of cases to reach the appellate courts involving the legal effective date of various amendments to the food stamp program contained in the Food Security Act of 1985. The Secretary of Agriculture has taken the position that the amendments were not effective until he promulgated new regulations since the whole statutory scheme, as well as the legislative history of the 1985 Act, evidenced by Congress' intent that the amendments be implemented in an orderly manner.

His position was upheld by the Second Circuit in an unpublished summary affirmance of the district court's decision in Phillips v. Lyng, No. CIV-86-1028C (W.D.N.Y. July 16, 1987), aff'd, 847 F.2d 835 (2nd Cir. March 22, 1988) (Table), but was recently rejected by the Eighth Circuit in Metzer v. Lyng, No. 88-5192MN (8th Cir. Dec. 20, 1988). The Sixth Circuit has now also rejected the Secretary's position, reversing the district court's decision in our favor.

In a decision issued on April 7, 1989, the court of appeals (Guy, Norris, JJ., and Bell, Dist. J., sitting by designation) reversed the district court's judgment. The panel held, first, that the plain language of the statute favored plaintiff's position and that the Secretary's view "seemingly [gives him] unbridled authority to thwart the remedial intent of Congress." Turning next to an examination of the legislative history, the court stated that "at least one passage * * * explicitly demonstrates that Congress intended for the amendments" to become effective on enactment. As for the other courts that had already addressed the issue, the panel stated there was "no case law compelling this court to support one party over the other." Finally, also rejecting our fall-back argument that the Secretary's view was entitled to deference, the panel noted that there is nothing about the Secretary's expertise in administering the food stamp program that would make him "better able to divine congressional intent as to effective dates."

Gwendolyn Lynch, et al. v. Richard Lyng, No. 88-5533 (6th Cir. April 7, 1989). DJ # 147-71-23.

Attorneys: Michael Jay Singer, FTS/202-633-5431
Jeffrica Jenkins Lee, FTS/202-633-3469

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Ninth Circuit Reduces Damage Award In Federal Tort Claims Act Obstetrical Malpractice Case

The Ninth Circuit has reduced a $6.5 million damage award in a Federal Tort Claims act obstetrical malpractice case by approximately $1.3 million. The court of appeals first cut in half the district court's award of $2.2 million for the plaintiff's pain and suffering. The court explained that circuit law plainly indicated that an award of this magnitude was excessive and chastised the district court (Judge Jack Tanner, W.D. Washington), for going "well beyond its prerogative." The Government's challenges to other aspects of the damage award were less successful. The court of appeals rejected our contentions that

the economic damages were not supported by credible expert testimony. It also rejected our contention that the present value calculation for medical care---which was based on an effective discount rate of .25%--was not based on adequate findings of fact. The court, however, accepted our contentions that the court had erroneously understated the discount rate--and thereby overstated the damage award--for lost wages.

The precedential effect of these holdings on the present value of economic damages is somewhat equivocal. On the negative side, the court upheld relatively low discount rates that were based on the low rates of interest earned on short-term investments. On the positive side, the court recognized that a 2% "real interest" rate--a rate we generally regard as favorable--can be used even in instances where the record evidence shows that the discount rate should be lower. In addition, the opinion states in dicta that annuity evidence is a permissible means of establishing present value--a point that the Torts Branch has been eager to establish in the trial courts.

McCarthy v. U.S., No. 85-1318 (March 28, 1989)
DJ # 157-82-1250.

Attorneys: Robert S. Greenspan, FTS/202-633-5428
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Ninth Circuit Reverses District Court's Decision Ordering The Secretary Of The Department Of Health and Human Services (HHS) To Reopen Unreviewed Denials Of Disability Benefits

HHS terminated John Panages' disability benefits in 1979. Although Panages contested the Secretary's determination before an Administrative Law Judge, he did not seek judicial review of the matter. He did file a second application, which was also denied. After the time for seeking review of this denial had passed, Panages filed a third application for benefits, which the Secretary also denied. This time, however, Panages sought judicial review. The district court (Orrick, J.) not only held that the Secretary's third denial was not supported by substantial evidence, it also ruled that the Secretary had to reopen his prior two denials on remand. The court reasoned that the failure to reopen violated due process because the earlier denials were not supported by substantial evidence, Panages was not represented by counsel, and the Secretary had failed to tell Panages which evidence he should submit. On appeal, the Ninth Circuit (Chambers, Brunetti, Noonan), following Supreme Court precedent directly on point, concluded that the district court lacked jurisdiction to review the Secretary's decision not to reopen.

Panages v. Bowen, No. 88-1691 (9th Cir. March 23, 1989). DJ # 137-11-1144.

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Ninth Circuit Holds That Export Control Proceedings Under Section 13(c) Of The Export Administration Act Are Not "Adversary Adjudications" For Which Attorneys' Fees May Be Awarded Under The Equal Access To Justice Act (EAJA)

Plaintiff petitioned for more than $100,000 in attorneys' fees incurred in defending against an action by the Commerce Department arising out of plaintiff's attempt to export silicon wafer polishers to Czechoslovakia. The EAJA provides that attorneys' fees may be recovered in administrative proceedings only if they are "adversary adjudications," which are defined by the statute as proceedings "under section 554" of the APA. The Commerce Department denied plaintiff's petition on the grounds that export control proceedings under Section 13(c) of the Export Administration Act were not "adversary adjudications." Plaintiff filed suit to overturn the agency's determination, but the district court dismissed the suit on the grounds that review of the underlying merits of the agency's determination was precluded and that therefore a different section of the EAJA, it did not have jurisdiction over the fee petition.

The court of appeals (Noonan, Norris, Leavy) has not reversed the district court's jurisdictional holding, but has agreed with the agency on the merits. The majority found (with Judge Leavy disagreeing on this point) that review of the underlying merits was not precluded, and therefore, the district court had jurisdiction over the EAJA fee claim. On the other hand, the court found that because the language and legislative history of the statute showed that Congress had specifically refused to apply Section 554 of the APA to proceedings under Section 13(c) of the EAJA (even though the other hallmarks of a formal administrative proceeding were present) export control proceedings were not EAJA adversary adjudications.

Haire v. United States, NO. 88-1627 (March 9, 1989) DJ # 145-9-795.

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CIVIL RIGHTS DIVISION

Supreme Court Sets Forth Burdens Of Proof In A "Mixed Motive" Case Under Title VII Of The 1964 Civil Rights Act

On May 1, 1989, the Supreme Court issued its decision in Price Waterhouse v. Hopkins, No. 87-1167, which addressed the respective burdens of proof of a plaintiff and a defendant under Title VII when it has been shown that an employment decision resulted from both legitimate and illegitimate motives. No opinion commanded a majority of Justices. In a plurality opinion and two concurrences, however, a majority held that at least where the plaintiff proves by direct evidence that her gender played a substantial part in an employment decision, the burden of persuasion shifts to the employer to demonstrate by a "preponderance of the evidence" (but not "clear and convincing evidence") that it would have reached the same decision even if it had not taken the plaintiff's gender into account.

There was broad agreement among the Justices that the new burden-shifting rules would not apply where plaintiff's only evidence is "stray remarks" in the workplace. See plurality, slip op. 21; O'Connor concurrence, slip op. 17; dissent, slip op. 1-2. It is unclear whether the decision will place the burden on employers to justify affirmative action plans in reverse discrimination lawsuits brought under Title VII. Compare plurality, slip op. 8 n.3, with O'Connor concurrence, slip op. 18-19, and dissent, slip op. 14 n.4. Justice O'Connor's suggested analytical framework (slip op. 18) is of some interest.

Price Waterhouse v. Hopkins, Sup.Ct. No. 87-1167 (May 1, 1989) DJ # 170-16-224.

Attorney: David K. Flynn, FTS/202-633-2195

* * * * *

CRIMINAL DIVISION

Federal Rules of Criminal Procedure

Rule 11(f). Pleas. Determining Accuracy of Plea.

Defendant, who pled guilty to misprision of a felony (mail fraud), moved to withdraw his plea. The district court denied the motion. Defendant appealed, contending inter alia that the factual basis for the crime was insufficiently presented to the district court, in violation of Federal Rules of Criminal Procedure 11(f) which requires that a district court not enter a judgment on a guilty plea without making inquiry as shall satisfy

it that there is a factual basis for the plea. The government argued that defendant's statement that he concealed his knowledge of the commission of the felony is sufficient to establish active concealment (one of four elements necessary to sustain a misprision of a felony conviction) and that a factual basis appeared on record; alternatively, a totality of the circumstances test should be applied to determine whether a factual basis has been established.

Relying on McCarthy v. U.S., 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1968), the Court of Appeals for the Sixth Circuit held that the trial court's failure to inquire or establish a clear factual basis for the crime of misprision of a felony, specifically the element of concealment, reduced defendant's guilty plea to an unknowing plea. Defendant's state of mind was not adequately examined and his plea was made without sufficient factual basis and without sufficient knowledge of the crime for which he was charged. The appropriate remedy to this type of Rule 11 violation was to vacate plea and remand to the district court for repleading. Reasoning that inferences of a factual basis would tend to negate the safeguards of Rule 11(f) mandate, the Court declined to apply the totality of the circumstances test.

(Vacated and Remanded.)

U.S. v. Marvin Goldberg, 862 F.2d 101 (6th Cir. 1988).

* * * * *

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

In a case too fact-laden and lengthy to be adequately summarized here, the Supreme Court, in light of U.S. v. Mechanik, 475 U.S. 66, 38 CrL 3122 1986), resolves controversy among circuit courts regarding distinction between immediate appeals and posttrial reviewability of Rule 6(e) and 6(d) violations.

Midland Asphalt Corp. v. U.S., 109 S.Ct. 1494 (1989)

* * * * *

Rule 6(d). The Grand Jury. Who May Be Present.

See Rule 6(e), above, for summary.

Midland Asphalt Corp. v. U.S., 109 S.Ct. 1494 (1989).

* * * * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Supreme Court Rules That FBI "Rap Sheets" Are Categorically Exempt Under The Freedom Of Information Act From Third Party Requesters

On March 22, 1989, the Supreme Court reversed the District of Columbia Court of Appeals, by a 9 to 0 vote, finding that the Freedom of Information Act (FOIA) does not require the Justice Department to release FBI "rap sheets" to third party requesters even if that information had once been publicly available.

The Court, in a broadly worded opinion, found that the release of the "rap sheet" would be "an unwarranted invasion of personal privacy" and, therefore, exempt under 5 U.S.C. §552 (b)(7)(c) of the Act. The Court noted that forty-seven states have laws restricting disclosure of the type of information compiled in a "rap sheet" and found "a privacy interest in the nondisclosure even where the information may have been at one time public." The Court also enunciated the public interest necessary to overcome individual privacy. One must look to the "nature of the document as it relates to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties," said the Court.

U.S. Department of Justice, et al. v. Reporter's Committee for Freedom of the Press, et al., No. 87-1379.

Attorney: Margaret A. Smith,
Freedom of Information Office
FTS/202-272-9826

* * * * *

TAX DIVISION

Supreme Court Rules In Taxpayer's Favor

Commissioner v. Clark. On March 22, 1989, the Supreme Court, by an 8-to-1 vote, affirmed the Fourth Circuit's ruling in the taxpayer's favor in this case that presented the question of the proper characterization of a cash payment received incident to the acquisition of Basin, Inc., the taxpayer's wholly owned corporation, by a public company (NL Industries). That acquisition resulted in Clark's receiving 30,000 shares of NL stock, and $3,250,000 in cash, in exchange for the stock in Basin; he turned down an offer of 425,000 shares of NL stock and no cash. Prior to the acquisition, which was stipulated to constitute a reorganization for tax purposes, Clark owned no NL

stock. After the reorganization, his 300,000 NL shares represented .92 percent of the shares outstanding. Clark treated the cash as long-term capital gains. The Commissioner maintained that it was an ordinary income dividend, to the extent of the $2.3 million in earnings and profits of Basin at the time of the acquisition. The Tax Court and the Fourth Circuit ruled for the taxpayer, creating a conflict with the Fifth Circuit's holding in Shimberg v. United States, 577 F.2d 283 (1978).

The Supreme Court, in an opinion by Justice Stevens, treated the transaction as if it were the deal Clark rejected, i.e., an exchange of his Basin stock in exchange for 425,000 shares of NL, followed by a redemption of 125,000 of the shares by NL for $3,250,000. This would reduce Clark's ownership of NL shares from 1.3 percent to .9 percent, or a 29 percent decrease, and would satisfy the "substantially disproportionate" standards of Section 302(b)(2) of the Internal Revenue Code for capital gains treatment. Justice White, in dissent, pointed out that the majority had recast the deal into the very form that Clark had turned down, and as to the deal that he had agreed to, the cash distribution had the effect of a pro rata dividend within the meaning of Section 356(a)(2) of the Code.

* * * * *

Supreme Court Notes Probable Jurisdiction In Case Involving State Regulation Of Military Liquor Purchases

State of North Dakota, et al. v. United States. On March 27, 1989, the Supreme Court, over our opposition, noted probable jurisdiction in this appeal by the state. The question presented is whether the state's liquor regulation, which requires that each bottle of liquor purchased by the military installations in the state from out-of-state suppliers must bear a special label to the effect that the liquor is for use only on the federal enclave, unconstitutionally conflicts with the federal procurement regulations that require the military to buy its liquor on the most advantageous terms. It is the Government's position that the state's labelling rule interferes with the procurement regulations because the out-of-state liquor suppliers either raise their prices to cover the labelling costs, or refuse to sell to the military at all. This, in turn, forces the military to deal with local suppliers on terms that are far more costly to the Government.

* * * * *

First Circuit Creates Conflict In Trust-Fund Designation Case

Internal Revenue Service v. Energy Resources Co., Inc.; United States v. Newport Offshore, Ltd. On March 31, 1989, the First Circuit ruled that bankruptcy courts have the authority to order the Government to apply tax payments made by a debtor-corporation under its Chapter 11 plan to the corporation's trust fund liabilities first. The practical consequence of such a designation is to reduce the liabilities of the debtor's responsible persons for the trust funds to the extent payments are made under the plan. In the absence of a designation, the IRS applies plan payments first to nontrust fund liabilities, thereby maximizing sources of collection in the event the debtor fails to make all its tax payments under the plan. In holding that such designations may be enforced, the First Circuit has created a conflict with decisions of the Third, Sixth, and Ninth Circuits. (An earlier conflict on this issue created by the Eleventh Circuit dissolved after the case became moot following the filing of a petition for a writ of certiorari by the Government.)

* * * * *

Eleventh Circuit Holds Grant Of Transactional Immunity Does Not Prohibit Prosecution For Tax Violations Committed In Later Years

United States v. Harvey. On April 14, 1989, the United States Court of Appeals for the Eleventh Circuit, sitting en banc, held that a grant of transactional immunity extended to the defendant in connection with a drug investigation did not prohibit his prosecution for tax violations allegedly committed in years following the grant of immunity. The defendant, Jerry Lee Harvey, disclosed his illegal drug activities to Drug Enforcement Administration agents under an unwritten informal grant of immunity in 1980. Four years later, a grand jury indicted Harvey for failing to report the interest income earned on the proceeds of those drug-related activities in the years leading up to and following the 1980 grant of immunity. Harvey moved to dismiss the indictment, arguing that the 1980 informal grant of immunity protected him from prosecution. The District Court agreed and dismissed the indictment with prejudice. The Government appealed the dismissal of those counts that charged violations for the years following the grant of immunity. A divided panel of the Eleventh Circuit affirmed, but the full court decided, sua sponte, to rehear the case en banc and vacated the panel opinion.

In its en banc opinion, the Eleventh Circuit reversed the order of the District Court. The court held that the purpose of a grant of transactional immunity is to preclude a witness' reliance on his Fifth Amendment privilege against compelled self-incrimination. Analyzing Supreme Court precedent, the court found that the focus of inquiry under the Fifth Amendment is whether the witness faces a substantial risk of incrimination as a result of his statements. It then ruled that the information Harvey revealed to the DEA agents in September of 1980 could not have created such a risk that it would incriminate him for tax crimes he later allegedly committed in 1981, 1982 and 1983. The court further rejected Harvey's argument that the 1980 grant of transactional authority somehow shielded the funds themselves from the reach of the tax laws, stating,"[t]here is no such thing as in rem immunity." It thus concluded that the grant of transactional immunity did not prohibit prosecution of the counts involving violations for the years following the grant of immunity.

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

District of Massachusetts

The District of Massachusetts is seeking two highly experienced Assistant United States Attorneys to fill the position of First Assistant United States Attorney and Chief of the Criminal Division. The Office has 49 Assistant United States Attorneys and 63 support personnel assigned with the District Office in Boston and a branch office in Springfield. The office is organized into three major divisions (Administration, Civil and Criminal). The Chief of the Criminal Division is responsible for the supervision of approximately 32 Assistant United States Attorneys organized into four units (General Crimes, Major Fraud, Public Corruption, and the Organized Crime Drug Enforcement Task Force).

Please submit a resume or SF-171 (Application for Federal Employment) to the United States Attorney's Office, Room 1107, J.W. McCormack Post Office and Courthouse, Boston, Massachusetts 02109, Attn: Wayne A. Budd. If you have any questions, please call James M. Pellegrino, Administrative Officer, at FTS 223-9384 or Commercial (617) 233-9384.

* * * * *

Office Of Consumer Litigation, Civil Division

The Office of Consumer Litigation, Civil Division, is currently seeking an attorney with criminal law litigation experience to take immediate responsibility for grand jury and criminal trial matters, as well as a more limited civil docket. The Office, which is staffed with 19 attorneys, has an active criminal and civil practice in substantive Food and Drug Administration, Federal Trade Commission, Consumer Product Safety Commission, and odometer fraud cases. The Office handles cases at both the district court and appellate levels. The Office expects to hire at a GS 13, 14 or 15 level.

Interested Assistant United States Attorneys are encouraged to contact John R. Fleder, Director, (FTS/202-724-6786), or Margaret A. Cotter, Assistant Director, (FTS/202-724-6787). Please submit a resume or SF 171 (Application for Federal Employment) to the Office of Consumer Litigation, Civil Division, U.S. Department of Justice, P.O. Box 386, Washington, D.C. 20044.

* * * * *

Restored Leave

In order to properly use restored annual leave, you must follow this procedure: The timekeeper will receive a mastercard from the payroll office which sets forth the amount of annual leave restored and the date restored leave must be used. In order to use the restored leave, the timekeeper must use object class 1402 on the time sheet. This will prevent any discrepancies occurring in the employee's current year annual leave account. Object class 1401 should NOT be used for restored annual leave, only for charges to the current year leave account.

Employees using restored leave should doublecheck his/her timesheet before initialing for leave. Object class 1402 and 1401 are located on the righthand side of your time and attendance report (T&A) under bi-weekly totals. You and your supervisor, not the timekeeper, are ultimately responsible for the accuracy of your leave account. Those employees with restored annual leave should take a few extra seconds to ensure the T&A is completed properly.

* * * * *

Thrift Savings Plan

The Thrift Savings Plan (TSP) is a retirement and investment plan for Federal employees. TSP offers Federal civilian employees the same savings and tax benefits that many private corporations offer their employees. Federal Employees Retirement System (FERS) and Civil Service Retirement System (CSRS and CSRS-Offset) are eligible to participate in TSP. Generally, FERS employees are those hired after January 1, 1984 and CSRS and CSRS-Offset employees are those hired before January 1, 1984, who did not convert to FERS. The TSP provides a number of benefits:

1) Before-tax savings and tax deferred investment earnings;

2) Earnings in the G Fund;

3) A choice of withdrawal options upon retirement or separation;

4) Portability if the employee leaves Government service;

5) A loan program, and

6) For FERS employees only; Automatic 1% agency contribution, agency matching contributions, and a choice of investing in three funds.

In 1989, most plan assets, including the employee's contribution, and the agency's matching contribution, are invested in a fund consisting of short term non-marketable United States Treasury securities specially issued to the plan. This is called the G Fund (Government Securities Investigation Fund). In addition to the G Fund, FERS employees may also invest some of their own contributions in either or both of the following funds: C Fund (Common Stock Index Investment Fund), and/or F Fund (Fixed Income Index Investment Fund). The TSP holds open seasons each year (May and November) for eligible employees to start contributing or change the amount of their contributions to the Plan. Open season this year is May 15 - July 31, 1989.

Attached as Exhibit G at the Appendix of this Bulletin is a Thrift Savings Plan Fact Sheet which provides monthly returns for January through March, 1989.

Questions should be referred to your Administrative Officer.

(Personnel Staff, Executive Office for United States Attorneys)

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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
10-21-88	8.15%
11-18-88	8.55%
12-16-88	9.20%
01-13-89	9.16%
02-15-89	9.32%
03-10-89	9.43%
04-07-89	9.51%
05-05-89	9.15%

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982 through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorney's Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorneys Bulletin, dated February 15, 1989.

* * * * *

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Alabama, S	J. B. Sessions, III
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* * * * *

EXHIBIT A

ANTI-DRUG ABUSE ACT AMENDMENTS OF 1988
By Michael Zeldin, Director, Asset Forfeiture Office

The Anti-Drug Abuse Act of 1988 significantly amended the money-laundering provisions we've all grown to love. What follows is a summary of key provisions of the bill.

Section 6471

18 U.S.C. §1956(a)(1)(A) is amended by providing new section A(ii). It will read:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of [26 U.S.C. §7201 (attempt to evade or defeat tax) or 26 U.S.C. §7206 (tax fraud and false statements)]....

18 U.S.C. 1956(a)(2) is amended. It previously provided:

> (2) Whoever transports or attempts to transport a monetary instrument or funds [into or out of] the United States—
>
> (A) with the intent ... [is guilty].

It now provides:

> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer ...
>
> (NOTE: We previously interpreted transport to include transmit or transfer by analogizing to other statutes. This clarifies it. Query: Does this mean that Congress didn't intend to include it in 1986 legislation?)

18 U.S.C. §981(g) is amended to clarify that "law" meant federal, state, or local law. It now reads:

> (g) The filing of an indictment or information alleging a violation of law, Federal, State or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the [AUSA] and for good cause shown, stay the forfeiture proceeding.

Section 6182 (Money-Laundering Prosecutions Improvements Act of 1988)

18 U.S.C. §1957(f)(1) defines the term "monetary transaction" for the purposes of 18 U.S.C. §1957. It has been amended to read:

> (1) the term "monetary transaction" does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution ...
>
> (NOTE: The bluesheet to USAM 9-105.400 covering prosecution of attorneys excluded cases in which bona fide fees were paid to the attorney for representation where the attorney acquired knowledge of their illegal origin preliminary to and in regard to undertaking representation in a criminal matter or during the course of representation or by confidential client communications. Under this provision sham or non-bona fide fee payments may not be covered.)

Section 6184

18 U.S.C. §1957(f)(1) definition of "monetary transaction" is amended to conform to the definition of monetary instrument in §1956(c)(5). Previously §1957 defined monetary transactions as defined in Title 31. It now covers cash, checks, money orders, etc.

> (NOTE: Ambiguity of §1956(c)(5) pertaining to whether paper must be in bearer form remains.)

Section 6185

Amends 31 U.S.C. §5312(a)(2) definitions of financial institutions to add the following:

> (V) businesses engaged in vehicle sales including cars, planes and boats;
>
> (W) persons involved in real estate closings;
>
> (X) Postal Service;
>
> (Y) any business or agency which engages in any activity which the Secretary of the Treasury defines by regulation to be an activity which is similar to, related to, or a substitute for an activity in which any business described in this section is authorized to engage;
>
> (Z) any business designated by the Secretary of the Treasury whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

31 U.S.C. §5325 is added. It provides for new identification requirements when financial institutions sell checks in excess of $3,000 or where contemporaneous transactions total in excess of $3,000. This section provides that:

> No financial institution may sell a bank check, cashiers check, travellers check, or money order totalling $3,000 or more (or a group of contemporaneous transactions totalling $3,000 or more) unless:
>
> (1) the individual has a transaction account with such financial institution and the financial institution—
>
> (a) verifies that fact through a signature card or other information maintained by such institution in connection with the account of such individual; and
>
> (b) records the method of verification in accordance with regulations which the Secretary of the Treasury shall prescribe; or
>
> (2) the individual furnishes the financial institution with such forms of identification as the Secretary of the Treasury may require in regulations which the Secretary shall prescribe and the financial institution verifies and records such information in accordance with regulations which such Secretary shall prescribe. Transaction account is defined in 12 U.S.C. §461(b)(1)(A).

31 U.S.C. §5326 is added. This is a geographic targeting rule. It provides that the Secretary of Treasury may order a specific financial institution or group of financial institutions in a particular geographic area (for 60 days) to obtain information and maintain a record about transactions in which the bank is engaged generally or specifically engaged with any person participating in the transaction.

Civil penalties under Title 12 for failure to comply with Bank Secrecy Act regulations may be imposed in an amount up to $10,000 for each day the violations continue.

Section 6186

12 U.S.C. §1120 is amended to provide that grand jury subpoena records need not be physically transported to the grand jury where actual presentation is impractical. In the case of no actual presentation, the grand jury shall be provided with a description of the contents.

12 U.S.C. §3412 of the Right to Financial Privacy Act is amended by adding new section (f). It provides that bank supervisory agencies may transfer to the Attorney General financial records obtained in the course of their supervisory functions upon certification by the bank supervisory agency official that:

(A) there is reason to believe that the records may be relevant to a violation of federal criminal law; and
(B) the records were obtained in the exercise of the agency's or department's supervisory or regulatory functions.

12 U.S.C. §3413 of the Right to Financial Privacy Act is amended by adding new section l which provides that the Right to Financial Privacy Act does not prohibit transfer of financial records to the Attorney General (of any officer, director, employee, controlling shareholder or any major borrower of the institution acting in concert with any of the above persons) if there is reason to believe that such person may be violating the Bank Secrecy Act or any law relating to crimes against financial institutions.

Section 6463

18 U.S.C. §981(a)(1)(A) is amended. "Gross receipts" language is removed and replaced with "Any property, real or personal, involved in a transaction or attempted transaction in violation of [31 U.S.C. §5313(a) or 18 U.S.C. §§1956 or 1957], or any property traceable to such property." Subparagraph 981(a)(1)(C) is deleted.

Section 6464

18 U.S.C. §982(a) is amended. (This is the criminal equivalent of §981.) It is amended to conform to the language of 18 U.S.C. §981(a)(1)(A).

18 U.S.C. §982(b) is amended. It extends the reach of §982 forfeitures to include the substitute assets provisions of 21 U.S.C. §853(p). However, this reach is qualified by the newly added sentence prohibiting the use of substitute assets in the place of the actual property laundered where the defendant "acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense."

Section 6465

18 U.S.C. §1956 is amended by adding new section (a)(3). This creates a "sting" provision. It provides that:

> Whoever conducts or attempts to conduct a financial transaction with the requisite intent (same as (a)(1) and (a)(2)) involving property "represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity" shall be fined up to the maximum provided in Title 18, imprisoned up to twenty (20) years, or both."
>
> (Note: The term "represented" means: Any representation made by a law enforcement officer or by another person at the direction of or with the approval of a federal official authorized to investigate or prosecute violations of this section.)

Sections 6466 and 7031

18 U.S.C. §1956(c)(7)(D) is amended. New predicate crimes are added, including entry of goods by means of false statements, copyright infringement, precursor and essential chemicals, aviator smuggling, and transportation of drug paraphernalia.

Section 6469

18 U.S.C. §1956(e) is amended to grant the United States Postal Service jurisdiction to investigate money-laundering offenses over which the Postal Service has jurisdiction.

Section 7601

26 U.S.C. §6050I is amended to add a new subsection (p)(1). It mirrors the language of Title 31 by providing that anyone who causes or attempts to cause a trade or business to fail to file a Form 8300 or a false Form 8300, or structures transactions to evade the reporting requirement, shall be guilty of a 5-year felony if the non-filing or false filing was willful [otherwise same as failure to file or false filing of a tax return].

26 U.S.C. §6103 is also amended to add new section (i)(8) which allows the Secretary of Treasury, upon written request, to disclose Form 8300 to officers and employees of any federal agency whose official duties include administration of non-tax criminal statutes.

2. Significant New Cases

(a) United States v. Hawley, 855 F.2d 595 (8th Cir. 1988): Upholding the propriety of charging individuals as financial institutions and related jury instruction matters as to knowledge of and intent to violate the reporting requirements.

(b) United States v. Mainieri, 691 F. Supp. 1394 (S.D. Fla., 1988): Upholding 18 U.S.C. §1956 against a claim that it was unconstitutionally vague.

(c) United States v. Scanio, Westlaw 1988 WL 99-316 (9/22/88), Cr. 88-64T (W.D. N.Y., 1988): Upholding 31 U.S.C. §5324(3) against a challenge that it was vague and violated defendant's Fifth Amendment right against self-incrimination.

(d) United States v. Camarena, 863 F.2d 880 (5th Cir. 1988): Upholding 31 U.S.C. §5324(3) against a vagueness challenge.

(e) United States v. Mastronardo, 849 F.2d 799 (3d Cir. 1988): Dismissing Title 31 indictment on Anzalone grounds. (Pre-§5324(3) decision.)

(f) United States v. Segal, 852 F.2d 1152 (9th Cir. 1988): Defendant guilty as aider and abettor to bank officer who violated CTR reporting requirements. (Distinguishes Varbel, Reinis, and Delta Espriella—see Winter, 1988, issue for citations.)

(g) United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988): Holding that transfers between separate branches or offices of defendant's criminal organization were transfers between legally distinct financial institutions subject to CTR requirements; transfers within the organization qualified as transfers "through" the financial institution subject to CTR requirements.

(h) United States v. Bucey, 691 F. Supp. 1077 (N.D. Ill., 1988): Upholding §5313 indictment against multiple challenges including multiplicity, sufficiency of indictment, Fourth Amendment search and seizure challenge to CTR reporting requirements, and pattern of illegal activity greater than $100,000 within a 12-month period.

(i) United States v. Risk, 843 F.2d 1059 (7th Cir. 1988): Defendant's participation in structured transactions which did not individually involve more than $10,000 did not violate statute requiring filing of CTR's even though same day transaction involved more than $10,000.

EXHIBIT B

ATTORNEY FEE FORFEITURE UPDATE

By Harry S. Harbin, Associate Director
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Perhaps the "hottest" issue in the area of forfeiture law at the present time is whether "criminally tainted property," which might otherwise be used to pay the attorney fees of defense counsel in a criminal case, may properly be subject to pretrial restraint and ultimately to forfeiture without violating the owner's Sixth Amendment right to counsel. The Supreme Court recently granted certiorari to review two cases which reached diametrically opposite results on this issue. The two cases are In re Forfeiture Hearing as to Caplin and Drysdale, Chartered, 837 F.2d 637 (4th Cir.) (en banc), cert. granted, 109 S.Ct. 363 (1988), and United States v. Monsanto, 852 F.2d 1400 (2d Cir.) (en banc), cert. granted, 109 S.Ct. 363 (1988). These cases--which were argued in tandem on March 21, 1989--are discussed below.

A. Caplin and Drysdale

On January 11, 1988, a majority of the Fourth Circuit, sitting en banc, held: (1) that the provisions of the criminal drug forfeiture statute (21 U.S.C. §853) permit the restraint and forfeiture of property that would otherwise be used to pay attorney's fees for representation in a criminal case, and (2) that this application of the statute does not violate the Sixth Amendment right to assistance of counsel. The majority opinion affirmed an earlier panel opinion with respect to the first issue but reversed the panel's determination that application of the statute in such cases violates the qualified Sixth Amendment right to counsel of choice. See United States v. Harvey v. National Association of Criminal Defense Lawyers (NACDL), 814 F.2d 905 (4th Cir. 1987) (panel opinion). The en banc majority flatly stated its conclusion on the constitutional issue as follows:

> There is no established Sixth Amendment right to pay an attorney with the illicit proceeds of drug transactions. The difficult policy choices posed by application of the forfeiture statute to attorneys' fees provide no basis for the creation of such a right.

837 F.2d at 640. In reaching this conclusion, the majority first noted that forfeiture of attorneys' fees poses no threat whatever to the absolute right to be represented by counsel in a criminal case inasmuch as a criminal defendant, deprived of counsel of choice because of pretrial restraint or forfeiture of assets, is entitled to representation by private counsel through use of unrestrained assets or by court-appointed counsel if unable to afford private counsel. Id. at 643. Thus, the only constitutional right implicated in "attorney fee" cases is the qualified right to representation by counsel of choice.

With respect to this qualified right, the majority opened its analysis by noting that every prior case applying the right to counsel of choice "has assumed as its starting point that the defendant wished to hire counsel with his own assets." Id. at 644 (emphasis in original). It then noted that this assumption is "conspicuously absent" in fee forfeiture cases because the

inclusion of a forfeiture count in a drug indictment constitutes an assertion that assets of a defendant identified therein are not legally his own, but the fruits of crime as to which the law recognizes no ownership rights. Id. Thus, it concluded that "[t]he right to counsel of choice belongs only to those with legitimate assets." Id. at 645 (emphasis added).

The majority also rejected as speculative and theoretical claims that "attorney fee" forfeitures and pretrial restraints are unconstitutional per se because they may impede attorney-client communications or create conflicts of interest. Regarding the alleged impediment of attorney-client communications, the majority stated that "[i]t is difficult to believe that, despite their professional obligations as defense lawyers, retained counsel will somehow attempt to go to trial with incomplete knowledge of a case so as to preserve 'bona fide purchaser' status in the event of forfeiture." Id. at 647. It spoke with approval of the Justice Department's policy which, the majority noted, limits the kinds of cases in which fee forfeitures may be sought to those in which there are reasonable grounds to believe that the attorney had actual knowledge that the particular asset with which he was paid was subject to forfeiture. Id. (This policy is embodied in the Department of Justice Guidelines on Forfeiture of Attorney Fees which are published in the United States Attorneys' Manual beginning at 9-111.100.) The majority observed that this policy greatly minimizes any possible adverse impact on attorney-client communications in cases in which the client has uncontested assets inasmuch as the defense attorney should be able to satisfy himself that his fees are paid out of the uncontested assets. Id. It similarly rejected the notion that the prospect of fee forfeiture will create a conflict of interest and lead to unethical conduct in which defense counsel will enter into plea agreements carrying long prison terms for the client in return for a lessened forfeiture that preserves their fee. Id. The majority "refuse[d] to presume that members of the bar will act in such an unethical manner even if they could convince their client and the court to approve." Id.

Four of the eleven judges on the en banc court dissented in a single opinion. The gist of this opinion is that pretrial restraints and forfeitures which deprive defendants of their ability to retain private counsel for their defense violate the qualified right to counsel of choice unless the Government establishes either that the transfer of such property to the attorney would constitute a fraudulent or sham transaction or that the defendant has sufficient unrestrained resources with which to employ private counsel.

B. Monsanto

On July 1, 1988, a majority of the Second Circuit, sitting en banc, held for various reasons that a defendant in a criminal case may be given access to restrained assets to the extent necessary to pay legitimate (i.e., non-sham) attorneys' fees in connection with the criminal charges against him. No single rationale commanded a majority of the court. Indeed, the judges filed eight separate opinions and stated the majority result in a ninth per curiam opinion.

The effect of the per curiam opinion was to reverse an earlier panel opinion in which the 2-1 majority had concluded that the pretrial restraint and ultimate forfeiture of property which would otherwise be used to pay legitimate attoneys' fees in a criminal case does not violate the qualified Sixth Amendment right to counsel of choice so long as the trial court affords the defendant the opportunity for a pre-trial adversarial hearing at which the burden is on the Government to demonstrate a likelihood that the assets in question are subject to forfeiture. See United States v. Monsanto, 836 F.2d 74 (2d Cir. 1987) (panel opinion). If the Government succeeds in meeting this burden, the assets in question would remain subject to restraint and forfeiture although the panel would have allowed a post-forfeiture invasion of the assets for the purpose of paying private counsel at rates set under the Criminal Justice Act. If the Government fails to carry its burden at the pretrial hearing, the assets in question could thereafter be used by the defendant to pay legitimate attorneys' fees and such fees would remain entirely exempt from forfeiture. The panel majority favored this alternative because it provided adequate protection for a defendant's right to counsel of choice and also barred the Government from imposing absolute pretrial restraints on a defendant's assets solely on the basis of inclusion of a forfeiture count in a criminal indictment obtained through the ex parte grand jury process.

The eight different opinions in the en banc decision may be summarized as follows:

(a) Three of the twelve judges (Feinberg, Oakes, and Kearse) held that application of the criminal drug forfeiture statute to restrain and forfeit assets which otherwise would be used to pay legitimate attorney fees violates the Sixth Amendment right to counsel of choice where no unrestrained assets are available to the defendant. (Judge Oakes, in a lone concurring opinion, also held that such restraints and forfeitures violate due process rights under the Fifth Amendment).

(b) Three of the twelve judges (Winter, Meskill, and Newman) did not reach the constitutional issue because they held, as a matter of statutory construction, that the criminal drug forfeiture statute does not permit the pretrial restraint of funds or property needed by a defendant to make ordinary, lawful expenditures, including expenditures to retain private counsel, and that such expenditures are not subject to post-conviction forfeiture if they were expressly authorized by the trial court.

(c) Two of the twelve judges (Miner and Altimari) agreed with the panel majority that a post-indictment restraining order may be entered against "attorney fee" assets if the Government establishes a likelihood that the assets are subject to forfeiture at a pretrial adversarial hearing. However, they joined in the per curiam reversal of the panel opinion based on their view that such procedural safeguards must be estabilshed by Congress, not by the courts. These two judges declined to address the issue of whether money or property actually paid to an attorney for representation in a criminal case may be subject to forfeiture, holding that the issue was not ripe for review in the circumstances presented.

(d) Three of the twelve judges (Mahoney, Cardamone, and Pierce) dissented from the per curiam reversal and would have affirmed the majority panel opinion on the grounds stated therein. They found the necessary authority for the contemplated pretrial adversarial hearing on the basis of "constitutional need." (It should be noted that Judge Mahoney wrote the majority panel opinion and was joined in that opinion by Judge Cardamone). However, Judge Mahoney also stated that he would exempt from post-conviction forfeiture only such assets as were the subject of such a pretrial hearing at which the Government failed to carry its burden. Any other assets transferred to the attorney, even as legitimate fees, would be subject to post-conviction forfeiture if the Government demonstrated that the assets were forfeitable and the attorney failed to qualify as a bona fide transferee without notice of the assets' forfeitability.

Judges Cardamone and Pierce wrote separate independent opinions, in which each of them joined, to express their view that any unrestrained assets transferred to an attorney as legitimate fees in a criminal case must thereafter be exempt from forfeiture in order to preserve a defendant's right to counsel of choice. Judges Cadamone and Pierce, therefore, joined in the per curiam reversal of the panel opinion but only to this very limited extent.

(e) One of the twelve judges (Pratt) wrote a lone opinion in which he opined (i) that attorney fee forfeitures do not violate the Sixth Amendment; (ii) that the pretrial adversarial hearing proposed in the majority panel opinion is required by due process; and (iii) that the criminal drug forfeiture statute provides no authority for a court to allow a defendant access to restrained assets for payment of ordinary legitimate expenses, including attorneys' fees. He also expressed agreement with Judges Miner and Altimari that the issue of whether fees actually paid to an attorney may be subject to forfeiture in some or all circumstances was not ripe for review.

It is important to note, in attempting to reconcile the eight different opinions in Monsanto, that six of the twelve judges clearly held that the pretrial restraint of "attorney fee" property does not violate the Sixth Amendment where the Government prevails in a pretrial adversarial hearing on the likelihood that the property will ultimately be found to be subject to forfeiture. These judges differed only on whether this pretrial hearing must be authorized by statutory amendment of the forfeiture laws (Miner and Altimari) or whether such hearings may be held on the basis of "constitutional need" (Mahoney, Cardamone, Pierce, and Pratt). Only three of the twelve judges directly held that the restraint and forfeiture of property needed to pay bona fide attorney fees in a criminal case violates the Sixth Amendment, at least where no unrestrained assets are available to pay such fees. The remaining three judges held, as a matter of statutory construction, that the criminal drug forfeiture statute authorizes the payment of attorney fees (and other ordinary lawful expenses) out of restrained assets and thus did not address the constitutional issue.

C. Subsequent Cases

On March 2, 1989, a panel of the Eleventh Circuit unanimously embraced the holding of the en banc majority in Caplin & Drysdale. See United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989). With respect to the Sixth Amendment issue, the panel held:

> [T]he appellants here had no Sixth Amendment right to use assets to the extent that those assets belonged to the United States. That the appellants could not, as a result, afford to pay private counsel is of no Sixth Amendment significance; a defendant may not insist on representation by an attorney he cannot afford.
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> * * * * *
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> Having received competent representation by appointed counsel in this case, the appellants, who had no uncontested assets with which to retain an attorney, suffered from no deprivation of their Sixth Amendment rights.

Id. at 1351. The panel also rejected the argument that the restraint and forfeiture of "attorney fee" property violates due process unless the Government demonstrates, at a pretrial adversarial hearing, a probability that the defendant will be convicted and that his assets will be forfeited. The panel characterized this argument as an assertion that the defendants had been denied a "meaningful hearing at a meaningful time." Id. at 1353. It held that appropriate analysis for this assertion was the four-factor test enunciated in Barker v. Wingo, 407 U.S. 514 (1972), for evaluating claims of prejudicial preindictment delay in criminal cases, which had been applied by the Supreme Court in the forfeiture context in United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983). Id. The four Barker factors are: the length of the delay, the reason for the delay, the defendant's assertion of his right to a hearing, and prejudice to the defendant. Id. at 1352. The panel held that the length of the delay between the initial restraint of the defendants' assets and trial -- 8 months -- was not significant. Id. It then held that the reasons cited by Congress for not requiring adversarial hearings on restraining orders prior to trial in criminal forfeiture cases -- including the potential for premature and damaging disclosures of the Government's case and the identities of the Government's witnesses -- were substantial. Id. With respect to the third Barker factor, it noted that the defendants had failed to move for any hearing to contest the Government's restraints. Id. at 1353-54. Finally, it held that the district court's ex parte findings of probable cause in issuing the pretrial seizure warrants and restraining order provided a significant check on the Government's power to restrain assets of doubtful forfeitability. Id. at 1354-55. The panel concluded, in balancing these factors, that a pretrial hearing with respect to the probability of forfeiture of the restrained assets was not constitutionally required in these circumstances. Id. at 1355.

A unanimous panel in the Seventh Circuit has held, consistent with the panel opinion in Monsanto, that the pretrial restraint and ultimate forfeiture of "attorney fee" property is constitutionally permissible so long as the defendant is afforded opportunity for a pretrial adversarial hearing on the likelihood that the property will ultimately be forfeited. See United States v. Moya-Gomez, 860 F.2d 706, 716-31 (7th Cir. 1988). Moreover, a panel in the Eighth Circuit, although rejecting the Government's argument that "attorney fee" property may constitutionally be subjected to pretrial restraint based solely on the return of a criminal indictment identifying such property in the forfeiture count or the ex parte issuance of a restraining order identifying such property, has strongly suggested that the adversarial hearing advocated by the panel majority in Monsanto would provide sufficient safeguards to allow such restraint without violating the Constitution. See United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium, 853 F.2d 1445 (8th Cir. 1988).

Finally, a panel of the Fifth Circuit has held that a defendant's property -- which had already been found subject to forfeiture by a guilty verdict in a RICO case -- must be exempted from forfeiture in order to allow payment of reasonable fees to the defendant's attorneys for representation in a criminal case. See United States v. Jones, 837 F.2d 1332 (5th Cir. 1988). The panel based its holding on the Sixth Amendment right to counsel of choice. One of the three judges stated, in a separate concurring opinion, that he would follow the en banc opinion of the Fourth Circuit in Caplin & Drysdale if free to do so, but that he felt constrained by Fifth Circuit precedent to join in the majority opinion. Id. at 1336 (Davis, J.). The panel decision has since been vacated and en banc review currently is pending. See United States v. Jones, 844 F.2d 215 (5th Cir. 1988).

C. Conclusion

Briefs were filed in the Caplin & Drysdale and Monsanto cases on February 22, 1989, and oral argument was scheduled for March 21, 1989. Obviously, the best result from the Government's perspective would be a solid affirmance of the holding in Caplin & Drysdale (and in Bissell) that the pretrial restraint and ultimate forfeiture of "attorney fee" property is authorized by the federal forfeiture statutes and does not violate any constitutional right or prohibition. Another very positive outcome would be for the Court to adopt the "middle ground" espoused by the majority in the Monsanto panel opinion (and in Moya-Gomez) under which "attorney fee" property may be lawfully restrained and forfeited so long as the defendant is afforded opportunity for an adversarial pretrial hearing at which the Government must demonstrate a likelihood of forfeiture. Given the diversity of opinions expressed by the en banc court in Monsanto, however, it is impossible to predict with any certainty what the ultimate outcome will be.

EXHIBIT C

MONEY LAUNDERING FORFEITURE AMENDMENTS
18 U.S.C. §§981 and 982
By Michael Zeldin, Director, Asset Forfeiture Office

1. Background

The civil forfeiture statute applicable to money-laundering offenses under 18 U.S.C.§§1956 and 1957 and 31 U.S.C. §§5313 and 5324 was enacted in 1986 and is codified at 18 U.S.C. §981. The criminal forfeiture statute applicable to offenses under 18 U.S.C. §§1956 and 1957 also was enacted in 1986 and is codified at 18 U.S.C. §982. The original scope of these forfeiture statutes was, however, extremely narrow.

For example, Section 981 originally authorized only the forfeiture of "[a]ny property, real or personal, which represents the gross receipts a person obtains, directly or indirectly, as a result of a violation of [18 U.S.C. §§1956 or 1957], or which is traceable to such gross receipts." 18 U.S.C. §981(a)(1)(A) (emphasis supplied). Section 982 similarly provided that a court "in imposing sentence on a person convicted under [18 U.S.C. §§1956 or 1957] shall order that the person shall forfeit ... any property real or personal, which represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts." 18 U.S.C. §982(a). The extremely narrow scope of these provisions becomes evident when one considers that the legislative history for these provisions states that the term "gross receipts" means the profits or commissions that the defendant earned as a result of the money-laundering violations. Thus, the term apparently did not include the corpus of the money laundered or any other real or personal property involved in the money-laundering offense. For example, if a car dealer knowingly sold an expensive car to a criminal in the name of a third party nominee and received the proceeds of a specified unlawful activity as payment in violation of 18 U.S.C. §1956(a), only the dealer's profits from the sale would be forfeitable under the original provisions of 18 U.S.C. §§981(a)(1)(A) or 982(a). Neither the automobile nor the remainder of money paid to the dealer would be subject to forfeiture under either of these provisions. The forfeiture provisions relating to violations of the currency transaction reporting requirements under 31 U.S.C. §§5313 and 5324 were considerably broader and authorized the forfeiture of any coin or currency used in the violation or any interest in other property traceable to such coin or currency. See 18 U.S.C. §981(a)(1)(C). Even here, however, the monies involved in such transactions were rarely available for forfeiture when the money-launderers were apprehended (indeed, most such violations involve the purchase with currency of cashiers' checks or money orders which are then quickly sent out of the United States and negotiated. The coin and currency involved in such transactions are generally unavailable for forfeiture and any property traceable to such coin or currency is beyond the reach of United States courts), and there was no provision in either Section 981 or 982 for forfeiture of "substitute assets" whenever the original assets were no longer available for forfeiture.

The need for a "legislative fix" of these provisions was evident to both prosecutors and Congress alike. This "fix" was provided by the enactment of the following amendments as part of the Anti-Drug Abuse Act of 1988.

2. Section 6463(a): Civil Forfeiture Amendments

Section 6463(a) of the 1988 Act considerably expanded the scope of the civil forfeiture provisions of 18 U.S.C. §981. It did this by deleting former subsections (A) and (C) of 18 U.S.C. §981(a)(1) and replacing them with new subsection (A) which provides for the civil forfeiture of:

> Any property, real or personal, involved in a transaction or attempted transaction in violation of [31 U.S.C. §§5313 or 5324], or of [18 U.S.C. §§1956 or 1957], or any property traceable to such property.

This new forfeiture provision eliminates the former restrictions which limited forfeiture to the "gross receipts" of an offense under 18 U.S.C. §§1956 or 1957 or to the coin and currency involved in transactions in violation of 31 U.S.C. §§5313 or 5324. Instead, it authorizes forfeiture of all property, real or personal, involved in such violations and any property traceable thereto. This includes the corpus of the money laundered as a result of the transaction, any other property involved in the transaction, and perhaps any property facilitating, or having a substantial connection to, the violation.

3. Section 6463(c): Criminal Forfeiture Amendments

Section 6463(c) of the 1988 Act substantially broadens the criminal forfeiture provisions of 18 U.S.C. §982, which previously applied only to property involved in violations of 18 U.S.C. §§1956 and 1957. First, the provisions now apply to offenses under 31 U.S.C. §§5313 and 5324 as well as offenses under Sections 1956 and 1957. Second, Section 6463(c) deletes former subsection (a) of Section 982 and replaces it with the following new subsection (a):

> The court, in imposing sentence on a person convicted of an offense [under 31 U.S.C. §§5313 or 5324] or [under 18 U.S.C. §§1956 or 1957], shall order that the person forfeit ... any property, real or personal, involved in such offense, or any property traceable to such property.

This provision, which is mandatory upon the court in sentencing a defendant convicted of an offense under 18 U.S.C. §§1956 or 1957 or 31 U.S.C. §§5313 or 5324, is as broad as the previously described civil forfeiture provision under amended 18 U.S.C. §981(a)(1)(A).

4. Section 6464: "Substitute Assets" Amendment

As noted earlier, the original provisions of 18 U.S.C. §§981 and 982 failed to authorize the forfeiture of "substitute assets" when the original assets involved in a money-laundering offense were found to be unavailable for forfeiture. Section 6464 of the 1988 Act partially corrects this deficiency by incorporating into 18 U.S.C. §982(b) the "substitute assets" provisions of 21 U.S.C. §853(p). The latter provision provides as follows:

> If any of the property [subject to forfeiture under 18 U.S.C. §982(a)], as a result of any act or omission of the defendant--
>
> (1) cannot be located upon the exercise of due diligence;
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> (2) has been transferred or sold to, or deposited with a third party;
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> (3) has been placed beyond the jurisdiction of the court;
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> (4) has been substantially diminished in value; or
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> (5) has been commingled with other property which cannot be divided without difficulty;
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> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Section 6464 adds the following sentence to these provisions:

> However, the substitute of assets provisions of [21 U.S.C. 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense.

The adoption of this "substitute assets" provision enormously enhances the reach of criminal forfeiture under 18 U.S.C. §982 because the crime of money-laundering is uniquely susceptible to the quick disposition of assets that would otherwise be subject to forfeiture. The scope of the exception for "intermediaries" is problematic inasmuch as "professional" money-launderers, who service drug traffickers and organized crime on a commission basis, typically do not retain the "actual property laundered" but instead pass it on to their clients. It strains credulity, however, to argue that Congress intended to exempt such professional money-launderers from the "substitute assets" provision. Ultimately, the courts will have to determine the appropriate scope of this statute.

EXHIBIT D

28 C.F.R. §50.15 - Representation Of Federal Officials And Employees By Department Of Justice Attorneys Or By Private Counsel Furnished By The Department In Civil And Congressional Proceedings, And In State Criminal Proceedings In Which Federal Employees Are Sued or Subpoenaed In Their Individual Capacities

(a) Under the procedures set forth below, a federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil and Congressional proceedings and in state criminal proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and providing representation would otherwise be in the interest of the United States. No special form of request for representation is required when it is clear from the pleadings in a case that the employee is being sued solely in his official capacity and only equitable relief is sought. (See USAM 4-13.000)

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency. Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations the litigating division may initiate conditional representation after a telephone request from the appropriate official of the employing agency. In such cases, the written request and appropriate documentation must be subsequently provided.

(2) Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expenses.

(3) Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege. If representation is authorized, Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an agency other than the Department of Justice undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Justice Department attorneys in representing the employee, shall be determined by the agency employing the attorneys.

(4) Representation is not available in federal criminal proceedings. In other proceedings for which representation is sought, where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter, the litigating division shall contact a designated official in the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") to determine whether the employee is either a subject of a federal criminal investigation or a defendant in a federal criminal case. An employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

(5) If a prosecuting division of the Department indicates that the employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible under the provisions of this section. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

(6) If the prosecuting division indicates that the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation, the litigating division shall inform the employee that no representation by Justice Department attorneys will be provided in the related civil, congressional, or state criminal proceeding. In such a case, however, the litigating division, in its discretion, may provide a private attorney to the employee at federal expense under the procedures of § 50.16 provided no decision has been made to seek an indictment or file an information against the employee.

(7) In any case where it is determined that Department of Justice attorneys will represent a federal employee, the employee must be notified of his right to retain private counsel at his own expense. If he elects representation by Department of Justice attorneys, the employee and his agency shall be promptly informed.

(i) That in actions where the United States, any agency, or any officer thereof in his official capacity is also named as a defendant, the Department of Justice is required by law to represent the United States and/or such agency or officer and will assert all appropriate legal positions and defenses on behalf of such agency, officer and/or the United States;

(ii) That the Department of Justice will not assert any legal position or defense on behalf of any employee sued in his individual capacity which is

deemed not to be in the interest of the United States;

(iii) Where appropriate, that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award;

(iv) That any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General, but the employee-defendant may pursue an appeal at his own expense whenever the Solicitor General declines to authorize an appeal and private counsel is not provided at federal expense under the procedures of § 50.16; and

(v) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the employee, if such conflict should arise in the future the employee will be promptly advised and steps will be taken to resolve the conflict as indicated by paragraph (a) (6), (9) and (10) of this section, and by § 50.16.

(8) If a determination not to provide representation is made, the litigating division shall inform the agency and/or the employee of the determination.

(9) If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups and that direct Justice Department representation be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(10) Whenever the Solicitor General declines to authorize further appellate review or the Department attorney assigned to represent an employee becomes aware that the representation of the employee could involve the assertion of a position that conflicts with the interests of the United States, the attorney shall fully advise the employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating division) whether the assertion of the position or appellate review is necessary to the adequate representation of the employee and

(i) If it is determined that the assertion of the position or appeal is not necessary to the adequate representation of the employee, and if the employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

(ii) If the employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, a Justice Department lawyer may not provide or continue to provide the representation; and

(iii) In appropriate cases arising under paragraph (a)(10)(ii) of this section, a private attorney may be provided at federal expense under the procedures of § 50.16.

(11) Once undertaken, representation of a federal employee under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures approved by the Solicitor General, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the United States. If representation is discontinued for any reason, the representing Department attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the employee.

(b) Representation is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding;

(2) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government;

(3) It is otherwise determined by the Department that it is not in the interest of the United States to provide representation to the employee.

(c)(1) The Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General or his designee.

(2) The Department of Justice may settle or compromise a personal damages claim against a Department of Justice employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damages claim was taken within the scope of employment and that such settlement or compromise is in the interest of the United States, as determined by the Attorney General or his designee.

(3) Absent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request either to agree to indemnify or to settle a personal damages claim before entry of an adverse verdict, judgment, or award.

(4) The Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee. The employee shall submit a written request, with appropriate documentation including copies of the verdict, judgment, award, or settlement proposal if on appeal, to the head of his employing component, who shall thereupon submit to the appropriate Assistant Attorney General, in a timely manner, a recommended disposition of the request. Where appropriate, the Assistant Attorney General shall seek the views of the U.S. Attorney; in all such cases the Civil Division shall be consulted. The Assistant Attorney General shall forward the request, the employing component's recommendation, and the Assistant Attorney General's recommendation to the Attorney General for decision.

(5) Any payment under this section either to indemnify a Department of Justice employee or to settle a personal damages claim shall be contingent upon the availability of appropriated funds of the employing component of the Department of Justice.

[Order No. 970-82, 47 FR 8172, Feb. 25, 1982, as amended at Order No. 1139-86, 51 FR 27022, July 29, 1986]

EXHIBIT E

AN OVERVIEW OF THE MAJOR FRAUD ACT OF 1988

Reflecting a continuing concern over the widespread scope of procurement fraud, Congress recently passed the Major Fraud Act of 1988. This legislation, Public Law Number 100-700, became effective as of November 19, 1988. It creates a new substantive offense which proscribes large scale procurement frauds in which the value of the contract or subcontract is $1 million or more; authorizes funding to establish additional Assistant United States Attorney positions and support staff positions for the prosecution of criminal and civil procurement fraud cases; and limits contractors, under certain narrowly defined circumstances, from recovering legal costs incurred in defending criminal, civil and administrative proceedings.

Questions concerning the provisions of the Major Fraud Act of 1988 should be directed to the Defense Procurement Fraud Unit, Fraud Section (786-4600).

I. Creation of a New Procurement Fraud Offense

Section 2 of the Major Fraud Act of 1988, codified at 18 U.S.C. §1031(a), provides that anyone who "knowingly executes, or attempts to execute, any scheme or artifice with the intent --- (1) to defraud the United States; or (2) to obtain money or property from the United States by means of false or fraudulent pretenses, representations or promises" in connection with a contract or subcontract award valued at $1 million shall be punishable by imprisonment for not more than 10 years or a maximum fine of not more than $1 million or both.

The penalty provisions of the new statute also provide for the imposition of a $5 million fine in cases where the gross loss to the Government (or the gross gain to the defendant) is $500,000 or greater, or where the offense involved "a conscious or reckless risk of serious personal injury." In no case, however, may a court impose a fine of more than the greater of that authorized in 18 U.S.C. §3571(d)(which allows for a fine of twice the gross loss or gain involved in the offense) or $10 million.

In interpreting the penalty provisions of the statute, it is important to take note that in defining the term "serious injury", Congress intended severe injury, such as fractures, severe lacerations, or damage to internal organs, or injury which could result in temporary or permanent disability, but not necessarily life-threatening injury. S.R. Rep. No. 100-503, 100th Cong., 2nd Sess. 11, reprinted in [1988] U.S. Code Cong. & Ad. News 5969, 5976.

Further, and most significantly, because of the extraordinary complexity of procurement fraud cases, subsection 1031(f) of the new statute provides for a 7 year statute of limitations period.

II. Contractor Recovery of Attorneys' Fees and Costs

Congress inadvertently enacted two conflicting provisions (Sections 3 and 8) concerning the treatment of a wide range of litigation costs which are incurred in procurement fraud cases. Clarifying legislation was introduced in the Senate on January 25, 1989, to delete Section 3 from the Act. In addition, subsection 31.205-47 of the Federal Acquisition Regulation, (48 C.F.R. 31,205-47) was revised, effective April 17, 1989, to implement Section 8.

In its present form, Section 3, which is codified at 18 U.S.C. 293, provides for the disallowance of litigation-related costs in 5 defined situations. Under this section, costs incurred in the defense of civil, criminal and administrative proceedings brought by the Government would not be recoverable in instances where the proceedings resulted in: (1) an information, indictment by a Federal grand jury, or a conviction; (2) the assessment of a monetary penalty upon a civil or administrative finding of liability if the charges involved fraud or similar offenses; (3) a civil judgment containing a finding of liability if the charges involved fraud or similar offenses; (4) a decision to debar or suspend the contractor or rescind, void or terminate a contract or default by reason of a violation or failure to comply; or (5) a consent decree or compromise in a proceeding where the Government sought one of the above four penalties or relief.

Section 3 also contains a provision limiting a contractor's costs under this section to an amount not to exceed $75 per hour, which is the rate specified in the Equal Access to Justice Act (5 U.S.C. §504[a]; 28 U.S.C. 2412[d]).

It is important to note that Section 8 of the Act, differs from Section 3 in two ways. First, although it would still disallow costs to contractors who were convicted, suspended or debarred for their misconduct, it would not permit a pending indictment to be used as a basis for disallowing costs. Second, the costs allowable under this section would be limited to 80 percent of the contractor's litigation costs.

II. Additional Resources for Department of Justice Anti-Fraud Efforts

Sections 4, 5, and 6 of the Major Fraud Act of 1988 authorize additional resources for the Department of Justice specifically dedicated to Government fraud cases. Sections 4 and 5 earmark an additional $8 million authorization for fiscal year 1989 and such sums as may be necessary for each of the four succeeding fiscal years, for additional assistant United States Attorney positions and support staff positions. The assignment of these positions, which are to be dedicated primarily to fraud investigations, is committed to the discretion of the Attorney General. Section 6 requires the Attorney General to report annually to the Congress on, and to specifically account for, the activity of each United States Attorney Office to which additional resources are assigned.

IV. Limits on Qui Tam Actions Under the False Claims Act

Section 9 of the Major Fraud Act of 1988 amends the Civil False Claims Act by placing limits on the ability of qui tam plaintiffs to share in recoveries under the Civil False Claims Act. The amendment authorizes a court to reduce awards to qui tam plaintiffs who planned and initiated the violation upon which the qui tam action was brought. Moreover, it disallows awards to qui tam plaintiffs who are convicted of criminal conduct arising from their role in the violation upon which the qui tam action was brought.

* * *

Additional anti-fraud legislation was enacted by the 100th Congress, including the new obstruction of federal audit statute (18 U.S.C. 1516) and the amendment to 18 U.S.C. 1345, which will expand the ability of the Department to seek injunctions to prevent §287, §371 and §1001 violations.

EXHIBIT F

Report On Convicted Prisoner By United States Attorney

NAME _____

CONVICTED OF _____

TERM IMPOSED _____

CRIMINAL CASE NO. _____

U.S.C. _____

DISTRICT _____

NOTE: This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

I. DESCRIPTION OF THE OFFENSE: Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

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(SEE REVERSE SIDE)

II. CORROBORATING EVIDENCE: If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

III. COOPERATION: Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unrewarded as a possible circumstance in mitigation of punishment.

IV. RECOMMENDATION RELATIVE TO PAROLE: This section is optional. (*See* the paroling policy guidelines at 28 CFR § 2.20)

DISCLOSURE INSTRUCTIONS (to institution staff):

_____ This report may be disclosed to the prisoner.

_____ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208(c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

NOTIFICATION REQUEST:

_____ I wish to be notified of the date and place set for this prisoner's parole hearing.

_____ I wish to be notified of the Commissioner's decision in this case.

For the United States Attorney

_____
DATE

Signed: _____
Assistant U.S. Attorney

Disposition of copies: This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed (The U.S. Marshal can put you in contact with your local CPO.)

EXHIBIT G

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

THRIFT SAVINGS PLAN FACT SHEET

C, F, and G Fund Monthly Returns

April 17, 1989

The 1989 C, F, and G Fund monthly returns below represent the actual total rates of return used in the monthly allocation of earnings to individual accounts of participants in the Thrift Savings Plan.

	C FUND	WELLS FARGO EQUITY INDEX FUND *	F FUND	WELLS FARGO BOND INDEX FUND**	G FUND
1988***	11.84%	16.60%	3.63%	7.58%	8.81%
1989					
January	7.14%	7.32%R	1.27%	1.33%	.76%
February	(2.51%)	(2.47%)	(.68%)	(.74%)	.67%
March	2.21%	2.30%	.50%	.53%	.78%
3 Months					
Period	6.75%	7.08%	1.08%	1.11%	2.23%

NOTE: The C, F and G Fund period returns are three-month returns and are not expressed on an annualized basis. These returns should not be compared to the 1988 returns or to any other annual investment returns.

* Tracks the S&P 500 index

** Tracks the Shearson Lehman Hutton Government/Corporate bond index

***The first C and F Fund investments in Wells Fargo's Equity Index Fund and Bond Index Fund, respectively, occurred on January 29, 1988. The February-December 1988 return for the C Fund was 12.06%, 13.21% on an annualized basis, and the Wells Fargo Equity Index Fund return was 11.88%, 13.02% on an annualized basis. The February-December 1988 F Fund return was 3.70%, 4.04% on an annualized basis, and the Wells Fargo Bond Index Fund return was 3.98%, 4.34% on an annualized basis.

R - revised

Numbers in ( ) are negative.

The G Fund. The 1989 G Fund returns presented above represent monthly returns, including the daily compounding of interest less accrued administrative expenses.

The G Fund rates announced monthly (e.g., 9.375% for April 1989) by the Thrift Investment Board represent the statutory interest rates (expressed on a per annum basis) applicable to G Fund investments made during the specified month, without adjustment for administrative expenses, compounding, or the allocation of earnings to the accounts of Thrift Savings Plan participants.

The C and F Funds. The C and F Fund returns, like the G Fund returns, are shown on a net basis, i.e., after deductions for accrued administrative expenses, the investment manager's (Wells Fargo) trading costs, and accrued investment manager fees.

The C Fund underperformed the Wells Fargo (Wells) Equity Index Fund for January-March 1989. This is primarily because the Wells returns are time-weighted: they assume a constant dollar balance throughout the January-March period. The C Fund monthly returns are dollar-weighted: they reflect total dollar earnings on the changing balances invested during the period.

The F Fund underperformed the Wells Bond Index Fund from January-March 1989 primarily because like the Wells Equity Index Fund, the Wells Bond Index Fund returns are time-weighted, while the F Fund monthly returns are dollar-weighted.

The calculations of the year-to-date C, F, and G Fund returns assume an unchanging balance (time-weighting) from month to month.

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