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Table Of Contents Page

Points To Remember (Cont'd.)

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COMMENDATIONS

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

Ivan Abrams (District of Arizona), by Bruce W. Bowers, Arizona Prosecuting Attorneys' Advisory Council, Phoenix, for his excellent presentation on the subject of search and seizure at a Constitutional Law Seminar attended by over 100 prosecutors throughout Arizona.

Jeffrey M. Anderson (Wisconsin, Western District), by Ted Meekma, Executive Director, State of Wisconsin, Office of Justice Assistance, Madison, for his role in organizing and conducting a District Attorneys' conference in Stevens Point on the prosecution of drug cases.

Mark R. Bailey (District of Oregon), by Dick Thornburgh, Attorney General, Department of Justice, Washington, D.C., for his valuable assistance to United States Attorney Charles H. Turner in the prosecution of a Mexican drug trafficking organization.

Richard Banks (Texas, Southern District), was awarded a Certificate of Appreciation by William Lannan, Forest Service Supervisor, Department of Agriculture, Lufkin, for his excellent representation on behalf of the U.S. Forest Service in a number of cases in the past year.

Robert A. Behlen, Jr. (Ohio, Southern District), by P. Lynn Peterson, Acting Chief, Solid Waste and Emergency Response Branch, Environmental Protection Agency, Chicago, for his assistance in obtaining court clearance to access a site suspected of radioactivity contamination.

Daniel J. Cassidy (District of Colorado), by Albert Reilly, Training Officer, DEA, Phoenix, for his excellent presentation on targeting drug traffickers at a recent DEA Asset Removal Seminar in Scottsdale.

Patricia A. Conover (Alabama, Middle District), by Joseph S. Cage, Jr., United States Attorney, Western District of Louisiana, for providing valuable assistance to his staff in a bankruptcy prosecution.

Mary Farnan (Texas, Southern District), by Bill Daley, Regional Counsel, Department of Housing and Urban Development, Fort Worth, for her professional skill in managing a complex HUD project in bankruptcy proceedings.

Peter E. Gelhaar (District of Massachusetts), by William S. Sessions, Director, FBI, Washington, D.C., for successfully defending a Special Agent in a trial involving allegations of a constitutional violation and other technical issues.

Barbara Koppa Gerolamo (Pennsylvania, Eastern District), by Henry P. Cullerton, Regional Auditor General, Department of the Army, Philadelphia, for her outstanding representation in a discrimination case.

Stephen R. Graben (Mississippi, Southern District), by Captain H.H. Lewis, Jr., Commanding Officer, U.S. Navy, Gulfport, for his successful prosecution of a complex civil litigation action on behalf of the Naval Construction Battalion Center.

Geneva S. Halliday (Michigan, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for her legal skill and expertise resulting in the dismissal of a case against the FBI.

Amy Reynolds Hay (Pennsylvania, Western District), by James S. Green, Acting General Counsel, Office of Personnel Management, Washington, D.C., for obtaining a favorable decision in a recent civil case.

Linda Hoffa (Pennsylvania, Eastern District), by Thomas Bera, Assistant Vice President-Auditing, Consolidated Rail Corporation, Philadelphia, for her professionalism and legal skill in the preparation and trial of a case involving mail fraud and interstate transportation of a financial instrument obtained by fraud.

Joseph M. Hollomon and **Peter Barrett** (Mississippi, Southern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for their valuable assistance in a number of labor union investigations.

Timothy Holtzen (District of Arizona), by Bruce W. Bowers, Arizona Prosecuting Attorneys' Advisory Council, Phoenix, for his excellent presentation on the subject of Batson issues at a Constitutional Law Seminar attended by over 100 prosecutors throughout Arizona.

Ronald D. Howen (District of Idaho), by Travis Breckon, Deputy Sheriff, Contra Costa County Superior Court, Martinez, California, for his professionalism and skill in the preparation and trial of an unlawful wiretapping case.

Bill Hunt and **Kathy Brinkman** (Ohio, Southern District), by William R. Britt, Chief, Criminal Investigation Division, Internal Revenue Service, Cincinnati, for their outstanding legal skills in prosecuting a complex criminal case.

Jay T. Karahan and **John Kyles** (Texas, Southern District), by George F. Taylor, Chief, Contract Operations, Defense Logistics Agency, Department of Defense, San Antonio, for their successful prosecution of the Camtron case involving an attempt to defraud the government.

J. Philip Klingeberger and **Robin W. Morlock** (Indiana, Northern District), by Ross E. Springer, District Counsel, Internal Revenue Service, Indianapolis, for their excellent representation in a high volume of bankruptcy cases relating to IRS.

Mary Beth Kotcella (Pennsylvania, Western District), by Lyle L. Karn, District Director, Immigration and Naturalization Service, Pittsburgh, for her outstanding representation in a discrimination suit brought by a former employee.

Kim R. Lindquist (District of Idaho), was presented a plaque by Special Agents of the Fish and Wildlife Service, Spokane, Washington in appreciation for his excellent representation in their behalf.

David F. McComb (Pennsylvania, Eastern District), by James J. West, United States Attorney, Middle District of Pennsylvania, for his successful prosecution of a civil case brought against him by 16 former employees of the Pennsylvania Auditor General's Office.

Dan H. Mills (Texas, Western District), by Donald Mancuso, Assistant Inspector General for Investigations, Department of Defense, Arlington, Virginia, for obtaining the conviction of a psychologist on 37 counts of submitting false claims to the Civilian Health and Medical Program of the Uniformed Services.

Chalk Mitchell (District of Colorado), by John Stuhldreher, General Counsel, National Transportation Safety Board, Washington, D.C., for his legal support in connection with a recent District Court case to be appealed to the 10th Circuit Court of Appeals.

Charles R. Niven (Alabama, Middle District), was awarded a Certificate of Appreciation from Special Agent Thomas W. Stokes, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Atlanta, for his outstanding services to the Atlanta District and his successful prosecution of an explosives case.

Stephen C. Peters (District of Colorado), by Derle Rudd, Regional Inspector, Internal Revenue Service, Dallas, for his professional skill in conducting an unusual and unique case involving the burglary of an IRS office in Denver.

Thomas O. Plouff (Indiana, Northern District), by John A. Gibson, Regional Inspector, Internal Revenue Service, Cincinnati, for his participation in a recent CPE training program in Columbus.

Stephen L. Schirle (California, Northern District), by Joseph R. Davis, Assistant Director-Legal Counsel, FBI, Washington, D.C., for his successful defense of the FBI and a Special Agent in Charge in a complex civil action.

D. Broward Segrest (Alabama, Middle District), by Edward S.G. Dennis, Jr., Acting Deputy Attorney General and Assistant Attorney General, Criminal Division, Department of Justice, Washington, D.C. for the successful prosecution of two defendants on numerous counts, including conversion of the Army's Secret Anti-Armor Master Plan.

James Seykora and **Bernie Hubley** (District of Montana), by Raymond J. McKinnon, Special Agent in Charge, DEA, Seattle, for their legal skill and expertise in bringing a drug trafficking case to a successful conclusion.

Tom Self (Kentucky, Eastern District), by Lloyd E. Dean, Special Agent in Charge, FBI, Fort Mitchell, for his outstanding success in prosecuting a case involving a chop shop operation and his presentation of an undercover drug case.

L. Lee Smith (Illinois, Central District), received an Honorary Special Agent Award from the Chief of the Criminal Investigation Division, Internal Revenue Service, Chicago, and the Acting Chief of the Criminal Investigation Division, Internal Revenue Service, Springfield, for successfully prosecuting over 30 criminal cases as well as other civil litigations.

James B. Tucker, Patricia W. Bennett, Ruth R. Harris, Nicholas B. Phillips, Richard Starrett, Joseph M. Hollomon, Peter H. Barrett, and Frank Violanti (Mississippi, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding assistance in detecting and investigating cases of public corruption, particularly Operation Pretense, which resulted in the convictions of 59 subjects and two Public Service Commissioners on kickbacks and rate-fixing charges.

David N. Usry (Mississippi, Southern District), by John B. Harper, District Counsel, Internal Revenue Service, Birmingham, for his legal skill and professionalism in a Chapter 11 bankruptcy case involving an underlying issue of federal income tax law.

John W. Vaudreuil (Wisconsin, Western District), by Thomas J. Tantillo, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his successful prosecution of an embezzlement case.

Catherine Votaw (Pennsylvania, Eastern District), by Thomas C. Rapone, United States Marshal, Philadelphia, for her valuable assistance in a case involving two court-ordered Marshals sales of contested parcels of land. Also, by Michael F. Hertz, Director, Commercial Litigation Branch,

Michael F. Hertz, Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C. for obtaining a favorable decision in the Third Circuit Court of Appeals concerning parallel proceedings.

Stewart C. Walz (District of Utah), received the prestigious inaugural Excellence in Advocacy by a Government Attorney Award from the Utah Federal Bar Association.

Craig A. Weier (Michigan, Eastern District), by Renald P. Morani, Acting Inspector General, Department of Veterans Affairs, Washington, D.C., for his support and assistance to the Kansas City investigative staff in two home loan guaranty fraud cases.

Donetta Wiethe (Ohio, Southern District), by Robert L. Brown, District Director, Immigration and Naturalization Service, Cleveland, for bringing a civil action to a favorable conclusion.

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SPECIAL COMMENDATION FOR THE DISTRICT OF MASSACHUSETTS

Victor A. Wild, Assistant United States Attorney for the District of Massachusetts, was commended by R.G.H. Seitz, Assistant Secretary of State for European and Canadian Affairs, Department of State, and Vassilios Papaioanou, Consul General of Greece in Boston, for his valuable assistance in connection with the taking of a formal deposition of Georgios Koskotas by a visiting investigatory committee consisting of four members of the Greek Parliament.

On Thanksgiving night 1988, AUSA Wild obtained a provisional arrest warrant charging Mr. Koskotas with embezzling $280 million from the Bank of Crete. After an extradition hearing in July, he obtained an Order of Extraditability for Koskotas' return to Athens for prosecution. Pending review of Koskotas' Petition for Habeas Corpus in this country, the Greek Parliament initiated investigation of former Prime Minister Andreas Papandreou and four Cabinet members. As the investigatory committee was under a strict deadline to formally report to Parliament, the Department of State considered it important that the United States be as responsive as our law would allow. Working closely with the Office of the Legal Adviser at the Department of State and the Office of International Affairs of the Criminal Division, AUSA Wild considered the merits of the request and arranged the deposition of Koskotas on September 8, 1989. Mr. Papandreou and other public officials were subsequently indicted by the Greek Parliament on criminal charges.

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PERSONNEL

On November 8, 1989, **Donald B. Ayer** was sworn in as Deputy Attorney General. Mr. Ayer previously served as Deputy Solicitor General and Counselor to the Solicitor General from 1986 to 1988, and United States Attorney for the Eastern District of California from 1981 to 1986.

On October 31, 1989, **Stuart M. Gerson** was sworn in as Assistant Attorney General for the Civil Division. Mr. Gerson was formerly a partner in the law firm of Epstein, Becker and Green, Washington, D.C.

On October 26, 1989, **Gene McNary** was sworn in as Commissioner of the Immigration and Naturalization Service.

On November 6, 1989, **K. Michael Moore, United States Attorney for the Northern District of Florida,** was appointed as Director of the United States Marshals Service.

On October 25, 1989, **Patrick Trueman** was named Director of the Obscenity Enforcement Unit of the Criminal Division. **Mary Spearing** was named Deputy Director of the Unit.

On October 8, 1989, **Timothy D. Leonard** became the Interim United States Attorney for the Western District of Oklahoma.

On November 6, 1989, **Ronald F. Ederer** became the Interim United States Attorney for the Western District of Texas.

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SENTENCING GUIDELINES

Sentencing Guidelines Amendments

The United States Sentencing Commission has prepared a Sentencing Guidelines Manual which incorporates the amendments that became effective November 1, 1989. Copies of these guidelines have been distributed to all United States Attorneys' Offices.

If you need additional copies, a limited supply is available by contacting the Legal Counsel staff of the Executive Office for United States Attorneys at FTS/202-633-4024. Also, the guidelines will soon be available on JURIS.

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Guidelines Sentencing Update

A copy of the "Guideline Sentencing Update," Volume 2, Number 15, dated October 30, 1989, is attached at the Appendix of this Bulletin as Exhibit A.

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Motions To Compel Discovery Of Information Affecting Guideline Sentencing

John Stuart Bruce, First Assistant United States Attorney, Eastern District of North Carolina (919/856-4530 or FTS 672-4530) has prepared the following summary of a recent District Court decision in United States of America v. Lloyd Neill Strickland, No. 89-24-01-CR-7:

> In all guideline cases, the Federal Public Defender in the Eastern District has been sending us letters requesting pretrial discovery of information relating to the defendant's guideline sentence. We declined to give any formal discovery of such beyond the normal requirements of pretrial discovery. The Federal Public Defender elected to make United States v. Strickland, No. 89-24-01-CR-7 (E.D.N.C. 1989) a test case on the issue. Strickland filed a motion to compel the government to provide the requested discovery. The Magistrate denied the motion, and the defendant appealed to the district judge. After briefing and argument, the court sustained the government's position by denying the motion. The court held that "the requirements of [Fed. R. Crim. P.] 11 are met if a defendant is informed of the maximum and minimum sentence for the offense with which he is charged." The court cited United States v. Sweeney, 878 F.2d 68 (2d Cir. 1989) and United States v. Turner, 881 F.2d 684 (9th Cir. 1989). Concluded the court, "defense counsel is in no greater need of information concerning the government's theories or arguments with regard to sentencing than he was before the Sentencing Guidelines."

A copy of the court's order dated October 16, 1989 is attached at the Appendix of this Bulletin as Exhibit B.

* * * * *

Legal Briefs

Third Circuit

Pennsylvania Department of Public Welfare
v. Davenport, No. 89-156.

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit was granted on October 2, 1989. The question presented is whether criminal restitution orders are dischargeable "debts" in proceedings under Chapter 13 of the Bankruptcy Code. Forty-one states and territories filed amicus briefs with the Commonwealth of Pennsylvania for the petition for writ of certiorari. The Solicitor General of the United States has agreed to file an amicus brief supporting the Commonwealth in this case. Charles W. Larson, United States Attorney for the Northern District of Iowa, met with the Solicitor General's staff on behalf of the Attorney General's Advisory Committee to urge the Department of Justice to participate in this appeal. Petitioners' briefs for both cases are scheduled to be filed by November 16, 1989. Oral arguments for both cases are expected to be scheduled for January or February of next year.

9th Circuit

U.S. v. Munoz-Flores, No. 88-1932.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit was granted on October 2, 1989. The question presented is whether 18 U.S.C. §3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, §7, Cl. 1. In order to address the justiciability issues presented in the case, the Supreme Court requested the parties to brief the applicability of the political question doctrine. If an issue falls within the political question doctrine, courts will find the issue inappropriate for judicial determination as it is more appropriately reserved for one of the other two "political" branches of government. The Ninth Circuit considered this issue and determined that it did not fall within the doctrine.

If you have any questions concerning the above, please contact Kathleen Haggerty or Nancy Rider, Financial Litigation Staff, Executive Office for United States Attorneys, at FTS/202-272-4017.

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ASSET FORFEITURE

Management Of The Asset Seizure And Forfeiture Program

On October 30, 1989, Attorney General Dick Thornburgh issued a memorandum stating that one of the Department's most effective weapons in combatting drug trafficking and organized crime is the seizure and forfeiture of the instrumentalities and proceeds of these illegal activities. Experience has shown that forfeitures can permanently dismantle the financial underpinnings of criminal enterprises and, because of the massive resources of drug and organized crime syndicates, we have also found that forfeiture has enormous potential as a source of revenue for law enforcement at all levels of government. In each of the last five years, the amount of property we have seized and forfeited has grown significantly.

The rapid growth of our asset forfeiture program has created difficult management challenges. Case processing delays, incomplete caseload information, inadequate financial management, and a lack of commitment to forfeiture in some areas have prevented us from realizing the full potential of forfeiture as a law enforcement weapon and revenue source. Simply put, the Department's very successful program has outgrown the informal systems and control processes that worked when the program was small. To achieve improvements in these areas, we need closer coordination of forfeiture activities at the highest levels of the Department.

The Executive Office for Asset Forfeiture is now established to oversee all aspects of the Department's forfeiture program. This new office is located in the Office of the Deputy Attorney General and will report to Associate Deputy Attorney General Barry Stern, who will also have responsibility for overseeing the Organized Crime Drug Enforcement Task Forces. Cary H. Copeland is the Director of the new Executive Office, with Katherine K. Deoudes and Michael A. Perez serving as Assistant Directors.

While the basic operational responsibilities within the forfeiture program will remain with each of the appropriate Departmental components, some adjustments can be anticipated. It will be necessary for each component to exhibit appropriate flexibility in responding to Executive Office initiatives. These will include the prompt resolution of pending policy recommendations, establishment of uniform procedures for documenting and processing forfeiture actions, improvement of financial controls over use of program funds, and implementation of a single Departmental forfeiture information system. One of the principal missions of the Executive Office will be to recommend any reorganizations or transfers of functions needed to achieve our goal of a truly effective and efficient Departmental forfeiture program.

* * * * *

Equitable Sharing In Forfeiture Cases

On November 9, 1989, Barry Stern, Associate Deputy Attorney General, advised all United States Attorneys as follows:

> As you know, Section 6077 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. §881(E)(3)(B) limits the ability of the Department to share drug forfeiture proceeds with cooperating state and local law enforcement agencies if such sharing might "circumvent" state law. Two legislative initiatives are underway to resolve this problem.
>
> First, Section 208 of H.R. 2991, the Commerce-State-Justice appropriations bill, would delay the effective date of 21 U.S.C. §881(E)(3)(B) until October 1, 1991. This bill has now been approved by the House and Senate and will shortly be forwarded to the President for approval. Upon approval by the President, this will postpone the implementation of Section 6077 for two years.
>
> Second, Section 1215 of H.R. 2461, the Department of Defense Authorization Act, would repeal 21 U.S.C. §881(E)(3)(B) inserting in its place a general requirement that sharing facilitates law enforcement cooperation. The bill goes on to make clear that the repeal is retroactive to October 1, 1989. The conference report on H.R. 2461 was approved by the House on November 9 and Senate approval is expected on November 14. Senate action will clear that bill for action by the President. Repeal will be effective upon approval of H.R. 2461 by the President.
>
> In summary, it appears that within the next few days the anti-circumvention provision of Section 6077 will first be delayed for two years (by H.R. 2991) and then repealed (by H.R. 2461). Until this occurs, the guidance provided on October 3 by Acting Deputy Attorney General Edward S.G. Dennis continues in effect (see Vol. 37, No. 10, p. 315 of the United States Attorneys' Bulletin, dated October 15, 1989). Once the anti-circumvention provision is no longer effective, bear in mind that 21 U.S.C. §881(E)(3)(A) will continue to be operative. That subparagraph requires that:
>
> > The Attorney General shall assure that any property transferred to state or local law enforcement agencies. . .has a value that bears a reasonable relationship to the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based.

Department of Justice officials preparing and reviewing requests for equitable sharing are urged to make certain that sharing decisions properly reflect the degree of direct participation of the requesting agencies and that such participation is fully documented in each case.

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DRUG ISSUES

Legislative Action

Committees of the House of Representatives are considering S. 1735, a drug bill that passed the Senate on October 5 that would, in part, implement those pieces of the President's 1989 National Drug Control Strategy that require legislation. These provisions had been added to the FY 1990 Transportation appropriations bill; however, they were dropped from that bill after the House agreed to act on S. 1735 before the end of the year.

On November 2, 1989, the House Judiciary Subcommittee on Crime marked up H.R. 3550. The bill contains provisions related to the Administration's Special Forfeiture Fund proposal. The Department will proceed to study the bill and develop positions on the various provisions.

The House Foreign Affairs Committee is scheduled to mark up its version of anti-drug legislation. The Department is working with the Department of State and the Drug Czar's office to develop an Administration position on this bill. The bill contains a number of objectionable Presidential reporting and notification requirements. It also contains a compromise change to the Mansfield amendment, which restricts activities of U.S. agents overseas during arrests by foreign officers, which we support.

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On October 24, 1989, the House Select Committee on Narcotics held a hearing on smokeable methamphetamine, also known as "ice." Testifying on behalf of the Department were Daniel Bent, United States Attorney for the District of Hawaii, and David Westrate, Assistant Administrator of the Drug Enforcement Administration. Mr. Bent discussed the epidemic problem of "ice" in Hawaii. He advised the Committee that the explosion of this drug in Hawaii could be an indication of an "ice storm" to hit the mainland.

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POINTS TO REMEMBER

Attorney General Thornburgh Meets With Soviet Officials In Moscow

Attorney General Dick Thornburgh attended a series of meetings with Soviet officials during the week of October 16-20 in Moscow at the invitation of U.S.S.R. Minister of Justice V. F. Yakovlev. The meetings led to agreements on U.S.--U.S.S.R. cooperation in several major law enforcement areas.

During his five-day visit, the Attorney General met with the following Soviet officials in addition to Mr. Yakovlev: Prime Minister Nikolai Ryzhkov; Deputy Chairman of the Supreme Soviet Anatoliy Luk'yanov; Procurator-General A.T. Sukharev; Minister of the Interior V.V. Bakatin; Chairman of the Committee on State Security V. Kryuchkov; and Supreme Court Chairman E.A. Smolentsev. He also held an informal discussion with the law faculty at Moscow State University, following a speech to some 200 students at the school on the rule of law, human rights and the American experience. In addition to his official meetings, the Attorney General visited a session of the Supreme Soviet during a debate on property rights, spoke with groups of Soviet refuseniks and human rights activists about conditions in the Soviet Union, sat in on Immigration and Naturalization Service interviews with Soviet citizens seeking to emigrate to the United States, and met with INS workers at the U.S. Embassy who are processing hundreds of immigration applications daily.

The Attorney General spoke with Soviet officials concerning the rule of law in society and discussed the principle of federalism, the separation of powers among three independent branches of the U.S. Government and the importance of an independent judiciary. U.S. and Soviet experts also met in seven Working Groups to specifically discuss topics of interest to both nations, including the environment, narcotics, organized crime, commercial law, immigration/emigration issues, investigation of former Nazi officials and law enforcement statistics. It was agreed by the Working Groups that their discussions contributed to greater understanding between the two countries and opened the way for further cooperation on issues of interest to both the U.S. and the U.S.S.R.

Attached at the Appendix of this Bulletin as Exhibit C is a Joint Statement signed by Attorney General Dick Thornburgh and U.S.S.R. Minister of Justice V. F. Yakovlev on October 19, 1989.

* * * * *

Boeing Company Settlement And Agreement In The District Of Kansas

On October 30, 1989, Boeing Company agreed to pay the Government $11 million to settle claims that the company provided inaccurate cost information to the Air Force while negotiating contracts for KC-135 aircraft. Acting Assistant Attorney General Stuart Schiffer in charge of the Civil Division said that the agreement settles claims that Boeing's Military Airplanes Division, located in Wichita, Kansas, failed to give the Air Force accurate prices for aluminum raw materials when negotiating contracts to replace the aluminum "skins" on portions of the KC-135 aircraft. "This settlement resulted from the government's statutory and common law claims that inaccurate information provided by Boeing caused the Air Force to pay higher prices than it would have paid had the company accurately reported its costs," Mr. Schiffer said.

Benjamin L. Burgess, Jr., United States Attorney for the District of Kansas, said the agreement is the culmination of a two-and-a-half year investigation into Boeing's aluminum pricing practices in connection with the scheduled replacement of a portion of the aluminum skins on the KC-135's. The settlement relates to four contracts negotiated with Boeing from 1982 to 1985 pursuant to the Truth in Negotiation Act, which required Boeing to certify to the Air Force that its cost and pricing data was current, accurate and complete. The government claimed that Boeing did not accurately certify the company's aluminum costs in accordance with the law. Mr. Burgess said the settlement resolves claims that Boeing's certification was false because Boeing gave the Air Force aluminum price quotes that were not current, accurate and complete in that they were based on aluminum companies' catalog or book prices. The settlement covers all non-tax claims that the government has or may have, under both the common law and civil statutes.

The out-of-court agreement also provides that, in addition to the $11 million cash payment, Boeing will not charge any of its costs or legal fees related to the settlement to accounts that are partially reimbursable by the government under other contracts.

The settlement was negotiated by the Commercial Litigation Branch of the Civil Division, Washington, D.C., and is the result of an investigation conducted by the Fraud Section of the Criminal Division, headed by Assistant Attorney General Edward S.G. Dennis, Jr., the United States Attorney's Office in the District of Kansas, and the Defense Inspector General's Office following an audit by the Defense Contract Audit Agency.

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Boeing Company Pleads Guilty To Two Felony Counts In The Eastern District of Virginia

On November 13, 1989, Henry E. Hudson, United States Attorney for the Eastern District of Virginia, announced that the Boeing Company entered a plea of guilty to two felony counts of "conveyance without authority" in the U.S. District Court in Alexandria, Virginia. Boeing pled guilty to obtaining two secret Department of Defense (DOD) internal budgeting and planning documents. The first count of the Information to which Boeing pled guilty concerned Boeing's unauthorized conveyance of the Department of Defense's 5-year defense plan for FY 1986 issued by the Comptroller of the Department of Defense in September, 1984. The second count of the Information concerned Boeing's unauthorized conveyance of the program decision memorandum for the Department of the Navy issued by the Office of the Secretary of Defense in August, 1984.

The Government's offer of proof accompanying the plea indicates that, during the years 1979 to 1985, Boeing acquired, without lawful authority, many editions of internal DOD planning, programming and budgeting documents, which included defense guidance, program objective memoranda for the Army, Navy, and Air Force, issue books and issue papers used in connection with the deliberations of the Defense Resources Board, program decision memoranda, program budget decisions, budget estimate submissions and 5-year Defense programs. These documents were acquired by a Boeing aerospace employee, Richard Fowler, and were conveyed by Fowler to the Washington Area Boeing Aerospace Company facility in Rosslyn, Virginia. As part of the plea, Boeing accepted the offer of proof as substantially correct. The terms of the plea are as follows:

1. Boeing pled guilty to two felony violations of 18 U.S.C. §641 and was ordered to pay a fine of $20,000.

2. Boeing agreed to pay the government $4 million in restitution.

3. Boeing agreed to pay the government an additional $1 million to reimburse the government for the costs of the investigation.

4. Boeing agreed to remove from its overhead claims to the government the amount of $200,000, representing a portion of the salary and expenses of Richard Fowler.

This disposition is a result of a two-and-a-half year investigation by Special Agents of the Inspector General's Defense Criminal Investigative Service, DOD. The prosecution was conducted by Assistant United States Attorney Randy I. Bellows, Eastern District of Virginia.

* * * * *

Child Pornography And Obscenity Prosecution

On October 25, 1989, Attorney General Dick Thornburgh issued a memorandum to all United States Attorneys that in recent years a pronounced federal law enforcement effort has produced substantial results, especially regarding child pornography. Nevertheless, there is much that remains to be done in these serious problem areas. Accordingly, prosecution of these crimes remains a matter of high priority with this Administration and with the Attorney General personally. The Attorney General stated as follows:

> Since returning to the Department in November, I have consistently expressed my support for these efforts in my addresses to United States Attorneys and citizen groups. When the Child Protection and Obscenity Enforcement Act was pending in Congress, I worked hard to retain it as drafted by the Department, and 16 of the 18 provisions of that bill ultimately passed almost exactly as introduced.
>
> At present the Criminal Division's Obscenity Enforcement Unit is developing a major project of considerable importance to the work of the Department. This project targets the major nationwide producers and distributors of obscene material. The project has the full support and cooperation of the FBI as well as numerous United States Attorneys' Offices. The Obscenity Unit will be contacting your office in the near future regarding this project if it has not done so already.
>
> Also, as part of the initial assault on these crimes, each United States Attorneys' Office was instructed in 1987 to designate an Obscenity and Child Sexual Exploitation Specialist to facilitate interaction and cooperation between the Criminal Division and the United States Attorneys' Offices. This has proven to be a constructive practice which I feel should be continued. Therefore, please contact Patrick Trueman, Obscenity Enforcement Unit, Room 2216, 10th and Constitution, N.W., Washington, D.C. 20530, to provide the name of the Designated Specialist for your office.
>
> I urge each United States Attorney to make every effort to devote the resources necessary to prosecuting obscenity and child pornography cases whenever violations are brought to your attention, whether by this Department, or through other government or private sector channels.

* * * * *

Congressional Restrictions On Relocations, Reorganizations Or Consolidations

On October 6, 1989, Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, issued a memorandum to Heads of Offices, Boards, Bureaus and Divisions, to remind the respective organizations of the newly enacted restrictions on Departmental relocations and reorganizations contained in the FY 1989 supplemental appropriations bill. This is to advise you that those restrictions are still in effect.

Section 105 of the FY 1989 Dire Emergency Supplemental Appropriations Act, P.L. 101-45, provided as follows:

> None of the funds provided in this or any prior act shall be available for obligation or expenditure to relocate, reorganize or consolidate any office, agency, function, facility, station, activity, or other entity falling under the jurisdiction of the Department of Justice.

By its terms P.L. 101-45 was limited to Fiscal Year 1989. However, section 101(c) of the recently enacted Continuing Resolution, P.L. 101-100, provides as follows:

> No appropriations of funds made available or authority granted pursuant to this section shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during the fiscal year 1989.

Thus, it would appear that the restrictions in section 105 continue in effect until the regular DOJ appropriations bill for FY 1990 is enacted or the expiration of the Continuing Resolution on October 25, whichever comes first.

There is no question that the members and staff of our Appropriations Subcommittees view this provision in the Continuing Resolution as extending the life of the restrictions in section 105 of the FY 1989 supplemental appropriations bill. Recently, we narrowly averted a serious confrontation with our Senate Appropriations Subcommittee over a consolidation of INS offices in Dallas which had started even before the end of Fiscal Year 1989. With this background in mind, all DOJ components should proceed with extreme caution, to be certain no actions are taken that could violate the P.L. 101-100 language.

If you have the slightest doubt about the legality of a reorganization, relocation or consolidation, please have your staff contact Janis Sposato, General Counsel, Justice Management Division, at FTS/202 633-3452.

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Department Support Of Adoptions

On October 5, 1989, Attorney General Dick Thornburgh issued a memorandum to all employees advising that President Bush recently signed a Memorandum for Heads of Departments and Agencies endorsing adoption as an alternative solution to some of the nation's most pressing family issues. The President identified these issues as teenage pregnancy, foster care, infertility, and welfare dependency. The President intends for the federal workforce to provide leadership in adoptions and asked each department and agency to develop methods for supporting the adoption plans and needs of employees and for promoting adoption among the workforce.

A copy of the Attorney General's memorandum is attached at the Appendix of this Bulletin as Exhibit D.

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Update On Public Law 100-694 (Westfall Legislation)

On October 12, 1989, Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, issued an update to all United States Attorneys on P.L. 100-694 (the Westfall legislation), together with a previous memorandum dated August 18, 1989 and a letter dated September 27, 1989 to James G. Richmond, Chairman, Attorney General's Advisory Committee of United States Attorneys. All United States Attorneys were advised that the Department of Justice would no longer argue that the certification of scope of employment by the Attorney General or his delegee pursuant to 28 U.S.C. §2679(d) was conclusive and not subject to judicial review. This action was taken because of the discovery that the Department's position in court was contrary to the express assurances previously given in testimony to the House Judiciary Committee by a Department representative that the certification was subject to judicial review. You were instructed that any argument to the contrary pending in district court or on appeal be withdrawn.

According to the staff of the House Judiciary Committee, in at least one case the argument has not been withdrawn. The Committee's representative has advised that the failure to withdraw this argument, after some two months, is contrary to the Department's assurances to the Committee in August that it would be withdrawn. It is, therefore, essential that you take immediate action to assure that this change of position has been implemented in all cases in your district to which it applies.

A copy of this memoranda is attached at the Appendix of this Bulletin as Exhibit E.

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United States Attorneys' Manual Bluesheets Concerning RICO

Edward S.G. Dennis, Jr., Assistant Attorney General for the Criminal Division, issued a bluesheet dated June 30, 1989, on the subject of temporary restraining orders under 18 U.S.C. §1963(d). This bluesheet implements new policy regarding the requirement of approval by the Organized Crime and Racketeering Section prior to filing a motion for a temporary restraining order in connection with a case involving RICO forfeiture.

Shirley D. Peterson, Assistant Attorney General for the Tax Division, issued a bluesheet dated July 3, 1989, on the subject of charging the filing or causing the filing of false income tax returns as mail fraud and/or as mail fraud predicates to a RICO charge. This bluesheet implements prosecutive policy concerning the use of mail fraud charges and mail fraud predicates for RICO where the filing of false tax returns or forms is involved.

The bluesheets are attached at the Appendix of this Bulletin as Exhibit F.

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LEGISLATION

Appropriations

On November 1, 1989, during Senate consideration of the conference report on the FY 1990 Commerce, Justice, and State appropriations bill, H.R. 2991, a compromise amendment was adopted on the minimum amount to be distributed to each state under the Office of Justice Programs' expanded drug grant program. This followed House rejection of a conference provision raising the minimum funding to small states to about $1.6 million. The compromise adopted by the Senate would provide a minimum state allocation of 0.25 percent or $500,000, whichever is greater. Under the FY 1990 funding level, this formula provides a minimum allocation per state of approximately $1 million.

On November 1, the House adopted (394 to 21) the conference report on H.R. 3015, the FY 1990 Transportation appropriations bill. This measure includes $1.79 billion for the Department for the war on drugs. On a point of order by Representative Bill Frenzel that the drug funding portion exceeded the budget allocation, the conference report was sent back to the Rules Committee for a budget waiver, which was approved later that day.

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Administratively Uncontrollable Overtime

The House of Representatives is expected to take up a bill that would revise the method by which premium pay is determined for irregular, unscheduled overtime duty performed by a federal employee. The bill will be revised to delay its effective date to FY 1991. The bill raises certain concerns, as it represents an expensive, piecemeal approach to a multi-faceted problem. The National Advisory Commission on Law Enforcement was created by P.L. 100-690 to study federal law enforcement compensation for the purpose of developing legislative initiatives to improve the government's ability to attract and retain individuals for law enforcement occupations. The Commission's final report is scheduled for completion in December, 1989.

Additionally, the bill would create inequitable pay relationships and would not be cost effective in enhancing our recruitment and retention abilities. It is estimated that the cost of implementing H.R. 215 for the FBI, INS, and DEA could be $65 million annually. Funds were not budgeted or appropriated for this expense in 1990.

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Debt Collection Procedures

S. 84, a bill to improve debt collection procedures, passed the Senate on November 3, 1989 by unanimous consent. This legislation, which passed the Senate in October as part of S. 1711, a drug bill, is a major priority of the United States Attorneys. It would establish uniform, nationwide procedures for the collection of debts owed the Federal Government. We are now seeking support in the House to move the proposal there.

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Environmental Crimes Bill

Rep. Charles Schumer is expected to introduce an environmental crimes bill in the near future. This bill would amend Title 18 to create three new environmental violations. Two of the new violations require an "environmental offense," which is defined by the bill as criminal violation of any one of twenty three federal statutes, including the Federal Water Pollution Control Act, the Clean Air Act, and the Lacey Act Amendments of 1981. The Department has indicated a willingness to testify before the Criminal Justice Subcommittee of the House Judiciary Committee.

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Federal Prison Industries (UNICOR)

The Senate acceded to the House and withdrew the Dixon amendment to the Department of Defense (DOD) authorization bill now in conference. This amendment would have removed the primary market outlet (DOD) for prison-produced products and crippled a program which is absolutely necessary for the orderly management of our rapidly expanding prison population. The Department worked with the Bureau of Prisons to educate the conferees and received overwhelming support from the House members. On October 30, the Department declined a final proposal from Senator Dixon. The Conference Report will now strike this amendment.

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Federal Tort Claims Act Amendments

On November 1, 1989, Assistant Attorney General Stuart Gerson testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations to express the Department's opposition to three bills that would significantly impact the Federal Tort Claims Act (FTCA). Two of them, H.R. 1095 and H.R. 2536, would substantially repeal the FTCA's discretionary function exception, which bars tort liability of the United States based upon policy decisions of government personnel. The Department is vigorously opposed to both of these bills, which would be extremely costly and would unreasonably handicap the decision-making processes that are essential to government functions.

The third bill, H.R. 2372, would establish an entitlement program for certain individuals who have specified diseases and who lived downwind from the atomic weapons test site. The program would also extend to certain uranium miners whose work related to the atomic weapons testing effort. The Department is opposed to this legislation because there is insufficient scientific evidence to establish that the vast majority of diseases in the downwind population were caused by the low levels of radiation to which they were exposed. The Department also opposes the portion of the bill relating to the miners because they have been appropriately compensated for any work-related injuries by the workers compensation program.

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Hatch Act Repeal

On October 20, 1989, The Senate Committee on Governmental Affairs filed its report on S. 135, the bill that would repeal the Hatch Act. The Administration unequivocally opposes the bill. Floor action is not scheduled at this time.

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CASE NOTES

CIVIL DIVISION

Supreme Court Grants Certiorari To Determine If Federal Government May Be Equitably Estopped

Although the Supreme Court has never sanctioned the imposition of an equitable estoppel against the government, it has left open the question whether so-called "affirmative misconduct" might be sufficient to work such an estoppel. In this case the Federal Circuit held that misinformation about a federal statute given the plaintiff orally by a government agent, and in writing by virtue of an out-of-date Office of Personnel Management circular, was affirmative misconduct sufficient to estop the government from denying the plaintiff annuity benefits. The Supreme Court has granted our petition for a writ of certiorari.

Office of Personnel Management v. Richmond,
No. 88-1943 (S.Ct. October 2, 1989.
DJ # 154-188-316

Attorneys: William Kanter, FTS/202-633-1597
Richard Olderman, FTS/202-633-3542

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D.C. Circuit Summarily Affirms Dismissal Of Action By Libyan Citizens Seeking Damages From The United States, President Reagan, The United Kingdom, And Prime Minister Thatcher For The 1986 U.S. Air Strike On Libya

In this action brought by citizens of Libya seeking substantial damages from the United States, President Reagan, various United States officials, the United Kingdom and Prime Minister Thatcher, for the 1986 U.S. air strike on Libya, the district court dismissed the claims against the British defendants and the United States for lack of jurisdiction, and dismissed the claims against individual government officials on grounds of immunity. Plaintiffs had asserted claims under the FTCA, RICO, the Foreign Claims Act, 10 U.S.C. §2734, the Alien Tort Claim Act, 28 U.S.C. §1350, and various constitutional and common law theories, including "the tort law of Libya." All defendants sought sanctions under Rule 11. Although the district court found that plaintiffs' counsel "surely knew" that the case "offered no hope whatsoever of success," it declined to impose sanctions on the ground that access to the courts of the United States as a forum for making a public statement of protest of Presidential action should not be foreclosed.

Plaintiffs appealed, and the United Kingdom and Prime Minister Thatcher cross-appealed the denial of Rule 11 sanctions and sought sanctions under Rule 38, Federal Rules of Appellate Procedure, for plaintiffs' frivolous appeal. The court of appeals has summarily affirmed the dismissal of plaintiffs' claims, summarily reversed and remanded the district court's denial of sanctions to the United Kingdom and the Prime Minister. Rejecting the district court's conclusion that federal courts should serve as a forum for public protests, if the suit otherwise meets the standard of Rule 11, the court of appeals concluded that the district court, having found a violation of Rule 11, should have awarded an appropriate sanction. The court then awarded costs and attorneys' fees to the United Kingdom and the Prime Minster under Rule 38, Federal Rules of Appellate Procedure, because the Supreme Court's decision in Argentine Republic v. Amerada Hess Corp., 109 S.Ct. 683 (1989), issued about a month after the district court judgment, "utterly foreclosed plaintiffs' argument that the United Kingdom is subject to the jurisdiction of the courts of the United States."

Saltany v. Reagan, Nos. 89-5051, 5052, 5053 (D.C. Cir. Sept. 29, 1989). DJ # 157-16-10858.

Attorneys: Barbara L. Herwig, FTS/202-63-5425
Larry L. Gregg, FTS/202-724-7056

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D.C. Circuit Awards Fees For Time Spent Litigating Appeal Of Decision On Attorneys' Fees

This is the second decision in an Equal Access to Justice Act ("EAJA") attorneys' fee case. We lost the first decision when the D.C. Circuit (Edwards, J.) held that a plaintiff who was, by profession, a lawyer was eligible for attorneys' fees under the EAJA. Judge Silberman, concurring, agreed with the government's position, but felt constrained by Circuit precedent to side with the majority. He agreed that the issue should be resolved by the Supreme Court. Indeed, this issue is the subject of enormous conflict in the circuits. Twice, the Supreme Court has refused to decide this issue, with Justice White and then-Chief Justice Burger dissenting on the grounds that there is a conflict in the circuits.

After we lost the initial decision, the winning plaintiff/lawyer applied for the fees he incurred in defending against our original appeal. We opposed that request because the fee statute only authorizes an award where the government has acted unreasonably and we believed we had acted reasonably in bringing the appeal, given that the issue in the original case was the subject

of conflict in the circuits, two Supreme Court Justices had voted for review, and Judge Silberman agreed with our substantive position. The D.C. Circuit has now ruled that we did not act reasonably in bringing the appeal. In an opinion to which Judge Silberman dissented, the court held that the government was simply trying to reargue the merits of the first appeal and, therefore, plaintiffs' appellate fee application should be granted. Judge Silberman dissented on the ground that the majority had read the "reasonableness" requirement out of the statute, rendering the government liable for fees automatically, whenever it loses.

David E. Jones v. Lujan, No. 88-5229
(D.C. Cir. Oct. 17, 1989). DJ # 35-16-2796

Attorneys: Michael J. Singer, FTS/202-633-5432
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Fourth Circuit Affirms Dismissal Of FTCA And Bivens Suit Against The United States And A DEA Agent And Former Assistant United States Attorney For Failure To Admit Witnesses To Federal Witness Protection Program

David and Cheryl Piechowicz were employees of a hotel in Baltimore and witnesses of illegal drug activity. Cheryl was threatened at a grand jury hearing by the girlfriend of the suspected dealer. The Piechowiczes advised DEA and the Assistant United States Attorney, who reassured them. Five days before the trial, David Piechowicz and his sister-in-law, who was evidently mistaken for her sister Cheryl, were murdered gangland style at the hotel by a hired killer. Cheryl Piechowicz brought suit against the United States, and the DEA agent and the Assistant United States Attorney, in their individual capacities, for failure to protect them through the Witness Protection Program.

The district court dismissed the FTCA suit against the United States and the Bivens action against the DEA agent and the Assistant United States Attorney. The Fourth Circuit (Ervin, Murnaghan, and Young (Sr. D.J., D.Md.)) has now affirmed. The court agreed with the district court that admission to the Witness Protection Program is a discretionary function calling for a policy judgment. The court also held that the agent and the Assistant United States Attorney were entitled to qualified immunity from suit in their individual capacities. The Piechowiczes had no clear constitutional right to protection by the United States. In addition, since the United States never took the Piechowiczes into custody, the United States had no due process clause obligations.

Piechowicz v. United States, Nos. 88-2099 & 88-2100 (4th Cir. Sept. 20, 1989).
DJ # 157-35-1244

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Jay S. Bybee, FTS/202-633-4096

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Fifth Circuit Reverses $7.5 Million Tort Judgment Against The United States, Holding That There Is No Duty Under State Law For A Police Officer To Arrest A Drunk Driver

In this FTCA action, plaintiff challenged a United States park ranger's decision not to arrest and take into custody a driver under the influence of alcohol and drugs, but rather to issue criminal citations. Ten hours later, after the drunk driver had purchased more alcohol, and continued to imbibe alcohol and smoke marijuana, he collided with plaintiff, who lost an arm and a leg as a result of the accident. The district court held that the park ranger's decision not to arrest was negligent and awarded $7.5 million in damages against the government. While we raised several defenses both as to liability and the amount of damages, the Fifth Circuit held that the lack of analogous tort duty under Texas law was dispositive, reversing the judgment in its entirety. In so doing, the court of appeals ruled that Texas law, even apart from state immunity considerations, did not impose a tort duty on state police officers to arrest. In the alternative, the Fifth Circuit held that there were no private party analogies that would permit the imposition of duty in the circumstances at hand under 28 U.S.C. §2674.

Crider v. United States, No. 88-2944
(5th Cir. October 10, 1989). DJ # 157-74-2844

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Seventh Circuit, In Conformity With Other Circuits, Holds That Special Factors Analysis Counsels Against The Creation Of A Bivens Remedy For Federal Employees

The Seventh Circuit, following decisions in other courts of appeals, has held that the Supreme Court's decisions in Bush v. Lucas, 462 U.S. §367 (1983) and Schweiker v. Chilicky, 108 S.Ct. 2460 (1988) establish that the Civil Service Reform Act of 1978 bars Bivens remedies for federal employees -- without regard to

whether that statute provides an "adequate" remedy. The court of appeals also found that plaintiff lacked standing to mount his claims for declaratory and injunctive relief and that, in any event, those claims could only be brought against the agency, not the individual defendants.

Joseph Feit v. John Ward and Eugene Grapa, No. 88-2533 (7th Cir. Sept. 26, 1989). DJ # 35-86-24

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Richard A. Olderman, FTS/202-633-3542

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Eighth Circuit Rejects Ninth Circuit's Lutz Decision And Holds That Air Force Is Not Liable Under Respondeat Superior For Damages Caused By Base Resident-Serviceman's Private Dog

At the Little Rock Air Force Base one of the housekeeping regulations requires residents to control their pets. An airman living on base owned a dog. The dog was once running at large and was taken to the kennel; the soldier was warned to keep the dog under control. There were two other incidents involving the dog, but neither warranted a warning. Subsequently, plaintiff's 11-year-old son approached the dog, which bit him on the head.

Adopting the reasoning of the Ninth Circuit in Lutz v. United States, 685 F.2d 1178 (9th Cir. 1982), the district court held that under the base regulation, the soldier who owned the dog had been "delegated a security duty which promoted the government's interest in health, safety and security on the base and so the control of a pet's acts was in furtherance of the government's interest. Thus, the control of the dog was within the scope of [the soldier's] employment [under the Federal Tort Claims Act]." The court went on to hold that the soldier was negligent in failing to control the dog and that the government was liable for damages under the doctrine of respondeat superior.

We appealed, and the Eighth Circuit (Beam, Heaney, Bright) has now reversed. The court squarely rejected the holding of Lutz, finding persuasive the alternative holding of the D.C. Circuit in Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988). The Eighth Circuit stated: "Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the [Tort Claims Act] too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty. * * * In this case and in many cases, connection between the duty imposed by the regulation and military service is far too tenuous to conclude that the FTCA applies." (The court remanded for consideration of issues of direct negligence.)

Piper v. United States, No. 88-2612
(8th Cir. Oct. 10, 1989). DJ # 157-9-471

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Rick Richmond (formerly of the Appellate Staff)

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Eighth Circuit Holds That Congress Has Not Waived Federal Government's Immunity From Awards Of Punitive Damages In The Bankruptcy Code

In this bankruptcy case, after the debtor farmers had filed their Chapter 11 bankruptcy petition, the Small Business Administration (SBA) -- a creditor of the debtors -- intercepted and held the debtors' check from the Farmers Home Administration to protect SBA's right of setoff under the Bankruptcy Code, 11 U.S.C. §553. Debtors argued that this action violated the automatic stay provision of the Code, 11 U.S.C. §362. SBA argued in response that it had not effectuated a setoff in violation of the automatic stay provision, but had merely "administratively frozen" the funds to protect its right to setoff. The bankruptcy court held that SBA's actions violated the automatic stay, and awarded punitive damages as well as attorneys' fees against the SBA. The district court affirmed.

On appeal, the Eighth Circuit has now affirmed the holding that SBA's actions violated the automatic stay, but reversed the punitive damages award (we did not appeal the fee award). The court rejected our "administrative freeze" argument, but agreed with us that the Bankruptcy Code does not authorize the award of punitive damages against the federal government. The court concurred in our view that the Supreme Court's recent decision in Hoffman v. Connecticut Department of Income Maintenance, 109 S. Ct. 2818 (1989) -- in which an equally divided court affirmed the Second Circuit's holding that 11 U.S.C. §106(c) does not waive the Eleventh Amendment immunity of the states from affirmative money judgments under the Bankruptcy Code -- establishes that Congress also has not waived the immunity of the federal government from affirmative monetary judgments under the Code. The court's reading of Hoffman should prove very helpful to the government in bankruptcy litigation.

Small Business Administration v. Rinehart,
No. 88-5442 (8th Cir. Oct. 6, 1989).
DJ # 105-69-131

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Ninth Circuit Holds That The United States May Not Be Substituted As Defendant In Place Of Army Doctor Under Both The Gonzales Act And The Westfall Act

In this medical malpractice action arising out of medical treatment provided by the Army in Italy, the district court, acting pursuant to the Gonzales Act, 10 U.S.C. §1089, substituted the United States for the individual defendant, and dismissed the action against the United States as barred by the foreign claims exemption to the FTCA, 28 U.S.C. §2680(k). Plaintiff appealed. After the case was briefed, the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") was enacted. It was cited to the court of appeals in a Rule 28(j) letter, and discussed at oral argument as an alternate ground for affirmance. After oral argument in Smith, the Eleventh Circuit held in Newman v. Soballe, 871 F.2d 969, that substitution is not available under the Gonzales Act when the claim arises in a foreign country. Instead, the protection for a military physician in a claim arising in a foreign country is the indemnification authorized under 10 U.S.C. §1089(f). The Eleventh Circuit also rejected application of the Westfall Act, holding that military doctors who are specifically protected by the Gonzales Act are not covered by the Westfall Act. The court further noted that if Westfall did apply, the foreign claim exemption would bar suit against the United States, and substitution thus would not be available. Following the Solicitor General's refusal to authorize rehearing in Newman, the Department of Justice withdrew the argument in Smith that substitution was required under the Gonzales Act, but instead urged that substitution was still required under the Westfall Act.

The Ninth Circuit accepted the government's concession that substitution is not available under the Gonzales Act. However, the Court went on to hold that substitution is not available under the Westfall Act, either. The Westfall Act provides that "[t]he remedy against the United States [under the FTCA]. . .is exclusive of any other civil action or proceeding for money damages. . .against the employee whose act or omission gave rise to the claim. . . ." The Court reasoned that because the claim arose in a foreign country, the remedy against the United States is barred by 28 U.S.C. §2680(k). Accordingly, because the plaintiffs have no remedy under the FTCA, the United States may not be substituted.

Smith v. Marshall, No. 88-5757 (9th Cir. Sept. 26, 1989). DJ # 157-12C-3592

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Tenth Circuit, Reversing District Court Judgment, Holds That Bush v. Lucas Bars Implication Of A Bivens Damages Remedy In Favor Of A Temporary, Part-Time Veterans Administration Medical Center Surgeon Who Was Rejected For A Permanent Staff Position In Alleged Retaliation For Exercising Her First Amendment Rights

From May, 1980 to June, 1981, plaintiff Mary E. Brothers, M.D., who was not board-certified in general surgery, was employed as a temporary, part-time surgeon at the Veterans Administration Medical Center (VAMC) in Leavenworth, Kansas. During this period, a position for a permanent, full-time surgeon became vacant for which Dr. Brothers applied and was rejected. Both before and during the time of her part-time employment, plaintiff had criticized certain practices and conditions at the VAMC, and the medical center's handling of a drug trial known as the Anafranil Study. Plaintiff filed the instant suit against two VAMC administrators individually, alleging that defendants' refusal to hire her as a permanent surgeon was in retaliation for her whistle-blowing activities and therefore violated her rights under the First Amendment. The medical center administrators moved to dismiss arguing, inter alia, that no Bivens remedy should be inferred and that they were entitled to qualified immunity. The district court rejected the official's arguments and allowed the case to proceed to trial before a jury. The jury found in favor of Dr. Brothers and awarded her $90,937 in compensatory damages, and $100,000 in punitive damages, which were later remitted to $10,000. We appealed on behalf of the officials.

In a decision entered on October 4, 1989, the Tenth Circuit (Seymour, Anderson, Brorby, JJ), has now joined its sister circuits in holding that the Supreme Court's decisions in Bush v. Lucas, 462 U.S. 367 (1983) and Schweiker v. Chilicky, 108 S.Ct. 2460 (1988), establish that a federal employee (or applicant for federal employment) for whom the Civil Service Reform Act of 1978 provides the limited remedy of petitioning the Special Counsel of the Merit Systems Protection Board for investigation of allegedly "prohibited personnel practices," may not supplement that remedy with a Bivens action against her superiors.

Mary E. Brothers, M.D. v. Donald L. Custis, et al., No. 87-2890 (10th Cir. Oct. 4, 1989)
DJ # 35-29-40

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Tenth Circuit, On Grounds Of Sovereign Immunity, Reverses District Court Judgment Awarding Damages Against The Small Business Administration (SBA) For Unlawfully Denying Loan Guaranty Application

Plaintiff, an unsuccessful applicant for an SBA loan guaranty, brought this action against the agency and its administrator in his official capacity for damages sustained due to the agency's denial of its application on the basis of an allegedly unconstitutional regulation. The district court awarded judgment in plaintiff's favor and awarded damages of $59,086.25. The agency appealed on the grounds that sovereign immunity barred the action for damages and that the SBA's denial of the loan guaranty application did not proximately cause plaintiff's injuries. It did not appeal from the holding as to the constitutionality of the SBA's "opinion molder rule," which disqualified certain businesses engaged in the "molding" of public opinion from receiving loan guarantees. The plaintiff, in turn, appealed from the district court's denial of $149,060 in claimed damages.

The Tenth Circuit (Holloway, Anderson, Saffels, D.J.), after deliberating nearly two years, reversed. It held that sovereign immunity barred plaintiff's claim that the agency violated its rights by denying the loan guaranty application based upon an unconstitutional regulation. It rejected plaintiff's claim that the "sue and be sued" clause in the SBA's enabling statute waives the government's sovereign immunity. It reasoned that plaintiff's suit essentially alleged a claim of constitutional tort that could be brought only if the Federal Tort Claims Act waived sovereign immunity. Because the FTCA does not authorize suit on claims based upon acts by officials in the execution of a statute or regulation unless their acts were negligent, the court concluded that there was no waiver of sovereign immunity. The court of appeals also held that the district court lacked jurisdiction over plaintiff's claims based on contract law; it determined that sovereign immunity likewise barred any such claims where there was no cognizable contract and where the action rested on constitutional claims.

The Ascot Dinner Theatre, Ltd. v. Small Business Administration, Nos. 86-1061 & 86-1117 (10th Cir. Oct. 5, 1989) DJ # 105-13-690

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LAND AND NATURAL RESOURCES DIVISION

Environmental Impact Statement Covering Transfer Of Airplanes From Dover, Delaware To Westover Air Force Base In Massachusetts Held Adequate

The plaintiff (Valley Citizens), an association of local residents, brought an action challenging the decision of the Air Force to transfer sixteen C-5A transport airplanes from Dover, Delaware to Westover Air Force Base in Massachusetts. Valley Citizens claimed in district court that the Environmental Impact Statement (EIS), prepared by the Air Force prior to the transfer of the airplanes, did not comply with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, et seq. After reviewing the record before the Air Force and additional documentary submissions by the parties, the district court granted summary judgment in favor of the Air Force.

In a lengthy decision, the court of appeals affirmed the decision of the district court and addressed three issues. First, the court concluded that the EIS's discussion of alternatives to the transfer of the C-5As to Westover was adequate. Specifically, the court concluded that an EIS need not discuss the environmental impacts that would result from pursuing an alternative to the basing decision, if no such alternative is feasible, regardless of the environmental effects of pursuing the alternative. Slip Op. at 12. Thus, in this case, alternatives to basing the C-5As at Westover were rejected because of the construction costs involved or because there was an inadequate base for recruiting Air Force reservists to operate and service the airplanes. A brief discussion of those considerations was sufficient and there was no need to discuss the fact that basing the C-5As at any of the rejected alternative sites would have caused fewer adverse environmental effects than being at Westover. The court concluded that whether the discussion of alternatives in an EIS is reasonable depends on the particular circumstances of the case and the type of action that is involved.

The second issue addressed was the adequacy of the discussion of air quality impacts in the EIS. We admitted that the Air Force had made an error in the EIS in understating the increase in nitrogen oxide emissions that would result from the basing of the C-5As at Westover. The court of appeals agreed with our argument that this error was not "significant" and that the EIS discussion of air quality impacts was therefore adequate. The court concluded that Valley Citizens had not met its burden of demonstrating significance when the technical error was considered in the context of the principal environmental concern of the EIS (i.e., noise impacts) and the concerns raised by commenters.

The court also discussed, inter alia, the fact that the area surrounding Westover was attainment for nitrogen oxides and that the level of increased nitrogen oxide emissions was small in the context of total regional emissions. This analysis may be helpful when we must defend an EIS that includes an error in the analysis of an environmental impact.

The final issue that the court addressed was whether the EIS had properly analyzed the noise impacts of moving the C-5As to Westover. Valley Citizens challenged the use of the Air Force's cumulative noise analysis, which averages noise impacts over a year, because the flight patterns of the C-5As resulted in very loud noises occasionally, rather than a continuous exposure to a lower noise level. The court concluded that the Air Force's use of the annual average day-night sound level data was reasonable because Valley Citizens had not presented any evidence of an alternative methodology that would have demonstrated the inadequacy of the Air Force methodology. The court stated that the Air Force methodology did account, at least partially, for the occurrence of periodic very loud noises. See Slip Op. at 33. The court also discussed the fact that the Air Force methodology is used by other federal agencies. Id. The court was unmoved by Valley Citizen's reliance on the affidavits of 1,535 residents who stated that they were greatly disturbed by the noise of the C-5A flights. See id. at 35-36. The court did, however, state that it was not implying that the noise methodology used in this case was not immune from legal challenge. Id. at 35. For such a legal challenge to succeed, the court stated that it would have to be made first before the agency in comments on the draft EIS and the commenter would have to propose an alternative methodology. Id.

Valley Citizens for a Safe Environment v. Aldridge, et al., 1st Cir. No. 88-2063 (September 28, 1989) (Breyer, Aldrich and Torruella). DJ # 90-1-4-3214

Attorneys: Michael P. Healy, FTS/202-633-2757
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Section 109(d)(1) Of The Clean Air Act Does Not Impose A Non-Discretionary Duty on The Environmental Protection Agency To Revise National Ambient Air Quality Standards For Sulfur Oxides

The National Resources Defense Council (NRDC) sued the Administrator of the Environmental Protection Agency (EPA) under Section 304(a)(2) of the Clean Air Act in the United States District Court for the Southern District of New York to compel the

Administrator to add eight pollutants to a list of hazardous air pollutants that EPA is charged with maintaining under Section 112(b)(1)(A) of the Act. NRDC contended that the Administrator is required to add the pollutants to the list because each has been recognized as either a known or probable carcinogen in a series of notices EPA published in the Federal Register. NRDC argued that this recognition triggered a nondiscretionary duty on the part of the Administrator to add the pollutants to the list and thus created subject matter jurisdiction in the district court under Section 304(a)(2) of the Act. The district court dismissed for lack of subject matter jurisdiction, ruling that since the conclusions reached in the notices were preliminary and did not constitute statutory determinations that the eight pollutants were "hazardous air pollutants" within the meaning of Section 112(b)(1)(A), the Administrator's decision whether to list the pollutants was discretionary and not reviewable in the district court.

The court of appeals affirmed. After conducting a detailed review of the framework of the Clean Air Act, the published notices, and the district court's opinion, the court of appeals held that the Administrator had not failed "to perform an act or duty * * * which is not discretionary with the Administrator" within the meaning of Section 304(a)(2). The court rejected NRDC's argument that the notices were the "functional equivalent" of a Section 112(a)(1) determination. The court also distinguished its prior decision in NRDC v. Train, 545 F.2d 320 (2d Cir. 1976), where the court mandated the listing of lead under Section 108 of the Act, on the ground that in Train the Administrator had conceded that lead was an air pollutant that was hazardous to public health, whereas in this case the Administrator has made no such concession, but rather has maintained that his findings are merely preliminary. Finally, the court noted that NRDC has not charged that the Administrator had engaged in unreasonable delay which allows a district court, under limited circumstances, to compel the Administrator to perform some formal action employing rulemaking procedures; also the Act does not include stated deadlines that can be construed as creating nondiscretionary duties. If NRDC believes the Administrator has delayed unreasonably, it should have filed suit in the D.C. Circuit which has exclusive jurisdiction under the citizen suit provision of the Act, Section 307.

Natural Resources Defense Council v. Thomas,
2d Cir. No. 88-6210 (September 18, 1989)
(Mahoney, Newman, Pierce). DJ # 90-5-2-1-928

Attorneys: Jacques B. Gelin, FTS/202-633-2762
Robert L. Klarquist, FTS/202-633-2731

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

Antitrust Division

The Litigation I and Litigation II Sections of the Antitrust Division are seeking several trial attorneys with 1-5 years of experience (antitrust, civil litigation, or white collar crime preferred) and with superior academic and professional qualifications. These positions entail some travel.

Interested applicants should send a resume or SF-171 (Application for Federal Employment) by December 1, 1989 to: U.S. Department of Justice, Antitrust Division, Personnel Unit, Room 3241, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, Attn: D. Gainey.

* * * * *

United States Trustees Office, San Diego

The Office of Attorney Personnel Management, Department of Justice, is recruiting an attorney to represent and assist the United States Trustee in supervising the administration of cases filed under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. The position is in San Diego. The attorney will be primarily responsible for the preparation and presentation of cases in the Bankruptcy Court arising under the Bankruptcy Reform Act of 1978, as well as providing assistance in the preparation and trial of cases in the Bankruptcy Courts, the United States District Courts and the U.S. Court of Appeals.

Applicants must possess a J.D. degree from an ABA-accredited law school, be an active member of the Bar in good standing, and must have at least one year of experience in the following areas: bankruptcy, litigation, appellate, and/or financial. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 to GS-13 ($28,852 to $53,460).

Please submit a current SF-171 (Application for Federal Employees) or resume to: Edward A. Infante, U.S. Trustee, Department of Justice, 101 West Braodway, Suite 440, San Diego 92101. No telephone calls, please.

* * * * *

Awards Programs

The following was prepared by the Personnel Management Staff of the Executive Office for United States Attorneys:

As we begin the new fiscal year, now is the time not only to implement our FY '90 initiatives but also to plan to improve participation in the Department's multi-faceted awards program. The importance of advance planning cannot be overemphasized.

Awards programs are designed to improve federal government operations and services through the motivation and reward of employees. The number and diversity of awards available often makes it difficult for supervisors to select an award best suited to an employee's contribution to the organization. The problem is compounded by the large number of awards sponsored by organizations outside the Department and the federal government. Outside organizations usually announce their awards to the Department, with the Department transmitting the information to component agencies. The result is often very little lead time for the submission of nominations. To assist the supervisors and managers of the United States Attorneys' offices in anticipating and planning for employee recognition with monetary and honorary awards, the Executive Office for United States Attorneys (EOUSA) Personnel Staff developed and distributed to all Administrative Officers on June 29, 1989 an Administrative Procedures Handbook Issuance entitled, "Awards Program." This document is essentially a catalog of awards for which staff may be nominated. The catalog/planning guide arranges the currently available awards by month according to their respective nomination due dates at the sponsoring organization. It is not meant to be all-inclusive with respect to award information; rather, it is organized in a manner that will allow supervisors and managers to become aware of the projected nomination deadlines. Specific information about the award and the EOUSA deadlines will be announced via memorandum or teletype from the Personnel Staff as soon as we are notified of the solicitation.

The guide consists of recurring (usually annually) awards that fall into the following categories: Presidential awards, Attorney General's awards, Department of Justice awards, public service awards, and occupationally-oriented awards. Awards not included are: cash awards, such as performance and suggestion awards (discussed in DOJ Order 1451.3A), awards limited to Performance Management and Recognition System Employees, and career service awards. The guide lists various awards and criteria, which are presented throughout the calendar year, on a monthly basis. Use this guide as a reference to be aware of awards available and maximize the use of appropriate nominations for deserving employees.

Since new award programs by outside organizations are established almost every year and deadlines and submission criteria for existing awards are often modified, this planning guide will be updated as needed so that United States Attorneys' offices will have the most accurate information possible. The guide is intended to be a management tool to assist in planning for awards activity and in nominating employees for the kind of recognition most appropriate to accomplishments.

Organizations sponsoring these awards often provide limited response time for the submission of nominations. This guide is intended to allow the development of nominations prior to the issuance of the solicitation. To that end, the Administrative Procedures Handbook Issuance includes an appendix with the most recent previously issued nomination formats for awards that have generated interest among the district offices in past years. Districts are cautioned that criteria and deadlines may change, so it is possible that last minute rewriting could become necessary.

Therefore, it is critical to review the guide in advance to note those awards for which nominations may be submitted. It is also important to follow the specific criteria for each award to the letter, including the length of the nomination. If the criteria specifies that the nomination cannot be more than one page, this instuction must be adhered to. Some agencies will reject nominations based on the fact that the guidelines were exceeded. It is most important to meet noted nomination deadlines. Nominations received for awards create a volume of paperwork within and outside the agency. To extend deadlines for one or two nominations creates a delay in selecting recipients, and questions the integrity of the awards program. A copy of the Administrative Procedures Handbook Issuance can be obtained from your Administrative Officer.

* * * * *

Monetary And Honorary Awards

Special Achievement Awards. Each United States Attorneys' office (USAO) receives annual allocations of cash award allowances which may be used for special achievement awards for sustained superior performance and for special acts or services. The total allocation for each USAO is based on the number of full-time permanent employees in that office. This allocation, issued on a fiscal year basis, may be used at the discretion of the United States Attorney for both attorney and non-attorney personnel who meet the qualifications for this award category, in accordance with existing regulations and Department of Justice orders.

Recommendations for special achievement awards for sustained superior performance for attorney personnel are submitted to the Executive Office for United States Attorneys (EOUSA) for review and subsequent approval by the Director. Recommendations for this award for non-attorney personnel are also submitted to EOUSA for review and subsequent approval by the Director, with the exception of districts that have full, expanded, or basic personnel delegation. These districts have the authority to approve their own non-attorney special achievement awards. Upon approval, the funding of the awards is from the USAO's annual allocations of cash award allowances. Also upon approval, the Labor and Employee Relations Branch of the Personnel Staff of EOUSA requests the award checks and the recognition certifications, which are forwarded to the USAO when received.

Nominations for special achievement awards for special acts or services are solicited at the discretion of the United States Attorney any time during the fiscal year. Attorney nominations are submitted to EOUSA for review and approval by the Director. Recommendations for this award for non-attorney personnel are also submitted to EOUSA for review and subsequent approval by the Director, with the exception of districts that have full, expanded, or basic personnel delegation. These districts have the authority to approve their own non-attorney special achievement awards. Upon approval for selection, funding for these awards is absorbed by the districts. Recognition certificates are also given to recipients of Special Acts or Service Awards.

Quality Step Increases. While not technically an award, the quality step increase provides monetary recognition (in the form of an additional step increase to base pay) for General Schedule (GS) employees rated as "Outstanding." Each USAO receives annual allocation allowances for quality step increases. The total allocation for each USAO is based on 25 percent of the number of full-time permanent support employees in that office. This allocation, issued on a fiscal year basis, may be used at the discretion of the United States Attorney for non-attorney personnel who meet the qualifications in accordance with existing regulations and Department of Justice orders. Recommendations for quality step increases are submitted to EOUSA for review and approval by the Director, with the exception of districts that have full, expanded or basic personnel delegation. These districts have the authority to approve their own quality step increases. Upon approval, funding for the quality step increase is absorbed by the district. Recognition certificates are also given to recipients of quality step increases.

EOUSA Director's Awards. Nominations for Director's Awards are solicited annually for 1) superior performance as an Assistant United States Attorney; 2) special commendation; 3) outstanding performance in a litigation support or managerial role; 4) equal employment opportunity; 5) outstanding achievement in financial litigation; 6) outstanding performance in assistance and management of witnesses; 7) outstanding performance in assistance of victims of crime; and 8) outstanding performance in law enforcement coordination. These are honorary awards which are presented at the EOUSA Director's Awards Ceremony, held at the Department of Justice in Washington, D.C.

Attorney General's Awards. Nominations for Attorney General's Awards are also solicited annually for a number of categories, including the John Marshall Awards. These awards have monetary value as well as award recognition devices and are presented annually at the Attorney General's Awards Ceremony held in Washington, D.C. Nominations are submitted to EOUSA for review and endorsement by the Director of EOUSA prior to submission to the Attorney General's Board of Review for selection. Unsuccessful candidates for the Attorney General's Awards are automatically considered for the Director's Awards.

Non-Department Of Justice Awards. In addition to the awards listed above, there are a large number of awards sponsored by organizations outside the Department and the federal government. These awards are designed to improve federal government operations and services through the motivation and reward of employees. These awards fall into the following categories: Presidential awards, public service awards, and occupationally-oriented awards. A planning guide arranging the currently available awards, by month, according to their respective nomination due dates at the sponsoring organization, was distributed to the districts as an Administrative Procedures Handbook Issuance on June 29, 1989.

Attached at the Appendix of this Bulletin as Exhibit G is a chart which delineates employee eligibility for incentive, EOUSA and Attorney General awards. Eligibility for non-Department of Justice awards can be determined by consulting the Administrative Procedures Handbook Issuance referenced above.

* * * * *

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%
06-02-89	8.85%
06-30-89	8.16%
07-28-89	7.75%
08-25-89	8.27%
09-22-89	8.19%
10-20-89	7.90%

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.

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Mark E. Davis
Arizona	Stephen M. McNamee
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	Joseph P. Russoniello
California, E	David F. Levi
California, C	Gary A. Feess
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Stanley A. Twardy, Jr.
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	K. Michael Moore
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Robert L. Barr, Jr.
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	D. Paul Vernier
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Anton R. Valukas
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	James G. Richmond
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Christopher D. Hagen
Kansas	Benjamin L. Burgess, Jr.
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Joseph M. Whittle
Louisiana, E	John Volz
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Breckinridge L. Willcox
Massachusetts	Wayne A. Budd
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Jerome G. Arnold
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	Richard J. Pocker
New Hampshire	Jeffrey R. Howard
New Jersey	Samuel A. Alito, Jr.
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	Otto Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	H. Gary Annear
Ohio, N	William Edwards
Ohio, S	D. Michael Crites
Oklahoma, N	Tony Michael Graham
Oklahoma, E	Roger Hilfiger
Oklahoma, W	Timothy D. Leonard
Oregon	Charles H. Turner
Pennsylvania, E	Michael Baylson
Pennsylvania, M	James J. West
Pennsylvania, W	Charles D. Sheehy
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	E. Bart Daniel
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	Marvin Collins
Texas, S	Henry K. Oncken
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	Dee Benson
Vermont	George J. Terwilliger III
Virgin Islands	Terry M. Halpern
Virginia, E	Henry E. Hudson
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Patrick J. Fiedler
Wyoming	Richard A. Stacy
North Mariana Islands	D. Paul Vernier

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EXHIBIT A

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

VOLUME 2 • NUMBER 15 • OCTOBER 30, 1989

Guidelines Application

DETERMINING OFFENSE LEVEL

Eighth Circuit holds that portion of "failure to report" guideline violates statutory mandate. Defendant was sentenced to an 18-month prison term on a drug conviction, but failed to report to prison. She pled guilty to a charge of failure to surrender for service of sentence. The applicable sentencing guideline, § 2J1.6, requires an increase in the base offense level of six based upon the maximum statutory penalty for the underlying offense. In this case the maximum was 15 years or more, resulting in an offense level increase of nine. Defendant argued on appeal that the guideline violates the Sentencing Reform Act by failing to consider the actual sentence imposed for the underlying offense, rather than the maximum potential penalty.

The appellate court agreed: "Section 2J1.6 ignores the significant difference in circumstances between failing to report for trial or sentencing, when a real possibility exists that the maximum sentence will be imposed, and failing to report for service after sentencing where the sentence to be served is but a fraction of the maximum. The language of [18 U.S.C. §] 3553 to consider the nature and circumstances of the offense and to impose a sentence that reflects the seriousness of the offense, and the language in [28 U.S.C. §] 991(b)(1) that the sentencing practices provide certainty and fairness, avoid unwarranted sentencing disparities, and consider mitigating factors, convince us that Congress intended courts to consider this significant difference when sentencing a defendant for failure to appear.... We therefore hold that the application of section 2J1.6 in this case is not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission. We conclude that the appropriate remedy is to invalidate the application of section 2J1.6 insofar as it deals with a defendant's failure to appear after a sentence has been imposed that is but a fraction of the maximum. This will necessitate resentencing as if there were no guideline applicable to this offense."

U.S. v. Lee, No. 88-5292 (8th Cir. Oct. 16, 1989) (Gibson, J.).

Under U.S.S.G. § 1B1.8(a) district court may not, when determining guideline range, use incriminating statements made pursuant to plea agreement unless the agreement so provides, Tenth Circuit holds. Defendant's plea agreement stipulated that in return for her cooperation in the investigation of other drug suspects she would "not be subject to additional federal criminal prosecution for crimes committed in this judicial district," but it also had a disclaimer that while the government would inform the court of her cooperation, "[s]entencing will remain in the sole discretion of the trial court." Self-incriminating information that defendant provided to the government was mentioned in her presentence report, and the court used it to increase her offense level. Defendant argued on appeal that under U.S.S.G. § 1B1.8 the district court should not have used this information in sentencing.

The appellate court agreed. Section 1B1.8(a) reads: "Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement." The court held that the language of the plea agreement here was sufficient to invoke the restriction in § 1B1.8(a). The court also noted that "we believe the language and spirit of *Guidelines* § 1B1.8 require the agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." One of the advantages of § 1B1.8, to "assure potential informants that their statements will in no way be used against them," would "be undercut if we allow ambush by broadly worded disclaimers. . . . The full disclosure approach we require here will ensure defendants are not unfairly surprised by sentencing determinations and will allow both the defendant and the government to bargain with full information."

U.S. v. Shorteeth, No. 88-2853 (10th Cir. Oct. 10, 1989) (Logan, J.).

Eighth Circuit adopts narrow definition of "substantial portion of his income" in Criminal Livelihood guideline; impending guideline amendment has similar effect. Defendant earned $450 from his criminal activities out of an annual income of approximately $1,525, and the district court determined that this constituted a "substantial portion of his income" under the Criminal Livelihood provision, U.S.S.G. § 4B1.3. The appellate court reversed, holding that because the "substantial portion" language was derived from the Dangerous Special Offender statutes, 18 U.S.C. § 3575(e)(2) and 21 U.S.C. § 849(e)(2), the definition from those statutes should apply to this provision. Those statutes defined "substantial source of income" as an amount that exceeds the yearly minimum wage under the Fair Labor Standards Act and also exceeds half of the defendant's declared adjusted gross income. The current yearly minimum wage is approximately

$6,700, the court found, and thus the Criminal Livelihood provision should not have been applied here.

A concurring opinion noted that § 4A1.3 has been amended, effective Nov. 1, 1989, to reach a similar result. The relevant language now reads: "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood . . . ." The commentary to the guideline states that "engaged in as a livelihood" means that the defendant earned income from the criminal conduct in excess of the yearly minimum wage and "that such criminal conduct was the defendant's primary occupation in that twelve-month period."

U.S. v. Nolder, No. 88-2648 (8th Cir. Oct. 4, 1989) (Wollman, J.).

Other Recent Case:

U.S. v. Leeper, No. 88-3726 (11th Cir. Sept. 29, 1989) (per curiam) (remanding for resentencing because on the facts of this case, offense level enhancement for "substantial interference with the administration of justice" under perjury guideline, U.S.S.G. § 2J1.3(b)(2), should not be applied when conduct in question occurred before and did not relate to offense of conviction; this position was taken by Department of Justice on appeal, and the appellate court agreed).

Departures

First Circuit holds departure may not be based on "community sentiment." The district court departed upward in sentencing a defendant convicted of possessing cocaine on board an aircraft. The court found departure was warranted "to discourage the utilization of the Puerto Rico International Airport, an airport with lesser law-enforcement capabilities than those in the mainland, as a connecting point for international narcotics trafficking," and because of the strong local public sentiment against this type of offense.

The appellate court remanded, holding that "the guidelines do not allow departures for reasons such as these. The basic flaw in the district court's reasoning is that it depends entirely upon the mere commission of the offense of conviction. . . . Because the grounds for departure derived their essence from the offense itself, not from idiocratic circumstances attendant to a particular defendant's commission of a particular crime, the grounds, virtually by definition, fell within the heartland" of typical cases encompassed by the Guidelines. The court also determined that departures based on local sentiment are inconsistent with the statutory language, and would undermine the goal of "national uniformity in sentencing."

U.S. v. Aguilar-Pena, No. 88-1477 (1st Cir. Oct. 12, 1989) (Selya, J.), *rev'g* 696 F. Supp. 781 (D.P.R. 1988).

Other Recent Case:

U.S. v. Warters, No. 89-2155 (5th Cir. Sept. 29, 1989) (Garwood, J.) (departure may be warranted for defendant convicted of misprision of conspiracy if facts demonstrate defendant was member of conspiracy and guilty of that offense—"[a] misprision defendant's personal guilt of the underlying offense is . . . a circumstance not taken into account in formulating the misprision guidelines under section 2X4.1").

Appellate Review

Departures

Seventh Circuit holds it has no jurisdiction to review refusal to depart. Defendant pled guilty to a charge of bank fraud. He requested a downward departure in his sentence on the grounds that there were mitigating factors present in his case that were not adequately considered by the Guidelines. The district court refused to depart, finding that the factors defendant raised were "considered in the guideline range."

The appellate court held that it did not have jurisdiction to review a district court's refusal to depart from the Guidelines. The court determined that 18 U.S.C. § 3742(a) controlled appellate review of sentences under the Guidelines. While subsection (2) of that statute "seems to support appellate review of a refusal to depart from the guidelines" when read literally, the court concluded that "the structure of section 3742 as a whole" and the legislative history lead to the conclusion "that Congress did not intend a district court's decision refusing to depart from the guidelines to be appealable."

The court noted that a similar decision was reached by the Second Circuit in *U.S. v. Colon*, No. 89-1141 (2d Cir. Sept. 6, 1989) ("the discretionary failure to depart downward is not appealable"), and that a "compatible" decision was reached by the Fifth Circuit in *U.S. v. Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989) ("we will uphold a district court's refusal to depart from the guidelines unless the refusal was in violation of law"). The court "agree[d] with the Fifth Circuit that, when a district court's refusal to depart is in violation of law, appellate review of that decision is available under 18 U.S.C. § 3742(a)(1)." *See also U.S. v. Fossett*, 881 F.2d 976, 979 (11th Cir. 1989) (claim that "district court did not believe it had the statutory authority to depart from the sentencing guideline range . . . presents a cognizable claim on appeal").

U.S. v. Franz, No. 88-2739 (7th Cir. Oct. 4, 1989) (Ripple, J.).

Fourth Circuit applies "reasonableness" standard in review of refusal to make departure permitted by Guidelines. Defendant requested, and was denied, a departure based on a claim that he acted under coercion or duress, a departure specifically listed in U.S.S.G. § 5K2.12, p.s. The appellate court determined that "where the defendant challenges a district court's decision to grant or deny a requested downward departure" it would "review to determine whether it was 'reasonable' for the district court to conclude that [defendant] did not act under 'coercion' or 'duress,' and that he therefore was not eligible for a downward departure under Guidelines § 5K2.12. *See* 18 U.S.C. § 3742(e)(3)." The court affirmed the refusal to depart.

U.S. v. McCrary, No. 88-5698 (4th Cir. Oct. 16, 1989) (per curiam).

Note: Beginning with this issue of *GSU* we will use the recommended citation forms found in United States Sentencing Commission, *Guidelines Manual* (Nov. 1989).

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

FILED IN OPEN COURT
ON 10/16/89
Clerk

NO. 89-24-01-CR-7

UNITED STATES OF AMERICA)
)
V.) ORDER
)
LLOYD NEILL STRICKLAND)

This matter is before the court on motion by defendant for discovery of information affecting guideline sentencing. For the reasons expressed hereinbelow, the motion is denied.

The defendant specifically requests the court to order the government to disclose to the defendant the following information: (1) the guideline the government contends is applicable to this case, (2) any aggravating offense characteristics the government contends are applicable to this case, (3) any aggravating adjustments the government contends are applicable to this case, and (4) the grounds, if any, that the government will argue justify an upward departure in this case. The defendant argues that this information is necessary to ensure the voluntariness of a guilty plea and the effective assistance of counsel. Without early disclosure of relevant sentencing information the government may have, the defendant contends a court cannot satisfy itself of the defendant's awareness of his likely exposure to punishment and counsel cannot fulfill his obligation to help the client meaningfully access the advantages of pleading guilty.

The purpose of Rule 11 of the Rules of Criminal Procedure is to ensure the defendant is aware of the consequences of his plea.

See McCarthy v. United States, 394 U.S. 459,464, 89 S. Ct. 1166, 1170,22 L.Ed. 2d 418 (1969). Rule 11 requires that "the district court must, before accepting the plea, inform the defendant of `the mandatory minimum penalty provided by law, if any, and the maximum penalty provided by law.'" United States v. Fernandez, 877 F.2d 1138, 1142-43 (2d Cir. 1989). Though it might be desirable if a defendant were fully aware of his likely sentence under the Sentencing Guidelines at the time he enters a plea, there is no such requirement in Rule 11 or the Sentencing Guidelines. See Fernandez, 877 F.2d at 1143. Under the Sentencing Guidelines, "although various factors will increase or enhance the range of a particular defendant's sentence, the maximum sentence will never exceed the maximum provided by statute" and the minimum sentence will be imposed even if a defendant falls into a lower sentencing range under the Guidelines. United States v. Turner, 881 F.2d 684,___, cert. denied, 58 U.S.L.W. 3218 (U.S. Oct. 2, 1989)(No. 89-5451); see also Sentencing Guidelines, 5G1.1 Commentary. Therefore, the requirements of Rule 11 are met if a defendant is informed of the maximum and minimum sentence for the offense with which he is charged.

The law in this circuit prior to the Sentencing Guidelines was that a defendant was not entitled to withdraw his guilty plea based on ineffective assistance of counsel because his attorney erroneously estimated his sentence. Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984). The Sentencing Guidelines do not avoid the effect of our precedents on this issue. See United States v. Sweeney, 878 F.2d 68, 70 (2d Cir. 1989). Before the guidelines,

there was a minimum and maximum sentence allowable under the statute and it was within the judge's discretion to impose sentence within the allowable range. Under the Guidelines, there still exists a minimum and maximum sentence although a judge's discretion is limited in that he must impose a sentence in accordance with the Guidelines. "The Sentencing Guidelines should make it easier for defense counsel to advise a defendant regarding the probable sentencing range with greater accuracy because the various factors that will affect the computation of the offense level and criminal history category are spelled out." Turner, 881 F.2d at ___. Therefore, defense counsel is in no greater need of information concerning the government's theories or arguments with regard to sentencing than he was before the Sentencing Guidelines. See Sweeney, 878 F.2d at 70.

It is, therefore, ORDERED that the defendant's motion for discovery of information affecting guideline sentencing is denied.

This 16 October 1989.

W. EARL BRITT
United States District Judge

EXHIBIT C

JOINT STATEMENT

The U.S. Attorney General Dick Thornburgh and the USSR Minister of Justice V. F. Yakovlev, expressing mutual desire for active exchange of experience and cooperation on the rule of law and concrete legal questions, have agreed on the following goals:

I. The Department of Justice and the Ministry of Justice will regularly exchange:

a) information on the most important legislative acts promulgated in each country on issues regarding the protection of rights and security of their citizens; combatting organized crime and illegal distribution of narcotics; protection of the environment; immigration and emigration; regulation of foreign trade; protection of foreign investments; and other issues of mutual interest;

b) legal research, court decisions and information on the practical implementation of the above legislation; and

c) provisions and acts on the structure and rules of procedure of judicial and administrative bodies and other legal institutions.

II. The Department of Justice and the Ministry of Justice, on a mutual basis and upon mutual request, will organize

a) consultations among officials on major legal issues;

b) exchanges of specialists for the purpose of studying and sharing the results of the work carried out by bodies concerned with the administration of justice;

c) study of the possibilities of concluding agreements on mutual legal assistance; and

d) periodic meetings of specialists from their ministries and other relevant government agencies dealing with the formulation and implementation of policies and procedures in the areas of emigration and immigration; criminal law, including organized crime, narcotics trafficking and terrorism; environmental law; and commercial law.

III. The Department of Justice and the Ministry of Justice will also promote the broadening of legal cooperation among other U.S. and Soviet institutions and individuals.

U.S. Attorney General

Dick Thornburgh

October 19, 1989

USSR Minister of Justice

V. F. Yakovlev

EXHIBIT D

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

October 5, 1989

MEMORANDUM

TO: All Employees

FROM: Dick Thornburgh
Attorney General

SUBJECT: Department Support of Adoptions

The President recently signed a Memorandum for Heads of Departments and Agencies endorsing adoption as an alternative solution to some of the Nation's most pressing family issues. The President identified these issues as teenage pregnancy, foster care, infertility, and welfare dependency.

The President intends for the Federal workforce to provide leadership in adoptions. He asked each department and agency to develop methods for supporting the adoption plans and needs of employees and for promoting adoption among the workforce.

The foundation of our Nation is the American family, protector of our most valuable yet vulnerable resource -- our children. Sadly, many American children do not belong to a family. They suffered a tragedy early in life or have been abandoned, neglected or abused. Their lost childhood can be restored to them by a permanent adoptive family. This, I believe, is an effort worthy of our greatest commitment. Consider the following sad facts:

> An estimated 15 percent of American couples of reproductive age are infertile.
>
> Right now, nearly 30,000 American children are legally available for adoption. Some of them are school-age, some are physically or emotionally handicapped, some are members of sibling groups that need to be placed in the same home, and some are minority children.
>
> Each year nearly 25,000 American babies are given life and the chance to be loved when their mothers choose adoption over abortion or unwanted parenthood; yet the opportunity to consider adoption is often denied to pregnant women. I am told that as much as 40 percent of pregnancy counseling does not even mention adoption.

Each year American families adopt about 60,000 children. Of these, 10,000 come from foreign countries. These children find love and a sense of belonging. Adoption works -- for children who need homes, for people hoping to become parents, and for those facing a crisis pregnancy. Everyone wins in adoption.

I ask you to consider adoption and the wonderful gift you can give to a child who has no one. I have asked the heads of Department components to be as flexible as possible in approving leave for adoption purposes. The Employee Assistance Program for the Offices, Boards, and Divisions will expand its service to include referrals and counseling of those considering adoptions. Bureaus also have been asked to provide this service for their employees. If you are interested in finding out more about adoptions, the Justice Training Center will offer a training program which will cover the information needed by those considering adoption -- where to go, how to go about it, qualifications, etc. Another way for you to support adoptions is to be generous to adoption agencies and placement centers. The Combined Federal Campaign, which will begin on October 6, 1989, will provide an excellent opportunity to show your financial support.

A commitment to adoption is one we can all share.

EXHIBIT E

U.S. Department of Justice

Civil Division

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

August 18, 1989

MEMORANDUM

TO: All United States Attorneys

FROM: Stuart E. Schiffer
Acting Assistant Attorney General
Civil Division

SUBJECT: **Update #4 on P.L. 100-694 (the Westfall Legislation)**

CHANGE OF POLICY

Effective immediately, we will no longer argue that the certification of scope of employment by the Attorney General or his delegee pursuant to 28 U.S.C. § 2679(d) is conclusive and not subject to judicial review, except insofar as § 2679(d)(2) makes the certification conclusive for purposes of removal. Any argument to the contrary presently pending in district court or on appeal must be withdrawn.

DISCUSSION

We originally argued that Congress intended that there would be judicial review only when the Attorney General refused to certify that a federal employee was acting within the scope of federal employment (28 U.S.C. § 2679(d)(3).) By eliminating an earlier provision which had permitted judicial review of a certification that an employee was acting within the scope of employment, we maintained, Congress intended that the Attorney General's certification be conclusive and not subject to judicial review.

However, during the hearing on the bill, following the submission of prepared remarks, the Department's representative stressed that a plaintiff would be able to challenge the Attorney General's scope certification and obtain judicial review of that certification. Given that the statute, itself, is not clear, we now think it reasonable to assume that the statute was enacted on the assumption that review would be available. Obviously, we should still maintain that the certification is entitled to great deference.

CERTIFICATION IS CONCLUSIVE "FOR PURPOSES OF REMOVAL"

If a federal court disagrees with the Attorney General's certification in a case removed from state court and holds that the conduct was not within the scope of federal employment, our position is that the case nevertheless must remain in the federal courts for adjudication. In light of the statute's statement that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" (28 U.S.C. § 2679(d)(2)), it is our view that the federal courts have no authority to remand a case removed under the statute.

National coordination and implementation of this change of position are essential. If you have any questions, please contact the Civil Division attorney assigned to the case. If there is no assignment, please contact Torts Branch Assistant Director Nicki Koutsis (FTS: 724-7038) concerning cases pending in state or federal trial courts or Appellate Staff Assistant Director Barbara Herwig (FTS: 633-5425) concerning cases on appeal.

cc: Solicitor General
Assistant Attorney General, Criminal Division
Assistant Attorney General, Office of Legislative Affairs
Assistant Attorney General, Land and Natural Resources Division
Assistant Attorney General, Tax Division
Civil Division Deputy Assistant Attorneys General
Civil Division Branch and Office Directors

We had to act promptly to resolve this matter for a number of reasons. There were two appellate court cases in which nonreviewability was at issue and briefs were due to be filed. It was also imperative that our position be resolved quickly in order to minimize the adverse impact upon the Department's relationships with the judiciary in light of the many cases in which the nonreviewability argument was pending. Finally, it was essential that the Department's relationship with Congress, particularly with the Committees which strongly supported our request for this emergency legislation, be preserved.

Very truly yours,

STUART E. SCHIFFER
Acting Assistant Attorney General

cc: Honorable Dexter W. Lehtinen
United States Attorney

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 27, 1989

Honorable James G. Richmond
Chairman, Advisory Committee
of United States Attorneys
4th Floor, Federal Building
507 State Street
Hammond, Indiana 46320

Dear Jim:

This letter is in response to the concerns raised by you and by Dexter Lehtinen regarding my memorandum of August 18, 1989, which directed the withdrawal of the argument that the Attorney General's scope certification was not reviewable.

The Department's change of position on reviewability was prompted by two events. First, the transcript of the hearing at which former Deputy Assistant Attorney General Willmore testified that scope would be reviewable came to my attention. Second, at about the same time, I learned that the House Judiciary Committee was very disturbed that the Department was making the argument contrary to the express assurances given to it that scope would be reviewable. Indeed, one of the principal sponsors of the bill indicated that he would seek amendment or repeal of the Act if the argument was not promptly withdrawn.

Under these circumstances, it was clear that the Department must honor the commitment made by its representative to the Judiciary Committee. Given the fact that the statute states only that the certification "shall conclusively establish scope of employment <u>for purposes of removal</u>" and that the Department had given assurances at the hearing that we understood the certification to be otherwise reviewable, any argument to the contrary would not be tenable. It would be substantively fruitless to continue to argue nonreviewability because, under Rule 11 of the Federal Rules of Civil Procedure, Department attorneys would be required to bring to the attention of the courts the contrary position expressed by the Department at the hearing.

U.S. Department of Justice

Executive Office for United States Attor

EXHIBIT F

Washington, D.C. 20530

JUN 30 1989

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for the United States Attorneys

Edward S.G. Dennis, Jr.
Assistant Attorney General
Criminal Division

RE: Temporary Restraining Orders Under 18 U.S.C. §1963(d)

NOTE: 1. This is issued pursuant to 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-110.414

PURPOSE: This bluesheet implements new policy regarding the requirement of approval by the Organized Crime and Racketeering Section prior to filing a motion for a temporary restraining order under 18 U.S.C. §1963(d) in connection with a case involving RICO forfeiture.

The following is a new section:

9-110.414 Temporary Restraining Orders

Under 18 U.S.C. §1963(d), the government may seek a temporary restraining order (TRO) upon the filing of a RICO indictment, in order to preserve all forfeitable assets until the trial is completed and judgment entered. Such orders can have a wide-ranging impact on third parties who do business with the defendants, including clients, vendors, banks, investors, creditors, dependents, and others. Some highly publicized cases involving RICO TROs have been the subject of considerable criticism in the press, because of a perception that pre-trial freezing of assets is tantamount to a seizure of

property without due process. In order to ensure that the rights of all interested parties are protected, the Criminal Division has instituted the following requirements to control the use of TROs in RICO prosecutions. (It should be noted that these requirements are in addition to any other existing requirements, such as review by the Asset Forfeiture Office.):

1. As part of the approval process for RICO prosecutions, the prosecutor must submit any proposed forfeiture TRO for review by the Organized Crime and Racketeering Section. The prosecutor must show that less-intrusive remedies (such as bonds) are not likely to preserve the assets for forfeiture in the event of a conviction.

2. In seeking approval of a TRO, the prosecutor must articulate any anticipated impact that forfeiture and the TRO would have on innocent third parties, balanced against the government's need to preserve the assets.

3. In deciding whether forfeiture (and, hence, a TRO) is appropriate, the Section will consider the nature and severity of the offense; the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

4. When a RICO TRO is being sought, the prosecutor is required, at the earliest appropriate time, to state publicly that the government's request for a TRO, and eventual forfeiture, is made in full recognition of the rights of third parties--that is, in requesting the TRO, the government will not seek to disrupt the normal, legitimate business activities of the defendant; will not seek through use of the relation-back doctrine to take from third parties assets legitimately transferred to them; will not seek to vitiate legitimate business transactions occurring between the defendant and third parties; and will, in all other respects, assist the court in ensuring that the rights of third parties are protected, through proceedings under 18 U.S.C. §1963(l) and otherwise.

The Division expects that the prosecutor will announce these principles either at the time the indictment is returned or, at the latest, at the first proceeding before the court concerning the TRO.

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

JUL - 3 1989

TO: Holders of United States Attorneys' Manual Title 6

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Shirley D. Peterson
Assistant Attorney General
Tax Division

RE: Charging the Filing or Causing the Filing of False Income Tax Returns as Mail Fraud and/or as Mail Fraud Predicates to a RICO Charge

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 6.
3. Insert at end of USAM Title 6.

AFFECTS: USAM 6-4.211(1)

PURPOSE: This bluesheet implements prosecutive policy concerning the use of mail fraud charges and mail fraud predicates for RICO where the filing of false tax returns or forms is involved.

The following supplements 6-4.211 Tax Division Jurisdiction with a new subsection 6-4.211(1) Filing False Tax Returns: Mail Fraud Charges or Mail Fraud Predicates for RICO.

The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme (e.g., a tax shelter) 1/. Such authorization will be granted only in exceptional circumstances as explained below.

The filing of a false tax return, which almost invariably involves a mailing, is a tax crime chargeable under 26 U.S.C. 7206(1) (if the violator is the taxpayer) or 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or tax shelter promoter). It is the position of the Tax Division that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed. See, United States v. Henderson, 386 F.Supp. 1048, 1052-53 (S.D.N.Y. 1971). 2/

1/ A scheme does not fall in the latter category if it is designed to defraud individuals or to defraud the government in a non-revenue collecting capacity.

2/ The Ninth Circuit in United States v. Miller, 545 F.2d 1204, 1216 (9th Cir. 1976) cert denied, 430 U.S. 930 (1977) in footnote 17 stated a contrary position, but did not analyze the issue as it was not squarely presented. The case involved corporate diversion and possible fraud on creditors as well as tax evasion.

Under certain narrowly defined circumstances, however, a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be appropriate in addition to, but never in lieu of, applicable substantive tax charges. See, United States v. Mangan, 575 F.2d 32, 48-49 (2d Cir. 1978)(where the defendant filed false refund claims on behalf of others, thereby acting more like a thief in the traditional sense). Such a situation could arise in a tax shelter or other tax fraud case, when individuals, through no deliberate fault of their own, were demonstrably victimized as a result of a defendant's fraudulent scheme and use of a mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims. The fact that a defendant committed conduct which independently victimized individuals is to be reflected in the mail fraud allegations in the indictment. Mail fraud charges could also be used in a tax fraud case when the government was also victimized in a non-revenue collecting capacity. See, e.g., United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987) (case involving primarily false contract claims). However, to the extent victimization of third parties constitutes an exception to the general rule, the evidence must demonstrate direct, substantial victimization as opposed to a general or theoretical harm to a general class of victims.

Normally, in a tax shelter case, the mere imposition of interest and penalties on the investors will not constitute sufficient victimization to warrant the use of mail fraud charges in addition to tax charges. However, each individual case will be reviewed on its

merits to determine whether the degree of culpability of the individual investors is such as to treat them more as victims than participants in the particular scheme. Among the factors to consider are the existence of bona fide pending civil suits against the promoters by the investors, the nature and degree of misrepresentations made to the investors, and the degree of independent losses beyond the tax liability.

A similar policy will be followed with respect to the filing of RICO charges predicated on mail fraud charges which in turn involve essentially only a tax fraud scheme. Tax offenses are not predicates for RICO offenses--a deliberate Congressional decision--and charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances justifying the use of a mail fraud charge are present.

However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.

For a determination as to whether a mail fraud charge predicated on the mailing of internal revenue forms or documents is appropriate, the Tax Division should be consulted early in the investigation rather than waiting until a last minute decision is needed.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989 - 241-712 - 418/00103

EXHIBIT G

MONETARY AND HONORARY AWARD ELIGIBILITY

AWARD	AUSA	NON-ATTORNEYS
1) Incentive Awards		
a. Special Achievement Awards for Sustained Superior Performance	Eligible	Eligible*
b. Special Achievement Awards for Special Act or Services	Eligible	Eligible
c. Quality Step Increase	Not Eligible	Eligible*
2) EOUSA Director's Awards		
a. Superior Performance as an AUSA	Eligible	Not Eligible
b. Special Commendation	Eligible	Eligible
c. Outstanding Performance in a Litigation Support or Managerial Role	Eligible	Eligible
d. Equal Employment Opportunity	Eligible	Eligible
e. Outstanding Achievement in Financial Litigation	Eligible	Eligible
f. Outstanding Performance in Assistance and Management of Witnesses	Not Eligible	Eligible
g. Outstanding Performance in Assistance to Victims of Crime	Not Eligible	Eligible
h. Outstanding Performance in Law Enforcement Coordination	Not Eligible	Eligible
3) Attorney General's Awards		
a. Exceptional Service	Eligible	Eligible
b. Distinguished Service	Eligible	Eligible
c. John Marshall Award	Eligible	Not Eligible

MONETARY AND HONORARY AWARD ELIGIBILITY

AWARD	AUSA	NON-ATTORNEYS
d. Exceptional Heroism	Eligible	Eligible
e. Excellence in Management	Eligible	Eligible**
f. Excellence in Law Enforcement	Not Eligible	Not Eligible
g. Equal Employment Opportunity	Eligible	Eligible
h. Upward Mobility	Eligible	Eligible
i. Outstanding Service to the Department of Justice Handicapped Employees	Eligible	Eligible
j. Excellence in Legal Support	Not Eligible	Eligible***
k. Excellence in Administrative Support	Not Eligible	Eligible***
l. Meritorious Public Service Award	Not Eligible	Not Eligible

***Performance Management and Recognition System employees are ineligible for these awards.**

****GS/GM-13 or higher grade**

*****GS-12 and Below**