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COMMENDATIONS

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

A. George Best (Michigan, Eastern District), by Alan Rose, Special Agent, Drug Enforcement Administration, Detroit, for his excellent presentation on the subject of forfeiture law before DEA staff in Bowling Green, Ohio.

Kathleen M. Brinkman (Ohio, Southern District), by William Britt, Chief, Criminal Investigation Division, Internal Revenue Service, Cincinnati, for her successful prosecution of a complex criminal case.

Wayne Campbell (Texas, Southern District), by Robert A. Dublin, Family Support and Human Services Division, Department of Health and Human Services, Washington, D.C., for his valuable assistance in obtaining a favorable verdict in a case pending in Corpus Christi over a period of several years.

David A. Capp (Indiana, Northern District), received a plaque from William M. Jacobs, District Director, Internal Revenue Service, Indianapolis, for his outstanding contributions and assistance to the Criminal Investigation Division of the Internal Revenue Service.

John M. DiPuccio (Ohio, Southern District), by Terence Dinan, Special Agent in Charge, FBI, Cincinnati, for his outstanding assistance in a case involving stolen art and an insurance fraud case involving the disposal of a luxury boat.

Carolyn Bell Harbin (Michigan, Eastern District), by Dale L. Cayot, District Counsel, Bureau of Alcohol, Tobacco and Firearms, Cincinnati, for obtaining a favorable decision on appeal in a complex forfeiture case.

Henry E. Hudson, United States Attorney for the Eastern District of Virginia, and **Robert Seidel, Jr.**, Assistant United States Attorney, Norfolk, by Rear Admiral E. D. Stumbaugh, Judge Advocate General, Department of the Navy, Alexandria, for their outstanding representation on behalf of the Navy in an espionage prosecution.

Gary Husk (District of Arizona), by D. L. Gaudioso, Arizona Prosecuting Attorneys' Advisory Council, Phoenix, for his excellent presentation entitled "Prosecution of the Multiple-Victim Child Molester" at a seminar recently held in Scottsdale.

Timothy K. Lewis (Pennsylvania, Western District), by Bob C. Reutter, Special Agent in Charge, FBI, Pittsburgh, for obtaining a conviction following a jury trial of a criminal matter involving multiple federal violations.

Sheldon N. Light (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for his successful prosecution of numerous cases involving Social Security and health care fraud with more than $1 million in recoveries, fines and savings.

Michelle Z. Ligon (District of South Carolina), by Jeffrey Axelrad, Director, Torts Branch, Civil Division, Department of Justice, Washington, D.C., for obtaining a favorable decision in a Federal Tort Claims Act case.

Ross I. MacKenzie (Michigan, Eastern District), by Colonel Daniel L. Rothlisberg, Staff Judge Advocate, Department of the Army, Falls Church, Virginia, for assisting in the release of two shipments of government freight from a carrier in Detroit.

Ivan Mathew and **Ana Maria Martel** (District of Arizona), by L. Gene Corder, Chief Patrol Agent, Immigration and Naturalization Service, Yuma, for their successful prosecution of a conspiracy case.

C. Larry Mathews, Jr. (Texas, Western District), by Russell Bruemmer, General Counsel, Central Intelligence Agency, Washington, D.C., for successfully prosecuting a major case involving theft of U.S. government property.

James C. Mitchell (Michigan, Eastern District), by John W. Gill, Jr., United States Attorney, Eastern District of Tennessee, for his valuable assistance in expediting charges against a defendant in a case involving the murder of a Knoxville police officer.

Blondell L. Morey (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for successfully prosecuting over 100 Social Security and Medicaid/Medicare cases and the recovery of millions of dollars over a substantial period of time.

Daniel A. Morris (District of Nebraska), by Iven J. Diemler, Regional Inspector General for Investigations, General Services Administration, Kansas City, for his successful prosecution of a product substitution case.

Thomas O'Rourke (District of Colorado), by Martin B. Kaye, District Counsel, Internal Revenue Service, Denver, for his excellent presentation at a training program for revenue agents on testifying as an expert witness in a criminal tax trial.

Karen L. Patterson (California, Eastern District), by Paul F. Barker, Regional Forester, Department of Agriculture, San Francisco, for her outstanding representation in the prosecution of an injury case pending since 1982.

Stephen C. Peters (District of Colorado), by John G. Freeman, Postal Inspector in Charge, U.S. Postal Service, Denver, for his successful prosecution of a criminal case involving robbery of postal funds from a postal employee.

Wayne F. Pratt (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for successfully prosecuting Medicaid providers illegally dispensing prescription drugs which resulted in over 400 convictions and 40 sanctions.

Robert E. Rawlins (Kentucky, Eastern District), and paralegal **Georgette Lilly**, by Anthony G. Belak, District Counsel, Veterans Administration, Louisville, for their professionalism and legal skill in a complex malpractice suit on behalf of the VA Medical Center.

Karen L. Reynolds (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for her successful prosecution of a number of fraud cases against HHS programs.

Stephen T. Robinson (Michigan, Eastern District), by Office of Inspector General, Department of Health and Human Services, Washington, D.C., for his success in prosecuting over 100 Social Security and health care cases over a period of time.

Adam B. Schiff (California, Central District), by Joseph R. Davis, Assistant Director-Legal Counsel, FBI, Washington, D.C., for his legal skill and expertise in quashing a subpoena calling for the production of sensitive FBI investigative files.

F. William Soisson (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for his valuable assistance in a number of cases involving health care and Social Security fraud.

Andrew Vogt (District of Colorado), by Wesley G. Clayton, Assistant United States Attorney for the Northern District of Texas, for his valuable assistance in the prosecution of an interstate car theft ring operating in Texas, Colorado, and Oklahoma.

Craig Weier (Michigan, Eastern District), by the Office of Inspector General, Department of Health and Human Services, Washington, D.C., for successfully prosecuting 18 people for defrauding various Social Security programs, resulting in settlements of $250,000.

William L. Woodward (Michigan, Eastern District), by Dr. Jule Moraver, Director, Ann Arbor Veterans Administration Medical Center, Ann Arbor, for his legal skill and expertise in an employment discrimination case.

Thomas A. Ziolkowski (Michigan, Eastern District), by the Office of the Inspector General, Department of Health and Human Services, Washington, D.C., for his valuable assistance in the prosecution of Medicaid providers illegally dispensing prescription drugs.

SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF TEXAS

Henry K. Oncken, United States Attorney for the Southern District of Texas, **Tom Meehan** and **Kenneth Magidson**, Assistant United States Attorneys, were commended by Steven W. Hooper, Special Agent in Charge, U.S. Customs Service, Houston; John G. Fish, Assistant Customs Attache, U.S. Customs Service, Bonn-Bad Godesberg, Germany; and Horst Kraushaar, Assistant Attorney for the Federal Republic of Germany, Frankfurt, Germany, for their success in an investigation that resulted in the first ever controlled delivery of cocaine from the United States to the Federal Republic of Germany.

This investigation was initiated on May 26, 1989 when Blanca Dominguez, a Colombian female, travelling from Guatemala to Amsterdam via Houston, was arrested by Houston Customs Inspectors after she was found in possession of 7 kilograms of cocaine. Based in part on information she provided, a second Colombian female, Francia Carroll-Munoz, was arrested in Houston two days later after she likewise was found in possession of an additional 7 kilograms of cocaine. A Senior Special Agent of the Houston U.S. Customs Service office advised Tom Meehan of the facts surrounding the arrest of Francia Carroll-Munoz and her willingness to participate in a controlled delivery of the cocaine to its intended recipients in the Federal Republic of Germany. After Tom Meehan consulted with Kenneth Magidson, they agreed to defer the criminal prosecution of Carroll-Munoz to Federal Republic of Germany authorities.

On May 29, 1989, two special agents of the U.S. Customs Service accompanied Carroll-Munoz to Frankfurt to continue the investigation with German Customs agents, the office of the Customs Attache in Bonn, and DEA in Frankfurt. The subsequent successful controlled delivery resulted in the arrests of eight persons in Frankfurt, and the seizure of narcotics, currency, and weapons and created an overwhelming positive impact on international relations between the various law enforcement offices involved.

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PERSONNEL

On August 8, 1989, **Richard B. Stewart** was sworn in as Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice. Mr. Stewart was formerly a Professor of Law at Harvard University.

On September 1, 1989, **Michael D. McKay** was appointed Interim United States Attorney for the Western District of Washington.

On September 5, 1989, **Jeffrey R. Howard** was appointed Interim United States Attorney for the District of New Hampshire.

On September 18, 1989, **Jean Paul Bradshaw** was appointed Interim United States Attorney for the Western District of Missouri.

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DRUG ISSUES

National Drug Control Strategy Report

On September 5, 1989, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, forwarded a National Drug Control Strategy fact sheet issued by the White House to all United States Attorneys, followed by the National Drug Control Strategy Report. The report describes a coordinated and comprehensive plan of attack involving all basic anti-drug initiatives and agencies and recommends the largest dollar increase in the history of the drug war--nearly $2.3 billion, 39 percent above the fiscal 1989 level. The report emphasizes throughout the principle of user accountability--in law enforcement efforts focused on individual users; in decisions regarding sentencing and parole; in school, college, and university policies regarding the use of drugs by students and employees; in the workplace; and in treatment.

Additional copies of the National Drug Strategy Report are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325, at a cost of $8.00. Copies may also be obtained through Visa or Master Charge by calling 202/783-3238. When placing your order, please refer to stock number 040-000-00542-1.

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Department Of Justice Drug-Related Resources

On September 13, 1989, Attorney General Dick Thornburgh accompanied Director Richard Darman, Office of Management and Budget, and Drug Czar William Bennett to testify on FY 1990 appropriations for the National Drug Control Strategy before the House Appropriations Subcommittee on the Departments of Commerce, Justice and State.

In his testimony, the Attorney General outlined the Administration's request for an increase of approximately $3.5 billion for drug-related programs for the Department of Justice, including the President's initial FY 1990 request for over $2.3 billion, the $745 million drug-related share of the President's initiative to combat violent crime, and $219 million as part of the President's National Drug Control Strategy. The current House mark for the Department of Justice appropriations equates to approximately $2 billion in drug-related resources. The Senate mark approved in Subcommittee on September 12, 1989, provides almost the entire drug resource request. Accordingly, the Attorney General stressed the need to address this issue in conference action in order to provide the necessary resources for this flagship drug law enforcement program.

* * * * *

International Drug Organizations

On September 12 and 13, 1989, the Permanent Subcommittee on Investigations of the Senate Governmental Affairs Committee held hearings on the structure of international drug organizations. David Westrate of the Drug Enforcement Administration and William Baker of the Federal Bureau of Investigation testified on behalf of the Department of Justice. Their testimony outlined the infrastructure of the Medellin and Calli drug cartels. Both witnesses indicated that as the United States escalates its response to international drug trafficking, the possibility of counterattack by the cartels exists. All witnesses agreed that the formation of a national drug intelligence center is needed.

* * * * *

SENTENCING GUIDELINES

Guidelines Sentencing Update

A copy of the "Guideline Sentencing Update," Volume 2, Number 11, dated August 21, 1989 and Volume 2, Number 12, dated September 5, 1989 is attached at the Appendix of this Bulletin as Exhibit A.

* * * * *

Federal Sentencing Law And Practice

Joe B. Brown, United States Attorney for the Middle District of Tennessee, and Chairman of the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee, recently advised that West Publishing Company is publishing a book entitled "Federal Sentencing Law and Practice" at a cost of $82.50. Copies may be obtained by contacting your local West Publishing representative, or their toll-free number, 1-800-328-9352. Preliminary review of this book indicates it will be a good addition to your library.

* * * * *

ORGANIZED CRIME STRIKE FORCES

On September 8, 1989, Attorney General Dick Thornburgh and Secretary of Transportation Samuel Skinner testified in support of the Department of Justice's plan to consolidate the Organized Crime Strike Forces with United States Attorneys' offices before a joint hearing of the Senate Judiciary Committee and the Permanent Subcommittee on Investigations of the Committee on Government Affairs. A copy of the Attorney General's statement is attached at the Appendix of this Bulletin as Exhibit B.

The Attorney General and other witnesses in support of the management initiative repeatedly emphasized that they recognized the past successes of the Strike Force program but that the proposal was necessary to enable the Department to coordinate limited resources in order to better address the changing nature of organized crime. While some members of the two committees indicated that they would continue to disagree with the Department on the merits of the proposal, there also were indications that a consensus might be developing on the basis of the merger being within the Attorney General's management discretion.

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POINTS TO REMEMBER

Claims Of RICO Vagueness

On August 24, 1989, David Margolis, Chief, Organized Crime and Racketeering Section, Criminal Division, issued a draft of an argument to all Strike Forces, Field Offices, and Department of Justice Staff, concerning claims of RICO vagueness. This argument, prepared by Frank Marine, Special Counsel to the Chief, responds to appellants' arguments in a pending First Circuit appeal, claiming that RICO's requirement of a pattern of racketeering activity is unconstitutionally vague.

This draft may be of assistance in responding to similar arguments. If you wish to obtain a copy, or would like further information, please call Frank Marine at FTS/202-633-1569.

* * * * *

Congressional Relations Procedures Governing Congressional Liaison

On August 21, 1989, Attorney General Dick Thornburgh issued a memorandum to the heads of Department components advising that Carol Crawford, Assistant Attorney General for Legislative Affairs, and her office are responsible for all communications between the Department of Justice and Congress. Her office is to take the lead in supervising and coordinating all matters involving Congress. The Attorney General stated as follows:

> If we are to fulfill the duties and obligations of the Department, it is essential that we speak with one voice to Congress. The Office of Legislative Affairs is responsible for achieving that objective. Therefore, I am asking that heads of all the Department's components ensure that all personnel under their management work closely with the Office, and carefully follow its legislative guidance. Adhering to these procedures will benefit us all.
>
> There has been and should continue to be vigorous internal debate over legislative policy. However, once policy decisions have been made, we should work together using all of our resources to achieve the Department's legislative goals. Accordingly, all components of the Department are directed to observe operating procedures which will be promulgated from time to time by Ms. Crawford's office.

* * * * *

United States v. Drexel-Burnham-Lambert, The Largest Forfeiture Recovery To Date

On September 13, 1989, James G. Richmond, United States Attorney for the Northern District of Indiana, and Chairman of the Attorney General's Advisory Committee, and Joseph M. Whittle, United States Attorney for the Western District of Kentucky, and Chairman of the Financial Litigation Subcommittee, Attorney General's Advisory Committee, issued the following statement to all United States Attorneys:

> It is our pleasure to advise you that on September 11, 1989, the case of United States v. Drexel-Burnham-Lambert resulted in a $222,196,770.97 asset forfeiture recovery on behalf of the United States. This is the largest forfeiture recovery ever accomplished. Our congratulations go out to United States Attorney Benito Romano and his staff for their expert handling of this case. The Drexel case was developed through the extraordinary efforts of the United States Postal Service and the Securities and Exchange Commission. The deposit of this money into the asset forfeiture fund means that the United States Attorneys have exceeded the very ambitious goal of $450 million that was set. The Bureau of Prisons was originally hoping that $88 million could be transferred to them for prison construction. Because of this remarkable one-time recovery, more than twice that amount is likely to be transferred to them.
>
> The Department's asset forfeiture program is extremely important to the President's war on drugs. All United States Attorneys are urged to redouble their efforts to aggressively pursue the assets of the criminals who prey upon the honest citizens of this country.

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LEGISLATION

Americans With Disabilities Act

On September 7, 1989, the Senate passed landmark civil rights legislation for the disabled, the Americans with Disabilities Act (S. 933), by an overwhelming vote of 76 to 8. The White House and the Attorney General had taken a leading role in developing this legislation to help further millions of mainstream Americans with disabilities. Long and extensive negotiations with the Senate Labor and Human Resources Committee completed just prior to the August recess resulted in a bipartisan accord between key Senators and the President.

The House has begun hearings on this legislation and the Energy and Commerce Committee has begun subcommittee mark-up. The timetable for the legislation is slowed because there are four committees involved that have jurisdiction.

* * * * *

Department of Justice Appropriations

On September 12, 1989, the Senate Appropriations Subcommittee on Commerce, Justice, State and Judiciary marked up the Department's FY 1990 appropriations bill, H.R. 2991. The Subcommittee adopted an Emergency Drug Funding title increasing the Department's $6.250 billion appropriations by $1.713 billion to fund anti-drug programs, including the President's June 15, 1989, Violent Crime Initiative, and the more recent drug initiative transmitted by the President on September 5, 1989. Under the Subcommittee amendment, discretionary funds in all other appropriations would be reduced by .225 percent. The drug title brings Department of Justice appropriations up to the President's request level in virtually all accounts.

Three fee proposals were included in the bill:

a) The fees established by the FBI for non-criminal investigations were broadened to include fees for private sector contractors with classified government contracts, as requested by the Administration, but was further broadened by the Senate to include name checks, both being applied to non-law enforcement employment. Fees would cover the expense of fingerprint automation activities. Additional receipts were estimated at $30,000.000.

b) For the Immigration Examinations Fee Account, the U.S. Code was amended so that the first $50,000,000 in receipts would no longer go to the Treasury but could be used to supplant appropriated funds for the "Salaries and Expenses" appropriations of the Immigration and Naturalization Service.

c) A general provision was added applying a fee for the filing of premerger notifications which would provide up to $30,000,000 to the Federal Trade Commission and the Antitrust Division, receipts being equally divided. The Antitrust Division's appropriated budget was reduced $5,000,000 as a result.

The Subcommittee also agreed to an amendment that would repeal Section 6077 of the Anti-Drug Abuse Act of 1988 that would otherwise virtually eliminate, effective October 1, state and local law enforcement sharing forfeiture proceeds from cases in which they have assisted federal law enforcement agencies.

It was noteworthy that the Subcommittee did not include a general provision limiting the authority of the Attorney General to reorganize or relocate facilities, as was the case in the FY 1990 supplemental appropriations bill.

* * * * *

Death Penalty

A Senate Judiciary Committee hearing on Senator Thurmond's death penalty bill, S. 32, has been scheduled for September 19, 1989. In addition, a unanimous consent agreement has been reached that the bill will be reported out of Committee by October 17, 1989. The Department is working to gain support for the Administration's own death penalty provisions, as contained in the President's proposed Violent Crime Control Act, S. 1225.

* * * * *

Federal Prison Industries

The Department of Justice has been working with members and staff in an effort to eliminate in conference a provision in the Senate-passed Department of Defense authorization bill, S. 1352, which would terminate the procurement preference currently accorded the Federal Prison Industries (FPI) in offering products for purchase by the Department of Defense. The Department opposes this amendment because elimination of FPI's Department of Defense procurement preference would cripple a program which is absolutely necessary for the orderly management of our rapidly expanding prison population.

Department staff have been meeting with key staffers on the House and Senate Judiciary and Armed Services Committees. Senate conferees have been appointed and have had a preliminary meeting with the House members likely to be named as conferees.

* * * * *

Hatch Act Repeal

In the wake of the Senate Governmental Affairs Committee's approval on July 26, 1989, of S. 135, a bill that would repeal substantial portions of the Hatch Act, the Department is working with minority staff to provide information about this legislation to the staff of every Senator. It is not clear when Senate floor action will be scheduled as the Committee report has not yet been filed.

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Terrorism

On September 11, 1989, the Senate Committee on Governmental Affairs conducted a hearing on the threat of terrorism and government response to terrorism. Oliver B. Revell, Associate Deputy Director, FBI, testifying on behalf of the Department of Justice, stated that the threat of terrorist retaliation by Colombian drug cartels is possible in the wake of extradition of drug traffickers to the United States. He also stated that he could not give assurances that the United States Government could prevent attacks by Colombian drug cartels if they retaliate.

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CASE NOTES

CIVIL DIVISION

D.C. Circuit Rules That Organization Which Makes Voluminous Freedom Of Information Act Requests To Produce Sets Of Documents For Sale Qualifies As A Representative Of The News Media Entitling It To Preferential Pricing On Its Requests

Under the Freedom of Information Reform Act of 1986, certain types of information requesters are granted a fee preference whereby they avoid being charged with the costs incurred by an agency in searching for the documents. The National Security Archive, which is attempting to create a private library with massive numbers of government documents on national security matters, contended that it was entitled to such a preference when

seeking information it intended to collect in document sets of several thousand pages each, which would be sold to finance its activities. The Department of Defense denied this preference, and the district court upheld that denial, ruling that the Archive could not qualify as either an "educational institution" or a "representative of the news media."

The D.C. Circuit has now reversed. The court of appeals first upheld the agency's regulatory definition of "educational institution," and ruled that the category plainly was limited to schools of learning. The court also agreed that mere general dissemination of information to the public was insufficient to qualify an entity for the fee preference. However, the court characterized the Archive's plan to produce sets of thousands of documents for sale as "act[ing], in essence, as a publisher." Giving a broad reading to the term "representative of the news media," the court held that the Archive qualified for the fee preference under this category. The court also attempted to distinguish comments in the legislative history stating that organizations that sell government documents were not intended to qualify.

National Security Archive v. Department of Defense, No. 88-5217 (D.C. Cir. July 28, 1989) DJ # 145-15-1739.

Attorneys: Leonard Schaitman, FTS/202-633-3441
Gregory C. Sisk (formerly of the Appellate Staff)

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First Circuit En Banc Reverses District Court's Ruling Ordering Disclosure Of All Information Supplied By Confidential Sources Who Testified

In this Freedom of Information suit, the district court ordered the release of all information supplied by confidential informants who testified at the Smith Act trials contained in over 136,000 pages. The FBI had withheld this information on the basis of Exemption 7(D) of the Freedom Of Information Act. A panel of the First Circuit reversed the district court's disclosure order, declaring it significantly overbroad. In so doing, the panel specifically rejected the district court's holding that, by the act of testifying, a confidential informant waives the protection of Exemption 7(D) for all information he supplied to the law enforcement agency. Nonetheless, the court held that an informant who testifies does waive the protection of Exemption

7(D) for the subject-matter of the testimony and all related information as measured by the hypothetical scope of cross-examination.

We sought rehearing en banc on the latter aspect of the court's ruling, the scope of waiver issue. The First Circuit granted en banc rehearing and has now adopted the government's position in full. The en banc court held that there is no waiver of Exemption 7(D) as to (i) information identifying a confidential source and (ii) information supplied by a confidential source, when sources testify publicly beyond the actual trial testimony. In other words, the en banc court rejected the "hypothetical scope of cross-examination test" and ruled that, in the present circumstances, there was no waiver at all by sources who testified. In so doing, the court of appeals emphasized that Exemption 7(D) is mainly designed to protect law enforcement interests, including the recruitment of future sources. The en banc court also emphasized that in construing the Freedom of Information Act, in particular, the doctrine of waiver under the Act, courts must craft workable rules with a view toward the practical reality of both law enforcement and Freedom of Information Act litigation.

Irons v. FBI, No. 87-1516 (1st Cir. July 24, 1989)
DJ # 145-12-5158.

Attorneys: Leonard Schaitman, FTS/202-633-3441
Deborah R. Kant, FTS/202-633-1838

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First Circuit En Banc Unanimously Holds That The Rehabilitation Act Does Not Provide An Implied Cause Of Action By Which A Deaf Person May Challenge The Department Of Transportation's Requirement That Inter-State Truckers Satisfy A Minimum Hearing Requirement

Michael Cousins, a deaf man, filed this action challenging the Department of Transportation's safety regulation establishing a minimum hearing requirement for interstate truckers. Cousins asserted that he had an implied right of action under the Rehabilitation Act to bring this suit, and that this action entitled him to a trial over the validity of the Secretary's regulation. The district court dismissed the complaint without prejudice, holding that Cousins had to proceed under the Administrative Procedures Act. Cousins appealed, and a panel of the First Circuit reversed, concluding that the Rehabilitation Act contained an implied cause of action. We filed a petition for rehearing en banc, which was granted.

The full court has now unanimously affirmed the district court's decision. The court embraced in full our arguments as to why Cousins had to proceed under the Administrative Procedures Act. It also concurred in our assertion that any petition for review of Department of Transportation regulations must be filed in the court of appeals.

Cousins v. DOT, No. 88-1106 (1st Cir. July 24, 1989).
DJ # 35-34-29

Attorneys: Michael Jay Singer, FTS/202-633-5432
Robert K. Rasmussen (formerly of the Appellate Staff)

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First Circuit Holds That the Equal Access To Justice Act (EAJA) Does Not Authorize Fee Awards Against Purely Adjudicatory Federal Agencies

The Occupational Safety and Health Review Commission (OSHRC) is an independent adjudicative agency that reviews administrative complaints by the Occupational Safety and Health Administration (OSHA). In this case, one of OSHRC's administrative law judges issued a protective order that restricted the dissemination of information outside the confines of the administrative proceeding. The parties affected by the protective order were unable to seek relief from the administrative law judge's order administratively because OSHRC itself lacked a quorum, so they sought and obtained mandamus against the administrative law judge from the First Circuit. In keeping with its status as a neutral adjudicatory body, OSHRC took no position regarding the merits of the mandamus petition.

Following the success of their mandamus petition in the First Circuit, the petitioners filed an EAJA fee application against OSHRC. We opposed the petition on the ground that the EAJA does not authorize awards of attorneys' fees against purely adjudicatory agencies like OSHRC. After ordering a briefing and oral argument on the EAJA issue, the First Circuit has now denied the fee application. The First Circuit's decision squarely held that the EAJA does not extend to purely adjudicatory agencies.

In Re Perry, No. 88-1475 (1st Cir. Aug. 3, 1989).
DJ # 145-0-2725.

Attorneys: Anthony Steinmeyer, FTS/202-633-3388
Scott R. McIntosh, FTS/202-63-4052

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Third Circuit, In Divided En Banc Ruling, Sustains Department Of Transportation (DOT) Regulations Governing Accessibility Of Mass Transit To The Handicapped Against Challenge On Grounds That The Rehabilitation Act And Other Statutes Require Bus Service To Be Made Fully Accessible, But Holds That 3 Percent Cost Cap Is Arbitrary And Capricious On This Record

The Third Circuit, in a 2-1 panel decision, had invalidated Department of Transportation (DOT) regulations defining the extent to which federally-assisted mass transit systems must provide accessible service to the handicapped. DOT's regulations provided that a local transit operator may elect to serve handicapped riders through the purchase of wheelchair-accessible buses, the provision of demand-responsive, door-to-door van services, or a mixed system of bus and van service. The court, however, held that Congress, through section 504 of the Rehabilitation Act and other statutes governing federal transit assistance, has required mass transit systems to be equally accessible to the handicapped. It also held that this objective can only be achieved by requiring transit systems to gradually provide a mixed system of wheelchair-accessible buses and van services. The dissent concluded that the applicable statutes did not compel equal accessibility of mass transit systems and that DOT's regulations were in all respects a rational exercise of its discretion to set appropriate standards for handicapped services. The decision was significant because it adopted a somewhat novel approach to analyzing the requirements of section 504, because it conflicted with other decisions holding that section 504 does not require accessible mainline bus service, and because it imposed extensive and potentially burdensome obligations on local transit operators.

We sought and obtained a rehearing en banc. The en banc Court, in a splintered decision yielding only a plurality opinion, has now rejected the panel's reasoning and upheld DOT's regulations against the argument that complete "mainstreaming" of transportation services is mandated by the applicable statutes and regulations. At the same time, the Court found that DOT's 3 percent cost cap provision was arbitrary and capricious on this record, but made clear that a percentage cost cap could be sustained if adequately supported by the facts. The Court also remanded the case so that the agency can promulgate new regulations under a timetable established by the district court in consultation with the parties.

ADAPT, et al v. Burnley, Nos. 88-1139, 88-1177, and 88-178 (3rd Cir. July 24, 1989). DJ # 145-18-1450

Attorneys: Michael Jay Singer, FTS/202-633-5432
Jeffrey A. Clair, FTS/202-633-4027

* * * * *

Fourth Circuit Upholds District Court Decision Finding That The Federal Aviation Administration (FAA) Had Not Engaged In "Reverse" Employment Discrimination When It Promoted A Black Woman Over The Plaintiff, Who Is White, Even Though The Black Woman Lacked A Current Requirement For The Job When The Selection Was Made

Julia Lucas, who is white, brought suit against the FAA for alleged racial discrimination when it promoted Rosa Wright, a black woman, to the position of Quality Assurance and Training Specialist ("QATS") at the Flight Service Station in Leesburg, Virginia. Nineteen people applied for two such positions. Two local managers at the Leesburg facility selected four finalists for the jobs on the basis of personal interviews with the applicants. A third manager made the final selections and he chose Ms. Wright and another woman. At trial, the plaintiff presented evidence that Wright did not have a current Pilot Weather Briefing ("PWB") Certificate at the time of her selection, which the FAA admitted in its answer to the complaint was a requirement of the QATS position.

The court of appeals earlier had reversed the district court's dismissal of the plaintiff's complaint, holding that she had made out a prima facie case of discrimination. Following remand, the district court again held for the FAA on the ground that the PWB certificate was not a prerequisite for the job, because Wright was technically fully qualified to assume the responsibilities of the QATS position, because Wright possessed excellent communications skills and teaching experience, and because the plaintiff had a confrontational personality, which would not be desirable in a position requiring the ability to relate well with others.

The court of appeals reversed the finding that the PWB certificate was not a prerequisite for the position as clearly erroneous, holding that the FAA's admission that the certificate was a requirement for the QATS position was binding on the FAA at trial. Nevertheless, it concluded that this admission only went to the establishment of the plaintiff's prima facie case. It agreed with the district court that the FAA had met its burden

of articulating a legitimate, nondiscriminatory reason for its action by introducing evidence that it needed an individual for the QATS position with both the experience and personal qualities necessary to be a successful teacher, and by showing that the plaintiff did not possess these qualities. The court of appeals also found that the plaintiff had not met her burden of showing that these reasons were merely a pretext for discrimination. It noted that FAA witnesses testified that Wright was not selected merely because she was black and that a white male without a PWB certificate was one of the four top candidates considered for the position. Accordingly, it concluded that the district court's finding that the plaintiff's nonselection for the QATS position was not based upon prohibited racial discrimination could not be said to be clearly erroneous.

Lucas v. Burnley, No. 88-2807 (4th Cir. July 24, 1989).
DJ # 35-79-333

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Thomas Christina (formerly Associate Deputy Attorney General) (argued)
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Seventh Circuit, Reversing District Court, Upholds Army's Regulations Barring Reenlistment Of An Admitted Homosexual

Pursuant to its regulations, the Army barred plaintiff from reenlistment in the Army Reserves on the ground that she is an admitted homosexual. Although she unconditionally admitted that she is a lesbian, plaintiff did not admit to having engaged in any homosexual acts, and the Army had no evidence that she had committed such acts. The district court held the Army's regulation as applied to a person who has not been shown to have engaged in homosexual conduct violated both the First Amendment and the Equal Protection Clause.

The court of appeals (Woods, Easterbrook and Kanne) reversed. In an opinion that repeatedly relies on judicial deference to the military, the Court rejects plaintiff's First Amendment and equal protection arguments. On the First Amendment issue, the Court holds that the regulation does not infringe on free speech because the regulation does not prohibit advocacy, but, instead, bars one who is identified as a homosexual. Moreover, the Court holds that any incidental effect on free speech

is justified because it is necessary to the government's legitimate interest in "maintaining an efficient and easily administered system of raising armies." On the equal protection issue, the Court defers to the Army's decision regarding military affairs. The Court holds that plaintiff's unconditional admission of homosexuality can be reasonably viewed as reliable evidence of a desire and propensity to engage in homosexual conduct, and, accordingly, in light of Bowers v. Hardwick, the Army's regulation need only be rationally related to a permissible end. Given the deference required to the military, the Court concludes that the regulation is rational. Therefore, it cannot interfere with the military's decision to bar homosexuals from service.

Ben-Shalom v. Marsh, Nos. 88-2771 and 89-1213 (7th Cir. Aug. 7, 1989). DJ # 145-4-3512

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Eighth Circuit, Applying Harlow's "Objective Legal Reasonableness" Standard, Reverses District Court's Holding That Disputed Issue Of Material Fact With Respect To Officials' Subjective Intent Precluded Summary Judgment On The Basis Of Qualified Immunity

Plaintiff brought this Bivens and 42 U.S.C. §1983 suit against five FBI agents, a Bureau of Alcohol, Tobacco and Firearms agent, a former United States Attorney and a state deputy sheriff, claiming that they unconstitutionally seized or authorized the seizure of a large quantity of silver coins and ingots (which was later turned over to the Internal Revenue Service) while executing an otherwise valid search warrant for his residence. In affidavits submitted in support of their motion for summary judgment on qualified immunity grounds, defendants stated they removed the silver for purposes of safekeeping because the plaintiff was incarcerated at the time of the search and the house could not be secured because the door and locks had been irreparably damaged upon entry. Plaintiff countered that defendants' safekeeping argument was a pretext and that the silver was seized in order to satisfy plaintiff's outstanding tax obligation to the Internal Revenue Service. The district judge granted summary judgment to four of the defendants due to their lack of involvement in the actual seizure, but refused to grant the remaining FBI agents and the state defendant qualified immunity because he found that there was a genuine issue of material fact concerning the officials' subjective intent in seizing the silver. We took an immediate appeal.

The court of appeals has now reversed in a unanimous decision. Stating that "the prolonged judicial proceedings incident to inquiry regarding subjective motivation are incompatible with the Supreme Court's strong and repeatedly stated policy that insubstantial and vexatious claims against public officials should be disposed of in limine without trial, the Eighth Circuit held that as a matter of law defendants here are entitled to qualified immunity "even if their course of conduct involved benevolent cooperation with the IRS." In so holding, the panel emphasized that the Harlow v. Fitzgerald, 457 U.S. 800 (1982), standard focuses on the "objective legal reasonableness" of the official's acts and stated that the official's "subjective beliefs about the search are irrelevant" (quoting Anderson v. Creighton, 107 S.Ct. 3034, 3040 (1987). Concluding that the search was proper, as was the safekeeping of the silver, the panel held that there was no unreasonable seizure or retention of the silver by the agents in violation of the Fourth Amendment.

Arthur H. Russell v. Bill Hardin, et al., Nos. 88-1805WA and 8-1806WA (8th Cir. July 18, 1989). DJ # 157-10-189.

Attorneys: Barbara L. Herwig, FTS/202-633-5425
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Ninth Circuit Affirms Dismissal Of Action Seeking To Review Denial Of Security Clearance

Weston is an openly gay employee of Lockheed Missiles & Space Co. who requested special access clearance in order to work on a classified Department of Defense (DOD) program. Lockheed, claiming that it was proceeding under certain classified DOD guidelines, never submitted Weston's name for the special access. Weston then sued both Lockheed and DOD claiming that he had been denied procedural due process as well as other constitutional rights by Lockheed's failure even to submit his application for access to the government.

In the district court, the government filed a claim of state secrets privilege over the particular guidelines governing this program arguing that disclosure of the guidelines would reveal the nature of the program. The district court upheld the claim of privilege and noted that continued litigation of this matter would compromise the state secrets. The district court also ruled that Weston's claim against DOD was moot because DOD had clarified that neither a prior denial of a special access clearance nor homosexuality, in and of itself, is a reason not to forward an application for special access to DOD. Accordingly,

the court dismissed the action against DOD, and later also dismissed Lockheed and an individual Lockheed employee who also had been sued.

On appeal, Weston's counsel repeatedly claimed that he was not appealing from the ruling on state secrets privilege but contended that that ruling had no bearing on his argument that he had been denied due process and that the litigation could nevertheless continue on the constitutional issues. The court of appeals has now ruled that Weston's failure to challenge the dismissal based on state secrets is deemed an abandonment of that issue, and, accordingly, did not rule on the correctness of the district court's conclusion that the privilege required dismissal. Nevertheless, the court of appeals found that the dismissal based on the privilege was an adequate independent ground for the dismissal order and affirmed.

Weston v. Lockheed Missiles & Space Co. (9th Cir. Aug. 8, 1989) DJ # 145-15-1681.

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Freddi Lipstein, FTS-202/633-4815

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Eleventh Circuit Reverses District Court Holding Estopping The Government

Entitlement to social security benefits depends upon the filing of a written application. 42 U.S.C. §402(a)(3); 20 C.F.R. §404.603. In this case, plaintiff argued that the Social Security Administration should be estopped from relying upon this "written application" requirement to deny her benefits because when she went to her local office to "sign up for benefits," she was mistakenly told that she did not have enough "work quarters" to be covered. The district court agreed and awarded benefits. Now, the Eleventh Circuit has reversed relying upon the Supreme Court's decision in a case involving similar facts, Hansen v. Schweiker, to hold that the government may not be estopped under this set of facts. In so holding, the court of appeals rejected the plaintiff's argument that Hansen should be distinguished because it involved a mistake of law, rather than a mistaken factual representation.

Eagle v. Sullivan, No. 88-5301 (11th Cir. July 19, 1989). DJ # 137-18-599.

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LAND AND NATURAL RESOURCES DIVISION

Challenge To Environmental Assessment Dismissed For Mootness Since Project Was Complete By The Time Of The Appeal

Neighbors Organized to Insure a Sound Environment (NOISE) challenged the Federal Aviation Administration's 1981 Environmental Assessment on a proposed airport terminal in Nashville, Tennessee because it did not include a study of a possible new runway. By the time of this appeal, the terminal had been completed, and the runway, which had been considered a possibility in 1981, was a specific proposal and was receiving the full consideration of an environmental impact statement.

The Sixth Circuit held that the issue on appeal was moot because the terminal was completed and operational and because "we are not in a position to prevent what has already occurred." The Court also stated that NOISE had not demonstrated that the defendant's actions in this case are "capable of repetition yet evading review." Accordingly, the Court vacated the district court's order and remanded it to the district court to be dismissed on mootness grounds.

The Court noted that the record revealed that the FAA had conducted a thoroughly and carefully considered environmental assessment of the impact of the terminal complex. The Court also held that because the runway was not reasonably foreseeable in 1980, and because there will be a separate environmental impact statement for that runway, the FAA's decision to decline further examination of the impact of the runway was not arbitrary and capricious. Since NOISE had not demonstrated that the FAA had overlooked some plausible alternative airport site, the decision to not conduct further study of alternatives to moving the airport was not arbitrary or capricious.

N.O.I.S.E. v. McArtor, 6th Cir. No. 87-5693 (June 29, 1989) DJ # 90-1-4-3134

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Environmental Protection Agency's (EPA) Entry, Inspection, Obtaining Of Samples At National Standard Company Plants In Niles, Michigan Sustained

The Seventh Circuit affirmed the district court's judgment upholding EPA's entry, inspection, and obtaining of samples at plaintiff National Standard Company's two wire manufacturing facilities in Niles, Michigan, pursuant to the Resource Conservation and Recovery Act (RCRA). As required by Section 3005(a) of RCRA, National Standard applied to EPA for a permit for treatment, storage, and disposal of the hazardous wastes generated at the facilities. National Standard refused EPA access to its facilities for sampling purposes after the agency notified the company of the need to conduct such sampling following visual site inspections which revealed the existence of several "solid waste management units" (SWMUs) at each facility and the need for corrective action. The company objected to the breadth of the inspection sought, claiming that RCRA authorized the agency to inspect only areas identified by the company as SWMUs.

National Standard subsequently filed a declaratory judgment action in the Northern District of Illinois, seeking a declaration of the limits of EPA's inspection authority. Three days later, EPA sought and obtained ex parte an administrative search warrant in the Western District of Michigan to inspect the facilities. National Standard immediately filed both a complaint in that court seeking injunctive relief and an emergency motion to quash the warrant and transfer venue of all proceedings to the Illinois federal court. All matters were consolidated in the Illinois court by agreement of the judges (and without participation of the parties), after which the Illinois district court granted EPA's motion for summary judgment upholding the propriety of the search warrant.

The Seventh Circuit affirmed on the merits, after first rejecting our two procedural arguments: (1) that the Illinois district court had lacked subject matter jurisdiction because only the court that issued the warrant (in Michigan) had authority to review the propriety of the warrant's issuance, and (2) that the case is not moot because EPA had obtained the results of the sampling and no further inspection was contemplated. The court rejected the jurisdictional challenge, stating that the government had waived any such challenge by not earlier raising the question, ignoring entirely several Supreme Court cases brought to its attention in the post-argument briefs requested by the court, in which the Supreme Court had made clear that such jurisdiction cannot be waived by the actions or inactions of the parties.

The court found the case not moot both (1) because the agency had not yet acted on the results obtained, and (2) because the question is capable of repetition yet evading review because "it is virtually certain that EPA will likely again have to re-inspect and resample" the facilities. Finally, the Court upheld the propriety of the warrant, finding that RCRA authorized the agency to utilize such warrants, that the statute did not permit the facilities to determine the limits of an inspection, and that the warrant was not overbroad and was supported by probable cause.

National Standard Co. v. Adamkus, 7th Cir. No. 88-1833 (July 17, 1989) (Coffey, Ripple, Weis) DJ # 90-7-1-424

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Timber Sale In Hells Canyon National Recreation Area Upheld Under The National Environmental Policy Act (NEPA) And The Clean Water Act

A group of environmental organizations and an individual sought to enjoin a timber sale offered by the Forest Service in the Hells Canyon National Recreation Area. The Forest Service, as required by the legislation establishing the recreation area, had previously prepared a Comprehensive Management Plan, accompanied by an environmental impact statement (EIS), under which timber sales were permitted in this part of the recreation area for a variety of purposes, including the salvage of timber from trees killed by insect epidemics. For this particular timber sale, which authorized the logging of Engelmann spruce killed by the spruce bark beetle, the Forest Service prepared an environmental assessment that concluded that there would be no significant impact on the environment that had not already been considered in the EIS for the Comprehensive Management Plan. Plaintiffs alleged the Forest Service's offer of this sale violated the National Environmental Policy Act, 42 U.S.C. §4321 et seq. ("NEPA"), the Clean Water Act, 33 U.S.C. §1251 et seq. and the Hells Canyon National Recreation Area Act, 16 U.S.C. §460gg et seq. ("HCNRA Act").

The district court rejected all these claims. On plaintiffs' appeal, a unanimous panel of the Ninth Circuit affirmed as to all claims except the allegation that further regulations governing timber harvesting were required under the HCNRA Act.

Judge Trott rejected the NEPA claims, holding that the failure to supplement the EIS for the Comprehensive Management Plan was not arbitrary or capricious. Because the plan and its EIS had anticipated that salvage timber sales for insect damage would occur, the fact that such events had come to pass was not "significant new circumstances" warranting supplementation of the EIS where the proposed sale respected the management limits of the plan. The court also found the environmental assessment to be adequate on the specific issues of impacts on elk, water quality, cumulative effects, and the discussion of the no-action alternative. The panel also noted that "uncertainty in protecting environmental harms does not require a worst case analysis," citing the new decision in Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989). On the Clean Water Act claim, the court held that for nonpoint sources, proper implementation of state-approved "best management practices" (BMP's) will constitute compliance with the statute unless monitoring discloses the ineffectiveness of a particular BMP. The panel upheld, as not clearly erroneous, the district court's factual determination that there was no likelihood of a violation of state water quality standards. Finally, the panel rejected one claim under the HCNRA Act, that Section 8(f) limits timber harvesting to areas where harvesting was occurring at the time of enactment, but held that another provision, Section 10, required the promulgation of regulations governing timber harvesting that are "not duplicative of other rules already in effect in the" recreation area. The court remanded the case to the district court for an order re- quiring such regulations and for consideration whether injunctive relief is appropriate in the interim. In addition, the panel sua sponte awarded attorneys' fees under the Equal Access to Justice Act even though no application for such fees was ever filed. Judge Reinhardt, while concurring, would have issued an injunc-tion.

Oregon Natural Resources Council v. Lyng, 9th Cir. No. 88-4092 (July 21, 1989) DJ # 90-1-4-3348.

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TAX DIVISION

Second Circuit Rules In Case Involving The Tax-Exempt Status Of The League Of Women Voters

Fulani v. League of Women Voters Education Fund. On August 2, 1989, the Second Circuit affirmed the dismissal of this action by the District Court for the Southern District of New York. Lenora Fulani, an independent party candidate for the presidency in 1988, sought to participate in nationally televised primary debates sponsored by the League of Women Voters Education Fund, a tax-exempt charitable organization. When the League denied Fulani's requests to participate in the debates, Fulani brought this suit against the League and the Secretary of the Treasury, seeking to enjoin the League from holding the debates without her and to compel the Treasury to revoke the League's tax exemption on the ground that her exclusion from the debates constituted partisan political activity in contravention of Section 501(c)(3) of the Internal Revenue Code. The district court dismissed Fulani's complaint for lack of standing.

The Second Circuit held that Fulani had standing to challenge the tax exemption of the League of Women Voters Education Fund, but it went on to conclude that the League had not violated Section 501(c)(3) by excluding Fulani from the debates. In concluding that Fulani had standing to press her claims, the majority reasoned that the League's refusal to allow Fulani to participate in the debates resulted in a judicially cognizable injury because the denial to her of media access that had been afforded to the other candidates "palpably impaired [her] ability to compete on an equal footing with other significant presidential candidates." The majority held that this injury was fairly traceable to the League's tax exemption, reasoning that because tax-exempt status is a prerequisite to debate sponsorship under Federal Election Commission regulations, the League would have been disqualified from sponsoring the debates "but for" the Treasury's refusal to revoke the exemption. In the majority's view, Fulani's asserted injuries were also redressable by the requested relief, because the revocation of the League's exemption would have prevented the League's sponsorship of the debates, and her claims were not moot because of their recurring nature. The majority went on to conclude, however, that the League had not violated Section 501(c)(3) by excluding Fulani from the debates in question because she was not competing in the particular primaries targeted by the debates.

Judge Cardamone filed a concurring opinion disagreeing with the majority's holding that Fulani had standing to maintain this action. Judge Cardamone particularly took issue with the majority's conclusion that Fulani's injuries were likely to be redressed by the withdrawal of the tax exemption. Even if that relief were granted, the judge argued, Fulani's access to media exposure would still be dependent upon the actions of third parties not before the court.

* * * * *

Sixth Circuit Hears Oral Argument In Civil Fraud Case Involving Congressman Traficant

Traficant v. Commissioner. On July 24, 1989, oral argument was conducted before Judges Merritt, Nelson and Brown of the Sixth Circuit in this civil fraud case which involves a member of the House of Representatives, representing Youngstown, Ohio. It arises from the Commissioner's determination that Congressman Traficant had not reported as income approximately $108,000 in bribes that he had received. The Tax Court (Judge B. John Williams) upheld the Commissioner's assertion of tax deficiencies, civil fraud penalties and interest against Traficant, totalling over $100,000. At the oral argument, the appellate court focused on Judge Williams' ruling that Traficant, who had claimed the Fifth Amendment privilege against self-incrimination with regard to the authenticity of certain tape-recorded conversations, could not cross-examine Government witnesses with regard to the tapes.

* * * * *

ADMINISTRATIVE ISSUES

Overtime Compensation

In the United States Attorneys' Bulletin, Volume 37, No. 9, dated June 15, 1989, an article appeared addressing overtime pay. From that article arose questions concerning compensatory time off (comp time) in lieu of overtime pay. The following is an abridgment from the previous Bulletin regarding "exempt" and "nonexempt" employees, and answers to questions recently asked about comp time.

Q. What is meant by exempt and nonexempt under the Fair Labor Standards Act (FLSA)?

A. The term "exempt" means an employee is not covered by the provisions of the FLSA. In any event, all employees (attorney and non-attorney) are covered by Title 5 which also provides overtime benefits.

Q. What determines if an employee is exempt or nonexempt under the FLSA?

A. The principal exemptions from overtime provisions of the FLSA are applicable to executive, administrative, and professional employees. For purposes of applying the FLSA to the federal service, these categories of employees are defined as follows:

An executive employee is a supervisor, foreman, or manager who supervises at least three subordinate employees and who meets all of the criteria in the Department of Justice Order 1551.5, Chapter 2. A recent change to the regulations eliminates the presumption that employees GS-11 and above are automatically exempt;

An administrative employee is an advisor, assistant or representative of management, or a specialist in a management or general business function or supporting service whose position meets the criteria in the above cited Order; and

A professional employee exemption category includes, but is broader than, the occupations identified as professional series under the General Schedule and who meet the criteria under the executive employees definition.

Numerous judicial precedents have firmly estblished the principles that FLSA exemptions must be narrowly construed and applied only to employees who are clearly within the terms of the exemptions and the burden of proof rests with the employer who asserts the exemptions. Thus, if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be ruled nonexempt.

Q. Can you, as a supervisor, order a nonexempt employee, to work compensatory (comp time) in lieu of overtime?

A. In accordance with the Department of Justice Order 1551.1c, an employee (exempt or nonexempt), whose rate of basic pay is not greater than the maximum rate for Grade GS-10, must receive overtime pay. **Only the employee may request** comp time equal in amount to the time spent in irregular or occasional overtime work in lieu of overtime pay.

Q. Can you, as a supervisor, order an **exempt** employee (rate of basic pay is in excess of the maximum rate of basic pay of GS-10) to work comp time in lieu of overtime pay?

A. Yes, these employees may be **required** to take comp time instead of overtime pay for irregular or occasional overtime work.

Q. What if there are no funds available for the payment of overtime?

A. An exempt employee whose rate of basic pay is less than GS-10 (currently $34,136) may UPON REQUEST be granted comp time in amount to the time spent in irregular or occasional overtime work in lieu of overtime. An exempt employee whose rate of basic pay is in excess of GS-10, may be ORDERED to work comp time in lieu of overtime. A nonexempt employee may be granted comp time off as a substitute for overtime, ONLY AT HIS/HER REQUEST.

Q. If an employee is unable to use the comp time to his/her credit within a limited time frame, will he/she be paid for the time, just as overtime?

A. Yes. An employee shall be paid for any comp time not used by the end of the leave year following that in which it was earned, providing: (1) the employee has made one or more requests to use the comp time which have been denied; or (2) the latest or only request was made between September 1 and September 30 of the leave year following that in which the comp time was earned. The Personnel Staff of the Executive Office for United States Attorneys will be sending all Administrative Officers more detailed procedures in the near future.

Q. Is there a limit to the number of comp time hours an employee may accrue?

A. Title 10-2.534 states as a rule, an employee should not be permitted to accumulate more than 80 hours of comp time.

Q. If an employee prefers to use annual leave before using comp time to his/her credit, can that be authorized?

A. As a matter of policy, an office may require that comp time earned be taken before using annual leave.

* * * * *

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%
06-01-89	8.85%
06-29-89	8.16%
07-27-89	7.75%
08-24-89	8.27%

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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Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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Guidelines Application

Ninth and Eleventh Circuits disagree as to whether Sentencing Commission may mandate consecutive sentences. In the Ninth Circuit case, defendant was serving a state sentence at the time he was sentenced in the district court. Under guideline § 5G1.3, "[i]f at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences." Prior to taking defendant's plea, the district court did not inform him that the Guidelines required that the sentence imposed be consecutive to his current term. Defendant claimed on appeal that failure to advise him of that fact violated Fed. R. Crim. P. 11.

The appellate court determined that whether a violation of Rule 11 occurred hinged upon whether the consecutive sentence was a "direct consequence" of the plea, of which defendant had to be informed. That issue, in turn, depended upon whether "in this case, the trial judge had discretion to impose a consecutive or concurrent sentence." Guideline § 5G1.3 indicates that the trial judge does not have such discretion, but the court concluded that the guideline conflicts with 18 U.S.C. § 3584(a), which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."

The court held "that a judge has discretion to impose a concurrent or consecutive sentence, as a matter of law, under section 3584(a). First, section 3584(a) unambiguously confers that discretion upon the trial judge.... If the guidelines are to be consistent with Title 18, the discretion cannot be taken away." The court also found that "although the language of the guidelines would deprive the judge of discretion, the Sentencing Commission's commentary suggests that the guidelines are not meant to change section 3584(a), but rather to reflect it." Thus, "the district judge had discretion to impose either a consecutive or concurrent sentence..., the resulting sentence was not a 'direct consequence' of [defendant's] plea... [and t]he judge... did not violate Rule 11." *See also U.S. v. Scott*, No. JH-87-0570 (D. Md. May 23, 1988) (§ 5G1.3 inconsistent with § 3584(a); court will depart from § 5G1.3 when determining whether to impose concurrent or consecutive sentences).

U.S. v. Wills, No. 88-3291 (9th Cir. Aug. 9, 1989) (Leavy, J.).

In the Eleventh Circuit case, defendant argued unsuccessfully that the district court should have allowed her to serve her sentence concurrently with an earlier, unexpired sentence. Citing the discretion given to sentencing courts in 18 U.S.C. § 3584(a), the appellate court found that the Sentencing Reform Act "places limits on the court's discretion in this regard. In considering whether a term should run consecutively or concurrently, the Act requires the court to consider the factors set forth in 18 U.S.C.A. § 3553(a).... That section, in turn requires the court to consider any pertinent policy promulgated by the... Sentencing Commission."

The court cited § 5G1.3 as such a Commission policy, and concluded that "the district court could have ordered appellant to serve her sentence concurrently only if the court had followed the procedures for departing from the sentencing guidelines." *See also U.S. v. Mendez*, 691 F. Supp. 656 (S.D.N.Y. 1988) (holding § 5G1.3 does not conflict with § 3584(a)).

U.S. v. Fossett, No. 88-3904 (11th Cir. Aug. 7, 1989) (Tjoflat, J.).

DETERMINING OFFENSE LEVEL

Recent Cases:

U.S. v. Haynes, No. 88-2277 (8th Cir. Aug. 11, 1989) (Henley, Sr. J.) (defendant acquitted of a Continuing Criminal Enterprise charge may still be given an offense level increase under guideline § 3B1.1(a) for being an organizer or leader based upon his relevant conduct in the criminal activity).

U.S. v. Fuente-Kolbenschlag, No. 88-5424 (11th Cir. Aug. 3, 1989) (per curiam) (increasing offense level under both counterfeiting guideline § 2B5.1(b)(2) for "manufacturing" counterfeit currency, and guideline § 3B1.3 for use of "special skill," does not result in improper "double-enhancement"; also, disputes on overlapping guideline ranges are appealable under 18 U.S.C. § 3742(a)(2) "if the appealing party alleges that the sentencing guidelines have been incorrectly applied, even in cases where the guideline ranges advocated by each of the parties overlap"). *Cf. U.S. v. Bermingham*, 855 F.2d 925 (2d Cir. 1988) (guideline range dispute may be left unresolved if same sentence would be imposed); *U.S. v. Turner*, No. 88-5143 (9th Cir. Aug. 1, 1989) (following *Bermingham*).

U.S. v. Scroggins, No. 88-8218 (11th Cir. July 31, 1989) (Tjoflat, J.) ("loss" under theft guideline § 2B1.1(b) includes cost of repairing property damage, in this case damage to postal vending machines defendant robbed; also, district court properly denied reduction for acceptance of responsibility to defendant who continued to use drugs after his arrest because such use "cast doubt on the sincerity of [defendant's] avowed acceptance of responsibility").

U.S. v. Natal-Rivera, No. 88-2462 (8th Cir. July 14, 1989) (Henley, Sr. J.) (Guidelines do not violate due process, and

district court did not err, by not taking defendant's "cultural heritage" into account as a mitigating factor).

U.S. v. Hewitt, No. 89 Cr. 0025 (S.D.N.Y. Aug. 4, 1989) (Sweet, J.) (when factors relating to defendant's past criminal conduct were used to increase offense level under the criminal livelihood provision, § 4B1.3, court would not use those same factors as basis for upward departure in criminal history category under § 4A1.3—using both sections "would doubly punish defendant for the common nature of his criminal acts, and do so in furtherance of nearly identical sentencing principles. Such sentencing practices involving 'double counting' are inappropriate and, in all likelihood, are unlawful.").

Departures

District court denies request to order government to move for sentence below statutory minimum, notes differences in motions under guideline policy statement § 5K1.1 and 18 U.S.C. § 3553(e). Defendant was subject to a five-year mandatory minimum sentence, and his guideline range was 51–61 months. As part of a written plea agreement the government stated it would "have the option" to move under § 5K1.1 for a departure from the Guidelines if defendant cooperated with the government. The defendant cooperated to some extent, but the government chose not to make the § 5K1.1 motion. Defendant contended he made a good faith effort to cooperate, and was entitled to a departure from the statutory minimum sentence to allow a sentence at the low end of the guideline range, even without a motion by the government.

The court noted that defendant's request for sentencing below the statutory minimum indicated it was actually a request to order the government to make a motion under 18 U.S.C. § 3553(e), which grants a court "the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance" to the government. Section 5K1.1, on the other hand, allows a departure "from the guidelines" if a defendant "has made a good faith effort to provide substantial assistance." The court concluded that, "[b]ecause of the apparent confusion surrounding the distinction between § 3553(e) and § 5K1.1, the Court will construe the plea agreement against the government, the drafter, and will assume the parties used '5K1.1' as the shorthand for a departure from both the Sentencing Guidelines and the statutory minimum."

Although both sections require a motion by the government, and neither section limits the government's discretion, the court found it is "a well established principle" that if a plea was induced by a promise or agreement of the prosecutor, that promise must be fulfilled or the defendant may be entitled to specific performance of the agreement. Thus, in this case, "if the government has breached its obligation under the plea agreement to recommend a departure based upon defendant's assistance, this Court may order specific performance of that promise." In determining whether the government breached its promise, the court noted that "[a]though the government clearly reserved the right to determine whether to recommend a downward departure, it has an obligation to make that determination in good faith."

To determine whether the government acted in good faith, the court had to determine "the standard by which defendant's cooperation is to be measured." Defendant argued that under § 5K1.1 he only had to make "a good faith effort to provide substantial assistance." The court held, however, that since defendant sought a departure from the statutory minimum, "§ 3553(e) provides the relevant standard." Under that standard, defendant must actually provide "substantial assistance," not just make a good faith effort to do so. The facts before the court demonstrated that defendant did not provide substantial assistance, and the government therefore acted in good faith. Defendant's motion was denied.

U.S. v. Nelson, No. 4-89-14 (D. Minn. Aug. 1, 1989) (Doty, J.).

District court finds upward departure justified because defendants hid large sum of stolen money. Defendants pleaded guilty to bank larceny and conspiracy. They had stolen a Wells Fargo truck, and at the time of their arrest almost $1.6 million was not recovered, apparently because defendants hid the money for later use. The guideline range for one defendant was 37–46 months, for the other 30–37 months.

The government urged the court to depart from the guideline ranges and impose the statutory maximum of 15 years against each defendant. The court agreed, finding that the "unique" facts of this case were not adequately considered by the Sentencing Commission: "The Defendants have stashed the proceeds of the crime, and they refuse to disclose the location. They plan to be millionaires upon their release from prison. The Defendants have obviously made a calculated decision—if they have to spend some time in prison, they are going to make it worth their while."

"The Sentencing Commission did not foresee cases in which the Defendants plan to exploit the letter of the law to their financial advantage. . . . A sentence imposed under the guidelines would be unjust. Under these circumstances, it is our duty to depart upward from the guidelines. Only a maximum statutory sentence will thwart the Defendants' attempt to defeat the system. . . . If the Defendants have a change of heart and decide to turn over the money to the Government, we will entertain a motion for reduction of sentence."

U.S. v. Valle, No. 89-080-CR (S.D. Fla. July 19, 1989) (Scott, J.).

Other Recent Case:

U.S. v. Gonzalez, No. 88 Cr. 559 (S.D.N.Y. July 27, 1989) (Haight, J.) (Defendant, mother of three small children, was granted downward departure from guideline sentence requiring short term of confinement and given probation. Although policy statement § 5H1.6 states that "family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the Guidelines," court holds that "the qualifying adverb 'ordinarily' implies that family ties in some circumstances may be considered in a downward adjustment; and where the father is in prison and the imprisonment of the mother would place minor children at hazard, I am prepared to depart from the ordinary," at least "when the mother's involvement is as peripheral as in the case at bar.").

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

Publication of *Guideline Sentencing Update* signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center. On matters of policy the Center speaks only through its Board.

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Sentencing Procedure

Eleventh Circuit holds evidence from a co-conspirator's trial may not be used to resolve dispute over quantity of drugs. Defendant and four others were indicted on drug charges. Defendant pleaded guilty to one count and stipulated that nine ounces of cocaine were involved in the offense. The presentence report, however, stated that over five kilograms were involved. The district court resolved the dispute by relying on testimony presented at the trial of one of defendant's co-conspirators, which supported the five-kilogram figure.

The appellate court held that the "reliance on testimony adduced at the trial of another was fundamental error," and remanded for resentencing. "We have held that a sentencing judge may rely on the evidence presented at the defendant's own trial in resolving disputed facts for sentencing purposes. ... This procedure is entirely proper: such a defendant has had the opportunity to cross-examine the Government's witnesses, make objections to the evidence, and put on his own case .... When the sentencing judge relies on evidence adduced at the trial of another, however, no such procedural guarantees are present." The court noted that, if appellant's testimony at the co-conspirator's trial constituted an admission as to quantity, that testimony could be used for sentencing. The court determined there had been no such admission, however.

U.S. v. Castellanos, No. 88-3535 (11th Cir. Aug. 17, 1989) (Tjoflat, J.).

Sixth Circuit holds burden of proof to avoid weapons enhancement may be placed on defendant to show it was "clearly improbable" that weapon was connected with offense. Defendant was convicted on drug charges. His offense level was increased by two levels under guideline § 2D1.1(b) because he possessed weapons during the commission of the offense. The commentary to that section states the adjustment should be applied "unless it is clearly improbable that the weapon was connected with the offense." Defendant argued on appeal that shifting the burden of proof on the probability of a connection between the weapons and the offense violated due process.

The appellate court rejected defendant's claim, finding that the "possession of a firearm during the commission of a drug offense may fairly be considered by the court as a fact, or bearing on the extent of punishment," rather than "one of the elements of the substantive crime, to be established to the satisfaction of the jury beyond a reasonable doubt. Not all factors that bear on punishment need to be proven before a jury." The court found that Supreme Court cases supported this conclusion, and also rejected defendant's claim that application of § 2D1.1(b) violated his Sixth Amendment right to a jury trial.

U.S. v. McGhee, No. 88-5878 (6th Cir. Aug. 18, 1989) (Nelson, J.).

Other Recent Cases:

U.S. v. Duque, No. 88-3999 (6th Cir. Aug. 24, 1989) (Gilmore, J.) (under 18 U.S.C. § 3553(c)(1), sentencing court need not state reasons for particular sentence within guideline range if that range does not exceed 24 months).

U.S. v. Turner, No. 88-5143 (9th Cir. Aug. 1, 1989) (Alarcon, J.) (sentencing court need not inform defendant of applicable offense level and criminal history category before accepting guilty plea). *See also U.S. v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989) (sentencing court not required to inform defendant of likely guideline sentence before accepting plea, but "where feasible, should").

U.S. v. Ligon, No. CR 88-00013-01-P (W.D. Ky. Aug. 14, 1989) (Siler, C.J.) (following *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989), holding that defendant must "carry the burden of proof in showing acceptance of responsibility").

Guidelines Application

DEPARTURES

Third Circuit finds Sentencing Commission "adequately considered" differences between escapes from secure and non-secure facilities, bars use of proposed guideline changes as basis for departures. Defendant pleaded guilty to escape from a non-secure prison facility. He argued he should receive a downward departure because the Commission failed to distinguish in the escape guideline between escape from a secure prison versus "walking away" from a non-secure prison camp, as evidenced by a Commission request for comment on whether it should reduce the base offense level for escapes from non-secure facilities.

In rejecting defendant's claims, the appellate court noted that, in § 2P1.1(b)(2), the Commission provided for an offense level reduction for escapees from non-secure facilities who returned voluntarily within 96 hours, showing the Commission did, in fact, make a distinction. Also, the May 17, 1989, final amendments to the Guidelines do not include the proposed amendment on which defendant relied, showing that "the Commission obviously rejected the proposal on further consideration. [Defendant's] argument that the Commission has not considered the issue therefore fails without question."

The court also held that "the existence of a proposal for amendment to the Guidelines is not a legitimate ground for departure from them." "[T]he fact that the Commission has invited public comment on a proposed change in no way indicates that it will in fact adopt this change. Any presumption to the contrary would precipitate departures from the Guidelines before the Commission had made a decision," and could deter the Commission from proposing amendments.

U.S. v. Medeiros, No. 89-5296 (3d Cir. Aug. 18, 1989) (Sloviter, J.).

Sixth Circuit outlines standard of review for departures. In upholding a departure to a six-year term from the guideline range of 30–37 months, the court determined it would follow the three-step process for review of departures outlined by the First Circuit in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989). The court also agreed with the Fifth Circuit, in *U.S. v. Roberson*, 872 F.2d 597 (5th Cir. 1989), that "'[t]he court's discretion to depart from the Guidelines is broad.'"

The court held that two factors used by the district court to justify departure were invalid: "defendant's national origin is not a factor which the court should consider in sentencing under the Guidelines," and "defendant's inability to speak English, while not specifically addressed in the Guidelines, is similarly a factor irrelevant to sentencing." Other factors used by the district court were valid, however, including defendant's illegal entry into the U.S. while serving a foreign sentence, dependence on criminal activity, and propensity to commit future crimes. "While one of the factors found in the present case standing alone might not support the court's sentence, seen as a whole, the sentence is permissible."

U.S. v. Rodrequez, No. 88-3604 (6th Cir. Aug. 15, 1989) (Milburn, J.).

Other Recent Case:

U.S. v. Akhtar, No. 89 CR. 0264 (S.D.N.Y. Aug. 1, 1989) (Sweet, J.) (on government's motion pursuant to guideline policy statement § 5K1.1 and 18 U.S.C. § 3553(e), court departed from guideline range of 97–121 months to impose sentence of one year and one day).

Determining Offense Level

Ninth Circuit holds conduct that does not result in a conviction should not be grouped with counts of conviction in setting guideline range for narcotics offense. Defendant was convicted of two counts of distributing cocaine. At the trial and at the sentencing hearing, a codefendant testified that defendant was involved in two other instances of cocaine possession. The sentencing court found that all four instances were part of a common scheme or plan in which defendant participated, and used the total amount of cocaine to set the offense level. Defendant claimed that the language of the multiple counts, or "grouping," guideline allows a court to use only the quantity of drugs in the offenses of conviction.

In a divided opinion, the appellate court agreed: "In our view, the Multiple Counts section, by its explicit terms, applies only to counts of which the defendant has been convicted. . . . [T]he opening sentence of the Multiple Counts section refers to 'all the counts of which the defendant is convicted,' Guidelines at 3.9 . . . , and Section 3D1.1 provides instructions for when 'a defendant has been convicted of more than one count . . . .' Guidelines at 3.10." The court concluded that "language that the government cites in the Relevant Conduct section—which provides that conduct related to counts of conviction can be grouped together with conduct not related to any count of conviction—conflicts with the above quoted language of the Multiple Counts section."

"At best," the court determined, "the Guidelines are ambiguous because they support both the interpretation offered by [defendant] and the interpretation offered by the Government. Given this ambiguity, our interpretation of the Guidelines should be informed by the 'rule of lenity.'" Applying that rule, the court held that "the district court erred in interpreting the Multiple Counts section of the Guidelines to require aggregation under subsections 3D1.2(d) and 1B1.3(a)(2) of quantities of drugs involved in counts of which [defendant] was convicted with quantities of drugs involved in counts of which [defendant] was neither charged nor convicted."

The dissenting judge found that the "Guidelines, read in conjunction with the commentary sections, are not ambiguous," and the quantities could be aggregated.

U.S. v. Restrepo, No. 88-3207 (9th Cir. Aug. 24, 1989) (Pregerson, J.) (Boochever, Sr. J., dissenting).

Other Recent Cases:

U.S. v. Rodriguez-Reyes, No. 89-2115 (5th Cir. Aug. 14, 1989) (Reavley, J.) (agreeing with First and Third Circuits that career offenders under guideline § 4B1.1 may not receive acceptance of responsibility reduction; agreeing with First Circuit that district court may account for it by sentencing at lower end of guideline range). *See U.S. v. Alves*, 873 F.2d 495 (1st Cir. 1989); *U.S. v. Huff*, 873 F.2d 709 (3d Cir. 1989).

U.S. v. Cain, No. 88-3977 (11th Cir. Aug. 11, 1989) (per curiam) (count of retaining and concealing stolen U.S. Treasury checks, guideline § 2B5.2, should be grouped pursuant to § 3D1.2 with counts of willfully possessing same stolen checks, § 2B1.1).

U.S. v. Williams, No. 88-2698 (8th Cir. July 20, 1989) (Gibson, Sr. J.) (increase pursuant to guideline § 2K2.2(b)(1) for stolen firearm does not require that defendant knew firearm was stolen; also, conduct in dismissed counts may be considered for adjustments to offense level).

U.S. v. Donatiu, No. 88 CR 441 (N.D. Ill. Aug. 3, 1989) (Rovner, J.) ("court must follow [guideline policy statement] § 5K1.1 in departing from a guideline sentence based on a defendant's substantial assistance," and the court "may not depart unless the government first brings a motion").

U.S. v. Lester, No. 89-13-A (W.D. Va. Aug. 2, 1989) (Williams, Sr. J.). (Defendant who claimed acceptance of responsibility at sentencing hearing would not be given that reduction—he previously told probation officer he had been entrapped, and had told two or three different stories about the offense. Court reasoned that truthfulness and actions of defendant are factors to consider for acceptance of responsibility.).

STATEMENT OF DICK THORNBURGH, ATTORNEY GENERAL, BEFORE THE COMMITTEE ON THE JUDICIARY AND THE COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE CONCERNING ORGANIZED CRIME STRIKE FORCES SEPTEMBER 8, 1989

I am pleased to testify today with regard to the Department of Justice plan to merge the present separate field offices of the Organized Crime and Racketeering Section (OCRS) of our Criminal Division into the United States Attorneys' offices.

At the outset, let me point out that those who characterize this plan as one to abolish these offices, known popularly as Strike Forces, are mistaken. Our merger plan is, in fact, designed to strengthen the fight against organized crime through efficient coordination and by making more resources available to the effort, reducing confusion and overlapping jurisdiction, and providing overall management through a newly-established Organized Crime Council in Washington.

What we are talking about, to a large extent, is a change that is more bureaucratic and managerial than substantive. To the public and to prospective targets of our organized crime fight, the day following the consolidation will be little different from the day preceding it. Over time, however, I believe this consolidation can lead to more prosecutions, more convictions, and to a more effective enforcement program. I have personally devoted a major portion of the past twenty years to the fight against organized crime. As a United States Attorney in Pittsburgh from 1969 to 1975, I worked closely with the Strike Force Office in Western Pennsylvania, which was established at my request in order to obtain the necessary personnel to step up our investigative and prospective capabilities. We empaneled the very first special grand jury in

the nation under the Organized Crime Control Act of 1970 to mount an unprecedented attack on mob activities including gambling, narcotics, extortion, labor racketeering and public corruption in Western Pennsylvania, utilizing new tools such as court-authorized wire tapping and witness immunity statutes, and I personally prosecuted a number of cases against major racket figures and corrupt public officials.

By appointment of then Attorney General Elliot Richardson, I also chaired a committee of United States Attorneys appointed in 1973 to examine relationships between our offices and the Strike Force offices across the nation.

Thereafter, I served as Assistant Attorney General in charge of the Criminal Division during the tenure of Attorney General Edward Levi, under whose direction in 1975 I commenced an office-by-office review of strike force operations under my jurisdiction, in response to continuing concerns expressed by the United States Attorneys, a review again designed to strengthen our overall anti-organized crime effort.

While Governor of Pennsylvania from 1979 to 1987, I created the first organized crime unit within our State Police, supported legislation creating court-authorized wiretapping and witness immunity laws, empaneled the first statewide grand jury to investigate organized crime activities and, in cooperation with the state's attorney general, our crime commission and federal

authorities, undertook efforts to contain the influence of organized crime as a high priority for our state.

That priority for the nation continues to this day in my service as Attorney General. Today, however, we find ourselves in an era when the traditional elements of organized crime are changing their tactics and new criminal organizations and techniques are emerging. This, we feel, requires new approaches and a new configuration in our efforts.

Prior Proposals to Consolidate

The Organized Crime Strike Force program, initiated in 1967 by Attorney General Ramsey Clark, has evolved into 14 permanent field offices employing approximately 130 attorneys. As early as 1970, the merger of the Strike Forces into the United States Attorneys' Offices was recommended by the Presidential Council on Executive Organization (the Ash Council). That recommendation was next repeated by the Attorney General's Advisory Committee of United States Attorneys in 1974, which recommendations were implemented in part during my tenure as Assistant Attorney General.

Again in February, 1987, the Attorney General's Advisory Committee (AGAC) submitted a formal recommendation to consolidate the Strike Forces to Attorney General Meese. That report urged that the consolidation take place largely in order to permit the United States Attorney in each district to direct all the law enforcement efforts in his or her district. The 1987 report

noted that consolidation had already occurred in several districts, most notably in the Southern District of New York (Manhattan and Westchester County), where the results had been extraordinary, compiling a record of racket busting under four successive U.S. Attorneys unmatched anywhere in the country.

Attorney General Meese adopted some of the recommendations of the 1987 Report. Specifically, the Attorney General directed that the United States Attorney must thenceforth approve all significant Strike Force activities in advance and that the United States Attorney, rather than the OCRS Chief in the Criminal Division, should be the performance rating official for the Strike Force Chief, changes incorporated in the consolidation plan that I have sent to Congress.

More recently, in April of this year the General Accounting Office (GAO) issued a report which stopped just short of recommending merger. The GAO did identify several continuing impediments to efficient law enforcement that the consolidation is designed to eliminate. Specifically, the consolidation will end "prosecutor shopping" by investigative agencies and will eliminate the "turf battles" that have been noted in the present system. Further, consolidation of the offices would centralize the accountability for prosecuting crime in a district and would encourage U.S. Attorneys to dedicate their resources strategically to combat organized crime.

One of the difficulties faced by the Department of Justice today in our war on organized crime is the identification, in the early stages of an investigation, of organized crime elements. Let me illustrate by example. In the case of local corruption, or of drug importation, or of protection rackets or union pension fund manipulation, the question is now asked: is this an organized crime case? If it is, then the FBI refers the case to the Strike Force, which reports to Washington, and that entity undertakes the case. If it is not, the FBI refers the case to the United States Attorney who handles it. As it happens, cases often change their character as investigations develop. Because the process of transferring a case from one office to the other is cumbersome, Strike Forces have prosecuted "non-organized crime" cases and United States Attorneys often have prosecuted "organized crime" cases. Moreover, different aspects of the same investigation may have both organized crime and non-organized crime aspects.

I would like to mention one other development which has occurred since the initiation of the Strike Force program in 1967. During this interval the overall quality, quantity and independence of the United States Attorneys and their assistants has measurably increased. While I personally believe that United States Attorney's Offices in 1967 were up to the task of combatting organized crime, with appropriate support from Washington, what I believed then is now undeniably true. The

United States Attorneys and their greatly enlarged staffs are now recognized as dedicated professionals widely respected within their districts.

The Planned Consolidation

The essential features of the planned consolidation are as follows:

a. All attorneys and staff in the Strike Force Offices will be transferred to the United States Attorneys' Offices, and the current commitments to hire will be honored by the United States Attorneys' Offices, except as set out in paragraph (c). There will be no reduction in positions dedicated to the Organized Crime effort.

b. Each United States Attorney's Office in a district where a Strike Force exists will incorporate the Strike Force Unit within its office. These units will retain the name of "Strike Force" for the purpose of public recognition and to insure the continuity of their mission. The Organized Crime Council provided for in paragraph (d) shall be advised of changes in attorney personnel assigned to each unit.

c. A strategic reserve of experienced prosecutors will be established in the OCRS by recruiting approximately 20 additional lawyers and 10 additional support staff from the existing Strike Forces and elsewhere to be brought to Washington. These lawyers will assist and conduct prosecutions where needed. In addition, these lawyers will be available to identify and to target emerging criminal organizations.

d. An Organized Crime Council will be established to oversee the national effort against organized crime. That Council will be chaired by the Attorney General, and will consist of the Deputy Attorney General, the Assistant Attorney General, Criminal Division, a designee of the AGAC and the head of each concerned federal investigative agency. The Council will review policies, promote interagency coordination and will review priorities and evaluate the threat presented by emerging organized crime elements to establish national priorities. Within 60 days of the initiation of the consolidation, each United States Attorney in a district where a Strike Force exists shall submit to the Chairman of the Organized Crime Council a written strategic plan to identify and to address organized crime

conditions in that district. From these plans, the Council shall formulate a national strategy for the investigation and prosecution of organized crime. The Council or its representatives will conduct field visits of each Strike Force Unit on a biennial basis and will report to the Attorney General with regard to the implementation of the national strategy developed by the Council.

e. The existing organized crime case management system will remain intact. The Strike Force Unit in each United States Attorney's Office will report case initiations and prosecution memoranda to the OCRS for approval and will report all other significant developments to the OCRS and to the Executive Office for United States Attorneys. These reports will serve two functions: (i) to keep in place the same controls and standards in the opening of new cases to be handled by Strike Force Units, and (ii) to maintain a uniform record keeping system for organized crime cases consistent with that used in the past.

f. The United States Attorney would name the head of the Strike Force in his or her district, with the concurrence of the Assistant Attorney General, Criminal Division. Decisions as to the hiring or transfer of Strike Force attorneys within a District will be made by the United States Attorney with the concurrence of the Assistant Attorney General, Criminal Division.

g. Commencing in the calendar year following the consolidation, and annually thereafter, the OCRS will report to the Organized Crime Council on the status of each of the Strike Force Units consolidated into a United States Attorney's Office.

Reasons for the Consolidation

The critical benefit from the consolidation is that the Department will be able to utilize finite resources more comprehensively against organized crime. This is particularly true in those offices where United States Attorneys are actively prosecuting traditional organized crime elements with their own resources, or where they are facing the threat of emerging criminal groups and are trying to determine who should target

those groups. After the consolidation, the United States Attorney will know better which activities to target within the district, because he or she will know exactly what resources are available. For example, the infiltration of a local union by organized crime elements today could be the long-range focus of either a U.S. Attorney or a Strike Force office. Consolidation will encourage a U.S. Attorney to dedicate his or her own Strike Force unit as well as any Assistant U. S. Attorneys handling related cases.

It is essential to the effective investigation and prosecution of all these cases that the witnesses in the cases, the investigators and the cooperating government entities involved in these cases have a single prosecutor to whom to turn. One prosecutor should be responsible, and that prosecutor should be the United States Attorney -- the chief federal law enforcement officer in his or her district.

The proposed merger would enable the government to undertake a truly unified approach in the war against organized crime, unencumbered by artificial jurisdictional boundaries.

While the consolidation is planned, in part, to alleviate the problems of the past, equally important, it will also give the Department's organized crime program the flexibility needed to pursue newly-emerging organized crime groups and to respond to

changes in traditional organized crime elements. It is this look to the future of organized crime that particularly convinces me that the consolidation of the Strike Forces with the United States Attorneys' Offices is a necessary and desirable course.

The emergence of newer criminal groups, such as the Colombian drug cartels, Asian organized crime groups, the Jamaican posses, Los Angeles street gangs and others, poses new threats in certain areas of the country, and while these threats differ little from those of traditional organized crime elements, they are not being addressed on a coordinated national basis. Strike Force Offices have been slow to pick up on these emerging groups, and yet those groups deserve the same intensive prosecutive effort that the Strike Forces have given to the traditional organized crime groups in the past.

If the U.S. Attorney is able to direct the assets of the Strike Force offices, he or she will be able to coordinate the overall law enforcement effort in the district against organized crime. This will avoid duplication of effort or, worse, mutual restraint in an area where aggressive prosecution is needed.

The model for this consolidation proposal is, in fact, the highly productive effort dealing with the drug problem being carried out by the thirteen Organized Crime Drug Enforcement Task Forces (OCDETF), each headed by United States Attorneys and coordinating the anti-drug efforts of numerous federal agencies as well as state and local efforts, a program described in

President Bush's National Drug Control Strategy this week as "a model in interagency coordination." It is significant, I believe, that this model has been utilized to attack our number one crime problem -- drugs -- rather than the independent and separate "strike force" model.

A second benefit to consolidating the Strike Forces with the United States Attorneys' Offices is that the local influences of the United States Attorney as chief federal law enforcement officer can be used to forge more effective alliances with local district attorneys, state attorneys general, and other state and local law enforcement agencies combating organized crime.

The Organized Crime Council

The plan for consolidation also provides for the creation of an Organized Crime Council, which will receive and coordinate the various plans submitted by the U.S. Attorneys in order to formulate and monitor a true national strategy in the war on organized crime. As chair of the Council, I can assure you this oversight function will be active and effective.

In addition to providing policy guidance and national coordination in the war on organized crime, the Council will monitor the programs instituted by each of the Strike Force units. Personnel changes within those units will be made by the United States Attorneys only with the concurrence of the head of the Criminal Division and will be reported to the Council, so

that any attempted dissipation of Strike Force resources would be quickly evident to the Department and the Council.

The Organized Crime And Racketeering Section

Here in Washington, we will also increase the size of the OCRS to provide a cadre of experienced prosecutors to try cases wherever necessary. The main purpose of this strategic reserve of attorneys will be to restore the original mobile, "hit and run" nature of the Strike Forces as created in the 60s before they became permanently established as alternate prosecutive units. The availability of these resources will guarantee that cases that should be investigated and prosecuted are investigated and prosecuted anywhere in the country. In addition, this group of prosecutors will be available for use at the direction of the Organized Crime Council to target emerging groups engaged in organized crime.

The OCRS will also continue to perform two important present functions: reviewing case initiation and prosecution decisions and providing expert prosecutors to try cases as needed.

The Review Process

When organized crime cases are initiated, and when the decision to prosecute is made, the Strike Force Unit in the United States Attorney's Office will be required to obtain the approval of the Organized Crime and Racketeering Section. This review and approval process is designed to insure that prosecutions will continue to meet the standards for organized

crime cases. The concern that I have heard expressed by some in Congress -- that the unit will be flooded by the routine work of the United States Attorney's Office -- will be insured against by this review process. Moreover, with this approval process, the Section will be better able to implement the national organized crime priorities established by the Organized Crime Council.

This review and approval process is a very workable option. The Criminal Division already exercises such review and approval with respect to several other types of prosecutions; the OCRS must approve the use of RICO in criminal cases; the Internal Security Section must approve espionage charges; and the Public Integrity Section must approve Hobbs Act prosecutions.

Forfeitures

Developments in the law since the early days of the Strike Forces have made the proposed consolidation even more compelling. As the 1986 Presidential Commission on Organized Crime noted, an important component in the fight against organized crime is the use of the civil forfeiture provisions under RICO. The Congress has appropriated money in the last few years to beef up the forfeiture program. Through that forfeiture program, the government has been enabled, finally, to get at the assets of criminal organizations, and to actually strip them of the fruits of their illegal labor. United States Attorneys' Offices have developed considerable experience in the area of civil forfeitures, and can use that expertise to attack the same

organizations that the Strike Force units prosecute. Locating both those units, the Forfeiture unit and the Strike Force unit, within a single United States Attorney's Office will obviously enhance their coordination and makes undeniable good sense.

Continuity In Strike Force Offices

I expect individual Strike Force attorneys assigned to the new Strike Force Units to remain there for many years, providing the continuity and experience that have been two of the traditional arguments in favor of separate Strike Force offices. I believe that the creation of such units would be useful, moreover, to counteract the "burn-out" that attorneys sometimes feel in U.S. Attorneys' offices, and would permit attorneys to transfer into or out of Strike Force units without severing the professional ties they have developed. Further, the higher pay scale in United States Attorneys' offices will eliminate the situation we now face where Strike Force Attorneys can be lured to a United States Attorney's office with the promise of higher pay for comparable work, although both offices remain undercompensated in today's legal market.

Because personnel changes in the units will necessarily be reported back to the Organized Crime Council there will be an institutional check to determine if personnel changes are serving

to dissipate experience accrued in Strike Force Offices. It is my belief that the experience level will not diminish in the proposed consolidation.

Let me describe a case in point. Jeremiah O'Sullivan, who is scheduled to testify today, recently left the Boston Strike Force. One of the most experienced attorneys in the Strike Force was Diane Kottmyer, and she applied to succeed him. Wayne Budd, the United States Attorney in Boston, knew her and believed that she would be a fit replacement and would be someone he could work with easily, and therefore recommended her. That recommendation was endorsed by the OCRS and was approved by the Assistant Attorney General for the Criminal Division and she is in place today. That is the way it should have worked five years ago; that is the way it works today; that is the way it will work five years from now under the consolidation plan.

Cost Efficiencies

Another benefit to consolidation relates to certain efficiencies that would be realized from economies of scale and from a termination of duplicative efforts. There will be no need, for example, to have two law libraries or two telephone systems. In most cases, a United States Attorney's Office and a Strike force unit would be able to share a single minicomputer in Project Eagle, the Department's data processing and word processing system, rather than requiring one for each office. Each of those minicomputers

costs thousands of dollars. Other economies of scale can result from merging other administrative functions. In an era of scarce resources and budget cutting, this could be a significant benefit.

The FBI Response to the Plan

FBI offices who have dealt with Strike Force offices have been canvassed about the proposed consolidation. The majority of the offices favored the consolidation. Those who did not endorse the consolidation based their reservations on their desire that a single purpose prosecutive unit be maintained to combat organized crime. That concern derives, I believe, from misleading reports about this proposal. The FBI offices do not want to see the single purpose unit disappear, and neither do I. Once it is made clear that the continuity of the Strike Force mission is the first priority of the Strike Force units, I have no doubt that those FBI offices that have thus far expressed some concern will embrace the consolidation as a fit substitute for a confusing and inefficient dual prosecution system.

I would like to point out that I agree with some of the points made by the FBI offices. In fact, they describe many of the problems that the consolidation is intended to eliminate. Specifically, it is clear that the effectiveness of the Strike

Force office has often been dependent on the ability to blend the personality of the Strike Force Chief and the United States Attorney. The consolidation will eliminate that need and relieve that situation.

Other Concerns

Since I first raised the possibility of a merger last winter, a number of mistaken charges have been made, most notably that the consolidation represents a dissipation of the effort against the traditional elements of organized crime. As I reported above, the reverse is true.

Others have said Strike Force attorneys, as career prosecutors, serve longer than the average Assistant United States Attorney. The statistics simply do not bear that out. Good, experienced prosecutors exist in abundance within both groups.

Some critics have even suggested that U.S. Attorneys will not be interested in long term work on complex organized crime cases. As members of this committee well know, this is a wholly unfair and unjustified charge. Each of you know many of our U.S. Attorneys personally and many of you have cooperated in the selection of these presidentially-appointed prosecutors -- prosecutors who are proving their ability daily to handle complex securities, tax, fraud and corruption cases, as well as their share of organized crime cases.

Put simply, this proposal to consolidate the Strike Forces with the United States Attorneys' Offices will enhance, rather than diminish, our continued strong, high priority effort against organized crime. It is time to get on with this fight, and not waste further time on continued arguments based on assertions such as those mentioned above.

It is time to add the 93 United States Attorneys offices to a new coordinated and revitalized effort against organized crime across this nation.