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Executive Office for United States Attorneys

United States Attorneys' Bulletin

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Laurence S. McWhorter, Director

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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VOLUME 36, NO. 11 THIRTY-FIFTH YEAR NOVEMBER 15, 1988

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

COMMENDATIONS

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

Steven D. Bell and **Michael Anne Johnson** (Ohio, Northern District), by K.C. Weaver, Regional Chief Inspector, U.S. Postal Service, Bala-Cynwyd, Pennsylvania, for their excellent representation in a civil case.

Charles S. Crandall (California, Southern District), by William S. Sessions, Director, FBI, for his contribution to the successful prosecution of a number of environmental crime cases.

Patrick Cunningham (District of Arizona), by Herbert H. Hawkins, Jr., Special Agent in Charge, FBI, Phoenix, for his participation in a Moot Court training program.

Louis Demas (California, Eastern District), by William Penn Mott, Jr., Director, National Park Service, Washington, D.C., for his outstanding representation in a prosecution involving a complex housing program.

John M. DiPuccio (Ohio, Southern District), was awarded a Certificate of Appreciation from Dr. Frank E. Young, Commissioner, Food and Drug Administration, Rockville, Maryland, for his contribution to the success of the National Anabolic Steroid investigation.

Nathan Dodell (District of Columbia), by Vice Admiral William H. Rowden, Naval Sea Systems Command, U.S. Navy, for obtaining a favorable decision on behalf of the Department of the Navy in a complex civil case.

Robert E. L. Eaton, Jr. (District of Columbia), by Michael Kozak, Acting Assistant Secretary of State for Inter-American Affairs, Department of State, for his outstanding assistance in a Freedom of Information Act case involving a list of 2,746 excludable Cuban nationals.

Thomas J. Hopkins (California, Eastern District), by Donald Mancuso, Assistant Inspector General, Department of Defense, Arlington, Virginia, for his successful conclusion of an investigation involving a theft ring at the Defense Depot at Tracy.

Wallace Kleindienst (District of Arizona), by Rick Parsons, Senior Investigator, Security/Loss Prevention, Citibank-Arizona, Phoenix, for his successful prosecution of a major bank fraud case.

Karen Kothe (District of Arizona), by Nina J. Rivera, District Counsel, Small Business Administration, Phoenix, for obtaining a guilty plea in a criminal fraud case.

Wilma A. Lewis (District of Columbia), by Raymond DeCarli, Assistant Inspector General for Auditing, Department of Transportation, Washington, D.C., for her excellent representation in the prosecution of a civil case.

Lawrence Lincoln (California, Eastern District), by Harold Ezell, Regional Commissioner, Immigration and Naturalization Service, Laguna Niguel, for his outstanding success in a multi-faceted document fraud investigation.

William McAbee (Georgia, Southern District), by Leo Shatzel, Postal Inspector in Charge, Atlanta, for his prompt and decisive action in the arrest and follow-up psychiatric treatment of a deranged individual, which precluded what could have been a very volatile situation.

James Moran (District of Colorado), by Charles R. Sekerak, Assistant Inspector General for Investigations, Railroad Retirement Board, Chicago, for the assistance extended to Special Agent Edward Tucker by Mr. Moran in a recent visit to Colorado.

Thomas O. Mucklow (West Virginia, Northern District) by William Sessions, Director, FBI, for his outstanding performance in the prosecution of two major drug cases in the tri-state area surrounding Wheeling, West Virginia.

Mark E. Nagle (District of Columbia), by Captain R.C. Berkley, Office of the Judge Advocate General, U.S. Navy, Alexandria, Virginia, for his outstanding representation of the Departments of the Navy and the Army in Freedom of Information Act litigation with the Viet Nam Veterans of America.

Stephen C. Peters (District of Colorado), by David J. Thomas, Executive Director, Department of Public Safety, Denver, for his presentation on civil discovery techniques and the federal forfeiture system in two training seminars for Colorado prosecutors.

Warren P. Reese (California, Southern District), was awarded a Certificate of Appreciation by Charles E. Hill, Special Agent in Charge, Drug Enforcement Administration, San Diego, for his dedication and professionalism in the prosecution of a complex narcotics criminal conspiracy case.

David E. Risley (Illinois, Central District), by D. C. Swindle, U.S. Postal Inspector, Springfield, for his successful prosecution of an embezzlement case.

Robert C. Seldon (District of Columbia), by Susan J. Crawford, General Counsel, Department of the Army, Washington, D.C., for obtaining a favorable settlement agreement on behalf of the U.S. Army in a complex Claims Court case.

Kenneth E. Vines (Alabama, Middle District), by Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, Washington, D.C., for his valuable assistance in legal proceedings involving the Farley Nuclear Plant.

Wayne P. Williams (District of Columbia), by Darrell J. Grinstead, Associate General Counsel, Business and Administrative Law Division, Department of Health & Human Services, Washington, D.C. for his excellent representation in the litigation of a civil case.

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PERSONNEL

On October 4, 1988, **Edward S.G. Dennis, Jr.** took the oath of office as Assistant Attorney General for the Criminal Division.

On October 5, 1988, **Harold G. Christensen** took the oath of office as Deputy Attorney General.

On October 6, 1988, **Francis A. Keating, II** took the oath of office as Associate Attorney General.

On October 17, 1988, **Thomas M. Boyd** took the oath of office as Assistant Attorney General for the Office of Legislative Affairs.

On October 17, 1988, **Douglas W. Kmiec** became Assistant Attorney General for the Office of Legal Counsel.

On October 14, 1988, **Dexter W. Lehtinen** was sworn in as the court-appointed United States Attorney for the Southern District of Florida.

On October 16, 1988, **Peter E. Papps** became Acting United States Attorney for the District of New Hampshire.

On October 18, 1988, **Dennis C. Vacco** was sworn in as the Presidentially appointed United States Attorney for the Western District of New York.

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POINTS TO REMEMBER

Career Opportunities

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced civil trial attorneys for the Land and Natural Resources Division, Land Acquisition Section, in Washington, D.C. The work of this Section involves the acquisition of land for the federal government, either by direct purchase or condemnation proceedings. Legal issues frequently include the power of the United States to condemn under specific acts of Congress, ascertainment of the market value of property, applicability of zoning regulations and problems related to subdivisions, capitalization of income and the admissibility of evidence. Applicants must possess a J.D. degree and be an active member of the bar in good standing. A minimum of five years of civil litigation experience involving cases of significance and a lead counsel role is required. Litigation experience in real estate valuation issues (e.g., eminent domain and tax assessments) is highly desirable. Salary is commensurate with experience, and applicants must be willing to travel. This position closes November 30, 1988.

Please submit a resume or SF-171 (Application for Federal Employment) to: U.S. Department of Justice, Executive Assistant, Land and Natural Resources Division, P.O. Box 7754, Washington, D.C. 20044-7754 (no telephone calls, please). The Department of Justice is an equal opportunity employer.

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The Office of Attorney Personnel Management, Department of Justice, is seeking a trial attorney for the Antitrust Division in Chicago, Illinois. Attorneys should have 1-4 years of litigation experience (antitrust and white collar crime preferred) and superior academic and professional qualifications. Applicants must possess a J.D. degree and be an active member of the bar in good standing. This position closes November 30, 1988.

Please submit a resume or SF-171 (Application for Federal Employment), references, and writing sample to: Antitrust Division, Chicago Office, 230 South Dearborn Street, Suite 3820, Chicago, Illinois 60604, Attn: Kent Brown, Chief (no telephone calls, please). The Department of Justice is an equal opportunity employer.

(Office of Attorney Personnel Management)

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Civil Service Retirement Deductions In Bankruptcy Proceedings

The Office of Personnel Management (OPM) advises that retirement deductions that are withheld from the salaries of federal employees, as required by the Civil Service Retirement Act, should not be included in a bankrupt's estate. See 5 U.S.C. §8334. A United States Bankruptcy Court recently directed OPM to turn over these deductions to a bankruptcy trustee. In re Gary William Wolthuis and Nelda Wolthuis. OPM advises that because a federal employee cannot demand payment of any funds withheld for retirement until the employee's employment terminates, neither can the trustee who steps into the shoes of the debtor, demand payment while the debtor is still employed by the Government. In In re Bizon, 28 B.R. 886 (Bankr. D. Md. 1983), the employee had terminated his employment with the Government. The court held that the debtor could not be required to take a lump sum payment for surrender to the trustee.

In any case, where a trustee attempts to attach a federal employee's retirement deductions, please contact Murray Meeker, Office of the General Counsel, Office of Personnel Management, FTS 632-5090.

(Executive Office for United States Attorneys)

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Sexual Offenses Under The Indian Major Crimes Act

As you were previously informed in United States Attorneys' Bulletin, Volume 35, No. 9, dated September 15, 1987, p. 175, the Indian Major Crimes Act, 18 U.S.C. §1153, was amended by the enactment of Section 87 of the Criminal Law and Procedure Act of 1986, Pub. L. 99-646, 100 Stat. 3623. The amendment substituted "a felony under Chapter 109A" for rape and other sexual offenses. The item warned that the amendment was not clearly reflected in West's 1987 paperback edition of the Federal Criminal Code and Rules or the 1987 supplement to the United States Code Annotated.

This has not been corrected in the 1988 paperback edition. The corrected version of the statute, together with an explanatory note, appears at page 844 of Supplement IV (1987) to the United States Code. A copy is attached as Exhibit A at the Appendix of this Bulletin, together with a copy of the excerpt from the United States Attorneys' Bulletin of September, 1987.

(Criminal Division)

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Internment Of Japanese-American Citizens

On August 10, 1988, the Civil Liberties Act of 1988 was signed by the President, and gives the Attorney General one year from the date of enactment to identify and locate, without requiring application, the approximately 60,000 Japanese-American citizens interned or evacuated by the United States during World War II who are eligible to receive payment under the Act. The responsibility for identifying and locating these individuals was delegated to the Civil Rights Division on September 9, 1988, and the Office of Redress Administration was created at that time to carry out this responsibility. The Division opened a toll-free (voice and TDD) number on September 19, 1988 to allow potential eligible individuals to identify themselves and to volunteer information on friends and relatives who were also interned. In addition, a post office box was established to receive information voluntarily submitted.

The availability of these methods of communication was publicized through informational flyers, press releases, and contacts with numerous Japanese-American organizations. In other outreach efforts, Division officials have met with representatives of major Japanese-American organizations, as well as small groups and church groups.

(Civil Rights Division)

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Surveys Of United States Attorneys' Offices

On October 21, 1988, Attorney General Dick Thornburgh issued a memorandum to the Heads of Department Components and all United States Attorneys concerning surveys of United States Attorneys' Offices. This memorandum refers to DOJ Order No. 2810.1, dated June 13, 1980, and signed by former Attorney General Benjamin Civiletti, which required that all surveys, questionnaires, or requests for information sought from one or more United States Attorney's Office by Department of Justice components or by other persons or organizations outside the Department, including the private sector, other United States Government offices, Members of Congress or Committees, or the General Accounting Office (see USAM 1-8.300) should be submitted to the Executive Office for United States Attorneys.

The Executive Office for United States Attorneys has been designated as the unit for coordinating surveys of United States Attorneys' offices because of the continuing burden on the United

States Attorneys' Offices to respond to frequent and sometimes duplicative surveys. It should also be noted that only the Executive Office has the authority to grant access to a United States Attorney's office material or personnel. Not only does this protect offices from being inundated with surveys, but it also limits access to the types of information sought. By limiting access to the types of information sought, the Executive Office can prevent government agencies or private organizations from inappropriately obtaining sensitive materials or information during active investigations.

(Executive Office for United States Attorneys)

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Special Deputy United States Marshals' Appointments

Pursuant to the February 18, 1988, Firearms Policy for United States Attorneys and Assistant United States Attorneys, all appointments for Special Deputy United States Marshals should be directed to the Associate Attorney General, through the Director of the Executive Office for United States Attorneys. The United States Marshals Service requires that firearms to be carried by attorneys appointed as Special Deputy United States Marshals must meet the following criteria:

- Firearms must be double action;
- Firearms must be 9mm semi-automatic, .38 caliber, or larger handguns that meet all criteria. (Handguns that chamber .380 ACP/9mm short, 9mm Browning short, 9mm Corto, 9mm Kurz, .380 semi-automatic, or 9mm M-34 ammunition, as well as other handguns utilizing a cartridge length less than .750 (3/4 of an inch), are prohibited;
- Firearms must be at least a six-shot weapon. No five-shot weapons will be authorized; and
- No alloy frame revolvers will be authorized.

(Executive Office for United States Attorneys)

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LEGISLATION

Omnibus Anti-Drug Abuse Act of 1988

On October 22, 1988, Congress passed the Omnibus Anti-Drug Abuse Act of 1988 (H.R. 5210). In brief, the provisions of the Act are as follows:

1. Drug Czar: Works out of the Executive Office of the President; Cabinet-level position; an advisor to, but not a member of, the NSC; maps out national anti-drug strategy and budget, including both supply and demand sides of the problem, but has no operational control over any Department/Agency assets, except where expressly authorized by the head of the Department/Agency; "Certification" of anti-drug budget requests by involved Department/Agency, but no veto power over budget formulations, can only make budget recommendations to President; has "veto" authority over reprogramming of anti-drug funds greater than $5 million. (Sections 1001-1012)

2. Death Penalty - (A Departmental Initiative): Applicable in cases in which the defendant intentionally kills or counsels, commands, induces, procures or causes the intentional killing of another in the course of a Continuing Criminal Enterprise offense, a major drug trafficking offense involving large amounts of drugs listed in 21 U.S.C. §841(b)(1)(A), or an importation offense involving the same amounts of drugs listed in 21 U.S.C. §960(b)(1) [for example, five kilograms or more of cocaine, one kilogram of heroin, or 1000 kilograms of marijuana]; and/or cases involving the killing or ordering the killing of any federal, state or local law enforcement officer during any felony violation of the Controlled Substances Act. (Section 7000-7002)

3. Public Corruption - (A Departmental Initiative): Effectively overturns McNally v. United States and restores coverage under the mail and wire fraud statutes for prosecuting schemes to defraud that deprive the public of the intangible right to honest services from public officials. (Section 7603)

4. Civil Enforcement: Places emphasis on use of civil enforcement sanctions (e.g. forfeiture, injunctions, civil RICO or civil actions to collect fines) to combat drug trafficking and organized crime; and mandates a study regarding need for reorganization of DOJ anti-drug efforts, including issue of separate Division within DOJ consisting of OCDETF task forces and the Narcotics, Organized Crime, and Asset Forfeiture Sections of the Criminal Division. (Sections 1051-1055)

5. Civil Penalties: Authorizes the administrative assessment of a civil penalty of up to $10,000 for the possession of certain controlled substances, and persons so assessed may seek judicial determination of a penalty in a jury trial subject to a reasonable doubt standard of proof. (Section 6480)

6. Innocent Owners Provision: Establishes as an affirmative defense to forfeiture of conveyances that forfeiture cannot be based on act or omission that was committed or omitted "without the knowledge, consent, or willful blindness of the owner." (This is perhaps the single worst provision in the bill.) (Section 6075-6079)

7. Precursor and Essential Chemicals: Establishes controls relating to precursor and essential chemicals used in the production of controlled substances. (Sections 6051-6061)

8. Habeas Corpus - (A Departmental Initiative): No substantive reform provisions, but mandates consideration by Congress of the recommendations of a Commission created by the Supreme Court to study and report on the issue next year and expeditious Congressional action on those recommendations. (Section 7323)

9. Money Laundering - (A Departmental Initiative): Strengthens the ability of law enforcement to detect and prosecute money laundering schemes by changing the Right to Financial Privacy Act to increase law enforcement access to financial records and a number of other modifications of existing law, including granting U.S. the authority to forfeit the money sought to be laundered (i.e., the forfeiture of the corpus), not just the launderer's profits. (Sections 6181-6187, 6463-6467, 6471)

10. User Accountability: Expressed the sense of Congress in opposing legalization of drugs and created provisions denying federal benefits to persons convicted of state or federal drug offenses (e.g., federal grants, licenses, loans, contracts, but not including Social Security, welfare, health, disability or veterans payments). (Sections 5001-5301)

11. International Narcotics Controls: Authorizes foreign assistance for herbicides, for aerial coca eradication, training for narcotics control activities, and military assistance for anti-narcotics efforts, as well as other measures to support U.S. overseas anti-drug efforts. (Sections 4001-4804)

12. Minor and Technical Amendments - (A Departmental Initiative): Contains over 100 minor and technical amendments to Title 18 and the Federal Rules of Criminal Procedure, virtually all of which were drafted by the Criminal Division. (Sections 6451-6487 and 7011-7111)

Not included in the bill were the following issues:

1. Exclusionary Rule - (A Departmental Initiative): No provisions modifying the exclusionary rule; the Senate rejected the House-passed extension of the good faith exception in the Leon case to warrantless searches and no compromise could be found so the provision was dropped.

2. Plastic Guns - (A Departmental Initiative): Plastic gun provisions were passed separately by both Houses; not included in the drug bill.

3. Diplomatic Immunity: Would have mandated that the State Department ensure that diplomats charged with crimes in the United States are prosecuted. The Departments of State and Justice objected on policy and constitutional grounds.

4. Federal Debt Collection - (A Departmental Initiative): Would have enhanced the remedies available to the United States and established uniform procedures in all federal judicial districts for the collection of debts owed the United States. Expected to account for $17 million in additional revenue.

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Child Protection and Obscenity Enforcement Act of 1988

H.R. 5210, the Child Protection and Obscenity Enforcement Act of 1988, was passed as an amendment to the Omnibus Anti-Drug Abuse Act (Sections 7511-7526). Most of the provisions of the Meese Commission on Pornography, as reflected in the Administration's bill, were enacted. The child pornography provisions were passed virtually intact, (except for a change in the recordkeeping requirement from "past 25 years" to post-February 6, 1978). The obscenity provisions were modified by the dropping of the civil forfeiture and civil fine provisions (the latter added by Senator Thurmond) and the dropping of "simple possession" provisions from the federal lands section. Minor modifications were also made to the "facilities" element of the criminal forfeiture section and to the amendment to 18 U.S.C. §1465 regarding interstate transportation of obscene material. The Department is extremely pleased with the final language relating to obscenity, despite premature press claims of the demise of the obscenity provisions.

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Federal Prison Industries Borrowing Authority

H.R. 5210, the Federal Prison Industries Borrowing Authority, was passed as an amendment to the Omnibus Anti-Drug Abuse Act of 1988 (Section 9093). This legislation was the Administration's proposal to seek enabling legislation for the Federal Prison Industries (FPI) to borrow from the United States Treasury. This borrowing authority will permit FPI to expand its prison work program into new and expanded federal prisons. This is a vital need for the Bureau of Prisons, as they are projecting rapid increases in their populations due to the implementation of sentencing guidelines, the Anti-Drug Abuse Act of 1986, and the anticipated impact of H.R. 5210.

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Federal Employees Liability Reform and Tort Compensation Act

On October 20, 1988, Congress passed H.R. 4612, the Federal Employees Liability Reform and Tort Compensation Act of 1988 by the Congress. This legislation provides needed protection for government employees which was removed by the Supreme Court's decision in Westfall v. Ervin, and thus reinstates the law as it existed prior to the Court's decision. The Act provides that lawsuits against the United States, under the Federal Tort Claims Act, shall be the exclusive remedy for common law torts allegedly caused by Federal government employees acting within the scope of their employment. It restores to federal employees, including those in the legislative and judicial branches, the same protections that apply to their private counterparts. It does not amend the Federal Tort Claims Act, but requires that tort litigation be directed at the employer, the United States, thus protecting federal employees from the threat of personal financial ruin that is the unavoidable consequence of being named as an individual defendant in a tort suit. The President is expected to sign this important legislation.

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Judicial Branch Improvements Act

On October 14, 1988, the Senate passed the text of S. 1482 as H.R. 4807, the Judicial Branch Improvements Act of 1988. This multi-faceted legislation, initially introduced as H.R. 3251, represents a major court reform effort. The Department worked closely with Congressional staff throughout the long process and supports the final version, although it does not contain all of the reforms that we hoped it would include.

One important reform pertains to the Title V provisions for interlocutory appeals to the Federal Circuit to settle threshold jurisdictional questions in Tucker Act cases. Title II increases the amount of controversy required for federal court diversity jurisdiction from $10,000 to $50,000, which we regard as a positive step, albeit a small one.

On October 19, 1988, the House passed H.R. 4807 as it had been passed by the Senate. The Department supports Executive approval of this legislation.

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Reauthorization of Justice Assistance Programs

When Congress passed H.R. 5210, the Omnibus Anti-Drug Abuse Act of 1988, as amended, the Justice Assistance Programs were reauthorized by amendments to the bill. The following state and local assistance programs were reauthorized: the Office of Justice Programs (OJP); the Bureau of Justice Assistance (BJA); the National Institute of Justice (NIJ); the Bureau of Justice Statistics (BJS); the Office of Victims Assistance (OVA); the Office of Juvenile Justice and Delinquency Prevention (OJJDP); the Missing and Exploited Children's Assistance Program; and the Public Safety Officers' Death Benefits Program (PSODBP). The limitations placed on appropriations by Gramm-Rudman-Hollings resulted in only two of the above reauthorized programs receiving any additional appropriations: BJA - $80 million for state and local anti-drug abuse assistance, and PSODBP - $10 million to cover increases to death benefits.

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Technical Corrections Tax Bill, Taxpayer Bill of Rights

The Taxpayer Bill of Rights, recently cleared for the President, contains 23 major provisions of which the Department of Justice was principally interested in the following three:

1. Awarding costs and certain fees in administrative and civil action. Any person who substantially prevails in any action brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty may be awarded reasonable administrative costs incurred before the IRS and reasonable litigation costs incurred in connection with any court proceeding.

2. Civil cause of action for damages sustained due to failure to release lien. Taxpayers are provided with the right to sue the Federal Government in Federal district court if any IRS employee knowingly or negligently fails to release a lien on the taxpayer's property as required by the Code.

3. Civil cause of action for damages sustained due to certain unauthorized actions by IRS. The right to sue authorized by this provision is limited to allegations of reckless or intentional disregard of the Internal Revenue Code and the regulations thereunder by an IRS employee in connection with the collection (as opposed to determination) of tax.

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Veterans' Judicial Review Act

On October 20, 1988, the Senate passed S. 11, a compromise judicial review bill. The Senate had passed an earlier version of this legislation on July 11, 1988, which this Department strongly opposed. The compromise bill would establish a new Article I court to review decisions of the Board of Veterans Appeals pursuant to the standards of review provided by the Administrative Procedures Act. Decisions of the new court could be appealed to the Federal Circuit. The bill also contains provisions on Veterans Administration (VA) rulemaking and attorneys' fees for representations of individuals claiming VA benefits.

On October 19, 1988, the House passed the compromise bill as S. 11. The House had already passed a prior version of this legislation, H.R. 5288, on October 3, 1988. We joined the VA in opposing that bill based upon our concern about subjecting the nonadversarial VA claims process to judicial proceedings.

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CASE NOTES

NORTHERN DISTRICT OF GEORGIA

United States District Judge, Atlanta, Issues Order Relating To FBI Control Over Its Reports Loaned To Local Police Agencies And Which The Media Seeks Access

This case arises out of the tragic period in the history of Atlanta between 1979 and 1981 when the Federal Bureau of Investigation (FBI) assisted state and local law enforcement agencies in attempting to solve the "Atlanta Child Murder Cases," in which the bodies of several young people were found brutally murdered. During this time, the FBI provided the City of Atlanta Police Department with documents and other assistance related to the investigation. Some, but not all, of the documents provided to the police contained the standard FBI ownership language:

> This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

After extensive investigation, Wayne Williams was indicted and convicted for two of the murders, and the remaining cases were closed. The FBI documents were not returned because it is not normal practice to request the return of such documents since they cannot know when all judicial proceedings have ended.

In January, 1987, members of the news media sued the City under state law to obtain access to the files generated during this investigation. As a result, the City was required to release the files to the media plaintiffs, many of which contained FBI documents which had been loaned to the Atlanta Police Department. The FBI was not aware that these documents had been released until August, 1987, when Legal Counsel for the FBI read a series of articles based on the documents. They then attempted to intervene in the state court action to prevent further disclosure of its documents, but their motion was denied.

In December, 1987, the United States filed an action in federal district court seeking return of the documents from the City. The district court issued a temporary restraining order enjoining further disclosures of documents until such time as it ruled on the merits of the action. In the same action the United States sued the state court judge who had ordered release of the documents because he had under in camera submission additional documents which he was considering for release. The state court

judge agreed to return the documents to the City pending resolution of the federal case, and the United States dismissed him as a party defendant. The news media state court plaintiffs, who had not been named as defendants in the federal court action, moved to intervene, and their motion was granted.

On August 31, 1988, the district court ruled on the United States' motion for summary judgment, ordering the City to return all the FBI documents to the United States. This ruling is a significant victory for the United States because it clearly and forcefully establishes that the United States Government owns its own documents, even if they have been loaned to local agencies and the media seeks access to them. A copy of the Court's Order as Exhibit B is attached at the Appendix of this Bulletin for your records.

United States of America v. George Napper, et al., (U.S.D.C., N.D. Ga., Civil Action No. 1:88-CV-2776-RCF)

Attorneys: Sharon D. Stokes, Assistant United States Attorney, Northern District of Georgia - FTS 242-3710

Jerome L. Epstein, Civil Division, Department of Justice - FTS 633-3338

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CIVIL DIVISION

First Circuit Holds That Section 504 Of The Rehabilitation Act Contains An Implied Private Right Of Action To Challenge The Department Of Transportation's General Safety Regulations For Interstate Trucking

Michael Cousins is a deaf man who wishes to become a commercial truck driver. The Department of Transportation (DOT), pursuant to its power to establish minimum safety standards for the trucking industry, has promulgated a regulation which requires that all commercial truck drivers have a minimum level of hearing. Cousins cannot meet this minimum requirement. In an attempt to invalidate the DOT regulation, Cousins filed suit under the Rehabilitation Act, asserting that Section 504 of the Act created an implied cause of action which entitles him to a trial in district court over whether he can in fact drive a truck. The district court found no implied cause of action and dismissed the suit without prejudice so that Cousins could file a suit under the APA.

The First Circuit has now reversed. The court held that this case was "controlled" by the Supreme Court's decision in Traynor v. Turnage, 108 S.Ct. §1372 (1988), which held that the Veterans Administration had not violated the Rehabilitation Act by promulgating a regulation which treated alcoholism as willful misconduct. Although neither the Court in Traynor nor the two courts of appeals whose judgment were at issue ever addressed the question of whether there is an implied cause of action under the Rehabilitation Act to challenge government regulation, the First Circuit held that the Supreme Court necessarily decided the issue.

Michael Cousins v. DOT, No. 88-1106 (1st Cir. Sept. 20, 1988) DJ # 35-34-39

Attorneys: Michael Jay Singer, FTS 633-5431
Robert K. Rasmussen, FTS 633-3424

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Fourth Circuit Rejects HHS' Interpretation Of "Incurred Costs" Under Accrual Basis Accounting In Holding That Hospital Was Entitled To Medicare Reimbursement For Contributions To A Deferred Compensation Plan For Hospital Executives

Charlotte Memorial Hospital sought Medicare reimbursement from HHS for money it had set aside for the compensation of certain executives under a deferred compensation plan. Relying on the Secretary's Provider Reimbursement Manual, HHS disallowed the hospital's claim for reimbursement. The Provider Manual required that, to be reimbursable, contributions to deferred compensation plans had to be invested in one of several investment vehicles. These vehicles precluded the hospital from maintaining control over the funds and ensured that the funds set aside for deferred compensation would not revert to the hospital in the event of forfeiture by the employee. The hospital challenged the Provider Manual requirements, arguing that they were inconsistent with Medicare regulations, providing for the reimbursement of a hospital's costs when, under accrual accounting, those costs are "incurred." Relying on generally accepted accounting principles (GAAP), the district court determined that the hospital had incurred a debt to its employees when the employees actually earned the salary that was deferred under its plan.

On appeal, the Fourth Circuit affirmed. Noting that the Secretary's interpretation of "incurred costs" for purposes of deferred compensation reimbursement was entitled to less deference than if the interpretation were embodied in a regulation,

the court held that the Medicare Act and the case law generally favors application of GAAP in determining cost reimbursement. The court found, in any event, that the GAAP approach more accurately reflected when a hospital actually incurred an obligation to pay for services rendered than did the Secretary's approach.

Charlotte Memorial Hospital v. Bowen, No. 87-3745 (4th Cir. Sept. 15, 1988) DJ # 137-55-330

Attorneys: Anthony J. Steinmeyer, FTS 633-3388
Michael E. Robinson, FTS 633-5460

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Seventh Circuit Holds That EPA Rating Plans For Applicants For Promotion Or Employment Are Protected Under FOIA Exemption 2

The district court held that the Environmental Protection Agency was required by the Freedom of Information Act to give plaintiff a copy of the rating plan used by agency officials to evaluate her application for promotion. A rating plan is a document used by agency evaluators to numerically rank job candidates according to their precise experience and skills; such plans are used by many agencies. The court held that although the plan was an internal document, it related to a matter of genuine and significant public interest and thus qualified for disclosure under Department of the Air Force v. Rose, 425 U.S. §352 (1976). After holding that release of the plan would not significantly risk circumvention of agency regulations or statutes, an exception left open in Rose, the court ordered disclosure.

The court of appeals reversed. After stating that the question of public interest was a close one that did not have to be decided, the court held that disclosure would significantly risk circumvention of agency "standards," as articulated in Rose, and that the district court had erred in holding to the contrary. The district court's suggestion that EPA could use additional verification to detect any skewing or falsification of resumes to meet the criteria of the rating plan ignored the practicalities of government administration and finance that make such verification extraordinarily difficult if not impossible.

Kaganove v. EPA, No. 87-2286 (7th Cir. Sept. 1, 1988) DJ # 145-185-235

Attorneys: Leonard Schaitman, FTS 633-3441
Marc Richman, FTS 633-5735

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Ninth Circuit Holds That ERISA Preempts California's "Bad Faith" Suits

The Kannes' son became ill in the Netherlands and was rushed back to the United States, under medical supervision, by airplane. The Kannes experienced some confusion and delay in the payment of their insurance claims for the airline, doctors, and hospital bills. The Kannes sued the insurance carrier, alleging breach of contract and breach of the duty of an insurer to act in good faith. They were awarded $252,234 in compensatory damages and $500,000 in punitive damages.

After waiting for the Supreme Court's decision in Pilot Life Insurance Co. v. Dedeaux, 107 S.Ct. §1549 (1987), the Ninth Circuit reversed the district court's judgment and held that the Employment Retirement and Income Security Act of 1974 (ERISA) preempted all state-law based remedies for mismanagement of an ERISA plan. Shortly thereafter, however, the panel vacated its decision and granted the Kanne's petition for rehearing. On rebriefing, the State of California filed a brief amicus curiae which argued that Pilot Life addressed only those state law theories derived from the common law and did not apply to California's statute-based liability for insurance companies. At the request of the Labor Department, we also filed a brief amicus curiae taking strong issue with the state's position. In our brief, we argued that the issue should not be resolved on the basis of ERISA's murky "savings clause," but upon the pre-emptive intent of Congress with respect to state-based remedies which are inconsistent with ERISA's remedial scheme. The Ninth Circuit's new opinion, again reversing the district court, limits remedies for improper plan management to those found in ERISA.

Kanne v. Connecticut General Life Insurance Co., et al, Nos. 85-5641 and 85-5642 (9th Cir. October 4, 1988)

Attorneys: John Cordes, FTS 633-3380
Bruce Forrest, FTS 633-2496

* * * * *

CRIMINAL DIVISION

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4(c)(1). Arrest Warrant or Summons Upon Complaint. Form. Warrant.

Defendant appeals the district court's denial of his motion to suppress firearms seized pursuant to a search warrant obtained after attempted execution of an arrest warrant. Defendant maintained that the arrest warrant violated the fourth amendment and Rule 4(c)(1), because his name was not inserted in the blank space provided in the body of the form. The Court of Appeals concluded that the arrest warrant for defendant was not invalid. United States v. Jarvis, 560 F.2d §494 (2d Cir. 1977), on which defendant relied, teaches that "[t]o comply with Rule 4(c)(1) and the fourth amendment the name or a particularized description of the person to be arrested must appear on the face of the 'John Doe' warrant." In this case, defendant's name was trumpeted in the style of the warrant and examination of the warrant leaves no doubt that it directed the officers to arrest defendant. Defendant's challenge contending, inter alia, that the arrest warrant violated the fourth amendment, had no bearing on the search warrant. The execution of the search warrant in subjective and objective good faith brings the actions of the officers within the good-faith exception to the exclusionary rule. (Affirmed.)

United States v. Joe Edward Benavides, a/k/a Little Joe, 854 F.2d §701 (5th Cir., August 26, 1988)

* * * * *

LAND AND NATURAL RESOURCES DIVISION

Sioux Not Entitled Under First Amendment To Compel Forest Service To Grant Permanent Special Use Permit For 800 Acres In National Forest For Use as Religious, Cultural And Educational Community

The Court reversed a judgment ordering the Forest Service to grant a special use permit to a group of Sioux Indians for use of 800 acres of the Black Hills National Forest as a religious, cultural, and educational community. The court held first that the Forest Service's denial of the special use permit to construct and maintain Yellow Thunder Camp did not burden the Indians' right to the free exercise of their religion. Since the Forest Service has neither performed any act of compulsion to interfere

with the Indians' ceremonies or practices, nor denied them access to the site for religious purposes, the court did not reach the second prong of the First Amendment test involving the significance of the governmental interest at stake. The Indians are not entitled to seek an affirmative benefit from the government, the imposition of a "religious servitude" upon 800 acres of a national forest.

Second, the court held that the Forest Service's denial of the special use permit was "arbitrary and capricious" in violation of the APA. Specifically, the court rejected the Indians' argument that discrimination was shown by the fact that the Agency had over the previous 5 1/2 years granted 58 non-Indian permit applications and denied 3 Indian applications. The court also rejected the district court's finding that the forest supervisor was subconsciously biased against Indian applicants as clearly erroneous.

Finally, while the court stated that the trial court had no authority to direct the issuance of the special use permit, it noted that nothing in its decision precludes the Indians from applying to the Forest Service for a special use permit drawn in more reasonable terms and conforming with the statutory limits on acreage and duration.

United States v. William Means, et al, 8th Cir. No. 87-5118 (September 29, 1988) DJ # 90-1-10-1579

Attorneys: Raymond B. Ludwiszewski, FTS 633-2762
Jacques B. Gelin, FTS 633-2762

* * * * *

Interior's Grizzly Bear Endangered Species Act (ESA) Regulations Sustained; The Asserted "Fundamental Right" To Possess And Protect Private Property Does Not Exist; There Was No Fifth Amendment "Taking"

Richard Christy owned a herd of 1700 sheep which he grazed on land leased from the Blackfeet Indian Tribe located adjacent to Glacier National Park in Montana. Bears attacked his herd and killed about 20 sheep, worth at least $1,200. In response to Christy's request, an agent of the Fish and Wildlife Service tried to trap the bears. Before he could succeed, Christy killed one grizzly, for which he was ultimately assessed an administrative penalty of $2,500 for violating the Endangered Species Act and the Department of the Interior's regulations. Joined by two

other persons who had lost sheep from grizzly depredations, Christy sued in district court to challenge the constitutionality of the Act and to enjoin Interior from enforcing its ESA regulations, claiming that he was deprived of his fundamental right to possess and protect his property, that the federally-protected bears had become agents of the United States, making the federal government liable to him for a Fifth Amendment taking, that he was deprived of his due process and equal protection rights, and that the regulations were an unconstitutional delegation of power. The district court issued a summary judgment against Christy rejecting all of his arguments.

The Ninth Circuit affirmed. The court held: (1) the ESA and its regulations, as applied, do not deprive Christy of property without due process, stating that his claimed "fundamental right" to possess and protect property does not exist; (2) there was no violation of Christy's right to substantive due process; (3) that the Act and its regulations, under the rational basis test, which applies when an enactment does not infringe a fundamental right, rationally further a legitimate governmental objective did not violate substantive due process; (4) that the Act and the regulations do not deny Christy equal protection of the laws; (5) that Interior's hunting regulations that allow controlled hunting are constitutional; (6) that the Act does not unlawfully delegate legislative power; and (7) that the Act and the regulations do not effect an unconstitutional taking of Christy's property without just compensation in violation of the Fifth Amendment, because the destruction of private property by protected wildlife does not constitute a governmental taking.

Christy v. Hodel, 9th Cir. NO. 87-3998
(Sept. 21, 1988) DJ # 90-8-6-72

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Martin W. Matzen, FTS 633-4426
Lee M. Kolker, FTS 633-4185

* * * * *

District Court's Amendment Of Consent Decree Under Clean Air Act On Economic Grounds Summarily Reversed

The court of appeals granted the government's motion for summary reversal of an order of the district court amending a consent decree. The decree required Wheeling-Pitt to install a sulfur dioxide emission control system in its Monessen, Pennsylvania coke plant by June 30, 1986, or shut down the plant. The company did not install the system, shut down the plant, and since then has maintained it on "hot idle." Sharon Steel (which,

along with Wheeling-Pitt, is in bankruptcy) wanted to buy the plant and restart it without first installing the system. The steel companies made a motion to amend the consent decree which the court granted, over the opposition of EPA and the Commonwealth of Pennsylvania. The court gave three reasons for its action: (1) Wheeling-Pitt's decision not to install the system was beyond Sharon's control; (2) Sharon's situation was "unforeseen" when the parties entered into the consent decree; and (3) failure to amend the consent decree would work a "grievous wrong" to Sharon, to Wheeling-Pitt, to the creditors of both steel companies in the bankruptcy proceedings, and most importantly, to the people of the Mon Valley.

The government appealed and applied for a stay. After the district court denied the government's motion, the court of appeals granted a stay pending the disposition of the motion for summary reversal. After argument, the court granted summary reversal on the ground that the district court abused its discretion when it amended the consent decree. Relying on its earlier decision in U.S. v. Wheeling-Pittsburgh Steel Corp., 818 F.2d §1077 (3d Cir. 1987), the court said none of the district court's three justifications for the amendment of the consent decree sufficed. First, Sharon was bound by the terms of the original decree, and it had full knowledge of the decree's requirements and the shutdown when it bought the plant. Second, the sale of the plant to Sharon was not a new and unforeseen circumstance. The decree's "successors and assigns" clause, the failure to comply with the decree and the plant's shutdown status were likewise contemplated. Third, failure to amend the decree would not work a grievous wrong; the economic injuries to Sharon, to Wheeling-Pitt, to their creditors, and to the people of the Mon Valley accepted by the district court did not justify failure to comply with the requirements of the Clean Air Act. The court then vacated its stay as moot.

United States v. Wheeling-Pittsburgh Steel Corporation et al., 3d Cir. No. 88-3447 (October 12, 1988)
DJ # 90-5-2-1-691

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Robert L. Klarquist, FTS 633-2731
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* * * * *

Secretary's Proposed Outer Continental Shelf (OCS) Lease Sale (No. 92) Did Not Violate Section 19 Of The Outer Continental Shelf Lands Act (OCSLA), National Environmental Policy Act (NEPA), Or Endangered Species Act (ESA)

The court of appeals did two things. First, based on its weighing of the factors employed in granting extraordinary relief, it issued an order staying the injunction pending appeal pending remand to the district court. Second, it affirmed the district court holding that (1) the Secretary of the Interior did not act arbitrarily or capriciously when he rejected the demand of the Governor of Alaska, made pursuant to Section 19 of the OCSLA, to delay OCS lease sale 92 another nine years and to delete all near-shore tracts; (2) that under the Administrative Procedures Act "without observance of procedure required by law" standard, the Secretary's Environmental Impact Statement and, in particular, its oil risk spill analysis adequately described the reasonably foreseeable impacts of the decision to offer oil and gas leases and thereby satisfied NEPA: (3) the Secretary did not act arbitrarily and capriciously when he adopted most, but not all, of the recommendations made by the National Marine Fisheries Service (NMFS) in the biological opinion submitted to him under the ESA, and when he also adopted additional protective measures to insure against jeopardy or harm to endangered whales; and (4) the NMFS' biological opinion did not violate the ESA by allegedly failing to analyze the impacts of incidental takes on endangered whales.

Tribal Village of Akutan v. Hodel, et al. (Sale 92), 9th Cir. Nos. 88-3610, 88-3703, and 88-3729 (October 5, 1988) DJ # 90-1-5-1583

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* * * * *

TAX DIVISION

Government Victory Creates Inter-Circuit Conflict On Question Whether Article III Judges Are Entitled To IRS Deductions

Porter v. Commissioner (8th Cir.). On September 19, 1988, the Eighth Circuit reversed the Tax Court and held that the taxpayer, a federal district judge, was not entitled to deduct payments to an Individual Retirement Account (IRA), because he was an active participant in a retirement plan established by the United States for its employees. The court agreed with our position that for purposes of the IRA statute (Section 219 of the Code), Congress intended to treat federal judicial officers as "employees" who are active participants in a retirement plan, without deciding whether the judges were employees in the common-law sense of the term. Judges may continue to receive their salaries after resignation or retirement, if certain age and minimum service criteria are met (under 28 U.S.C. §§371 and 372), and the court found that these statutes constituted a "plan" within the meaning of Section 219, and that the judges were participants in that plan when they continued to serve, thereby moving toward reaching the age and service requirements of Sections 371 and 372. Accordingly, it ruled that they are not members of the class entitled to claim IRA deductions during the periods in issue.

The Eighth Circuit's decision in our favor is in explicit and acknowledged conflict with the Third Circuit's recent decision in Adams v. Commissioner holding that the benefits provided under Sections 371 and 372 do not constitute a retirement plan for purposes of the IRA statute. Although Congress enacted legislation in 1987 intended to repudiate the Tax Court's decision here, and to confirm its agreement with our position that federal judges are not eligible for IRA deductions, it is quite likely that the taxpayer here will file a petition for a writ of certiorari based on the conflict in the circuits.

* * * * *

Second Circuit Holds That Bar Association Is Not Entitled To Tax-Exempt Status Where It Rates Candidates For Judgeships

Association of the Bar of the City of New York v. Commissioner (2d Cir.). On September 27, 1988, the Second Circuit reversed the Tax Court and ruled that the Association was not entitled to tax-exempt status as a Section 501(c)(3) educational

or charitable organization. In order to qualify for such an exemption, which would be far more advantageous to the Association and to those who contribute to it than is its present 501(c)(6) "business league" status, the organization must not participate in, or intervene in, any political campaign on behalf of or in opposition to any candidate for public office. Prohibited participation or intervention includes the publishing or distributing of statements. The Association evaluates candidates for federal and state judgeships, rating them as "approved," "not approved," or "approved as highly qualified." These ratings are made available to the press, the Association's members, libraries and law schools.

The Tax Court, by a 10-to 6 vote, held that the Association's evaluation did not constitute forbidden political activity. The Second Circuit, however, was not persuaded by the Association's argument that it was merely disseminating objective data in a nonpartisan manner. It found the ratings to be inherently subjective evaluations and recommendations, and believed that nonpartisanship was essentially irrelevant. Further, the court of appeals noted that the statute, while tolerating some insubstantial conduct that is aimed at influencing legislation on the part of a 501(c)(3) organization, has no leeway when it comes to the organization's support for a candidate for public office.

* * * * *

Government Wins Commodity Straddle Case (Worth As Much As $8 Billion In Revenue) In Ninth Circuit

Ivan Landreth, et al v. Commissioner (9th Cir.) On October 4, 1988, the Ninth Circuit granted the Government's petition for rehearing, vacated its prior opinion, and entered an opinion holding that Section 108(a) of the Tax Reform Act of 1984, as amended by Section 1808 of the Tax Reform Act of 1986, requires that a taxpayer must have entered into his commodity straddle transactions primarily for profit in order to be entitled to deduct the losses resulting therefrom. In Wehrly v. United States, 808 F.2d §1311 (9th Cir. 1986), the Ninth Circuit had held that under Section 108, prior to its amendment, a taxpayer could deduct his losses from commodity tax straddles if he had a reasonable expectation of profit. Our petition for rehearing in that case called the court's attention to the 1986 amendments, which would require a primary profit motive for losses to be deductible. Our petition was denied. In Landreth, the question of the effect of the 1986 amendments to Section 108 was again presented. In its initial opinion, the panel stated that it agreed with our position that Section 108 required application of the primary profit test. The panel held, however, that the panel in

Wehrly must have considered and rejected our argument with respect to the amendments to Section 108 when it denied our petition for rehearing, and that it therefore was bound by Wehrly. We filed a petition for rehearing, with a suggestion for rehearing en banc. The panel granted rehearing and vacated its prior opinion. This time, the panel held that the amendments to Section 108 constituted intervening authority, and that it therefore was no longer bound to follow Wehrly. The court, stating that it agreed with the Tenth Circuit's opinion in Miller v. Commissioner, 826 F.2d §1274 (1988), adopted the primary profit test. The Internal Revenue Service has estimated that as much as $8 billion in revenue may be at stake on this issue.

* * * * *

Supreme Court Grants Certiorari In IRS Summons Enforcement Case Involving Church Of Scientology

United States v. Frank S. Zolin and Church of Scientology of California, et al (Sup. Ct.). On October 17, 1988, the Supreme Court granted the Government's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this IRS summons enforcement case involving the Church of Scientology. The issues presented are: (1) whether a district court may place restrictions on the disclosure of information obtained by the IRS pursuant to an administrative summons, and (2) whether a prima facie case for invocation of the crime-fraud exception to the attorney-client privilege must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in camera inspection of the allegedly privileged material.

The Ninth Circuit's decision imposing limitations on the dissemination of summoned information by the IRS is in direct conflict with the rule adopted by the Fifth Circuit en banc in United States v. Barrett, 837 F.2d §1341 (1988), petition for cert. pending. In addition, the Ninth Circuit's restrictive view of the crime-fraud exception is in conflict with the prevailing rule in the Eighth Circuit (see In re Berkley & Co., 629 F.2d §548, 553, n.9 (8th Cir. 1980)), and clashes with the decisions of a number of other courts of appeals which have approved in camera inspections of documents in order to determine the applicability of the crime-fraud exception.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate
12-20-85	7.57%	06-05-87	7.00%
01-17-86	7.85%	07-03-87	6.64%
02-14-86	7.71%	08-05-87	6.98%
03-14-86	7.06%	09-02-87	7.22%
04-11-86	6.31%	10-01-87	7.88%
05-14-86	6.56%	10-23-87	6.90%
06-06-86	7.03%	11-20-87	6.93%
07-09-86	6.35%	12-18-87	7.22%
08-01-86	6.18%	01-15-88	7.14%
08-29-86	5.63%	02-12-88	6.59%
09-26-86	5.79%	03-11-88	6.71%
10-24-86	5.75%	04-08-88	7.01%
11-21-86	5.77%	05-06-88	7.20%
12-24-86	5.93%	06-03-88	7.59%
01-16-87	5.75%	07-01-88	7.54%
02-13-87	6.09%	07-29-88	7.95%
03-13-87	6.04%	08-26-88	8.32%
04-10-87	6.30%	09-23-88	8.04%
05-13-87	7.12%	10-21-88	8.15%

For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982 through December 19, 1985, see United States Attorney's Bulletin, Vol. 34, No. 1, p. 25, Jan. 17, 1986.

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EXHIBIT A

(As amended July 30, 1983, Pub. L. 98-63, title I, § 101, 97 Stat. 313; Oct. 12, 1984, Pub. L. 98-473, title II, § 1012, 98 Stat. 2142; Oct. 30, 1984, Pub. L. 98-557, § 17(c), 98 Stat. 2868.)

REFERENCES IN TEXT

Executive Order 12333, referred to in text, is set out under section 401 of Title 50, War and National Defense.

AMENDMENTS

1984—Pub. L. 98-557 substituted reference to Coast Guard member, and Coast Guard employee assigned to perform investigative, inspection or law enforcement functions, for reference to any officer or enlisted man of the Coast Guard.

Pub. L. 98-473 inserted "or attempts to kill" after "Whoever kills", substituted "or any United States probation or pretrial services officer, or any United States magistrate, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(F) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section," for "while engaged in the performance of his official duties or on account of the performance of his official duties", inserted ", or any other officer, agency, or employee of the United States designated for coverage under this section in regulations issued by the Attorney General", and inserted ", except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years".

1983—Pub. L. 98-63 inserted "any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions," after "National Park Service,".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 1117, 1201 of this title; title 7 sections 84, 87c, 2146; title 16 section 742*l*; title 19 section 1629; title 21 sections 461, 675; title 42 section 2000e-13.

CHAPTER 53—INDIANS

§ 1151. Indian country defined

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1164 of this title; title 15 sections 1175, 1243; title 16 sections 3371, 3377; title 25 section 1903; title 42 section 10101.

§ 1152. Laws governing

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1162 of this title; title 25 sections 1725, 2442.

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A [1] incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

[1] See 1986 Amendment note below.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

(As amended Oct. 12, 1984, Pub. L. 98-473, title II, § 1009, 98 Stat. 2141; May 15, 1986, Pub. L. 99-303, 100 Stat. 438; Nov. 10, 1986, Pub. L. 99-646, § 87(c)(5), 100 Stat. 3623; Nov. 14, 1986, Pub. L. 99-654, § 3(a)(5), 100 Stat. 3663.)

AMENDMENTS

1986—Pub. L. 99-646 and Pub. L. 99-654 which directed that section be amended identically by substituting in first par. "a felony under chapter 109A," for "rape, involuntary sodomy, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape," and by striking out in second and third pars. ", involuntary sodomy," was executed by making the substitution in subsec. (a) for "rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape," to reflect the probable intent of Congress in view of prior amendment of this section by Pub. L. 99-303, but amendment to second and third pars. could not be executed because such pars. were struck out by Pub. L. 99-303.

Pub. L. 99-303 inserted section catchline which had been eliminated by general amendment by section 1009 of Pub. L. 98-473, designated first par. as subsec. (a) and inserted "felonious sexual molestation of a minor,", struck out second par. which provided that, as used in this section, the offenses of burglary, involuntary sodomy, and incest be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense, and struck out third par. and restated the provisions thereof in a new subsec. (b), substituting "Any offense referred to in subsection (a) of this section that is" for "In addition to the offenses of burglary, involuntary sodomy, and incest, any other of the above offenses which are".

1984—Pub. L. 98-473 amended section generally, inserting offenses of maiming, involuntary sodomy and a felony committed under section 661 of this title and striking out reference to larceny in first par., and inserting ", involuntary sodomy," after "burglary" in third par.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendments by Pub. L. 99-646 and Pub. L. 99-654 effective respectively 30 days after Nov. 10, 1986, and 30 days after Nov. 14, 1986, see section 87(e) of Pub. L. 99-646 and section 4 of Pub. L. 99-654, set out as an Effective Date note under section 2241 of this title.

§ 1161. Application of Indian liquor laws

AMENDMENT OF SECTION

Pub. L. 98-473, title II, §§ 223(b), 235(a)(1), Oct. 12, 1984, 98 Stat. 2028, 2031, as amended, provided that, effective on the first day of the first calendar month beginning 36 months after Oct. 12, 1984 (Nov. 1, 1987), this section is amended by substituting "3669" for "3618". See Effective Date note set out under section 3551 of this title.

Sexual Offenses under the Indian Major Crimes Act, 18 U.S.C. §1153.

Section 87 of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3623, Nov. 10, 1986, entitled the "Sexual Abuse Act of 1986," replaced Title 18, Chapter 99 (Rape) with Chapter 109A (Sexual Abuse). This necessitated conforming amendments to the Indian Major Crimes Act, 18 U.S.C. §1153, which was undertaken in subsection (c)(5) of Section 87. Subsection (c)(5) calls for the striking out of "rape, involuntary sodomy, carnal knowledge of any female, not his wife, who had not attained the age of sixteen years, assault with intent to commit rape," and inserting in lieu thereof "a felony under chapter 109A." The draftsman overlooked the fact that Section 1153 had been amended earlier that year by the insertion of the offense "felonious molestation of a minor" between the offenses of "sodomy" and "carnal knowledge" by Pub. L. No. 99-303, 100 Stat. 438, May 15, 1986. The failure to direct deletion of "felonious molestation of a minor" (which also became superfluous by enactment of Chapter 109A) presents a problem for the codifier. Rather than inserting a reference to chapter 109A on either side of "felonious molestation of a minor," the editors of West's 1987 paperback edition of Federal Criminal Code and Rules and 1987 supplement to the United States Code Annotated elected to reprint Section 1153 without change, followed by an ambiguous explanatory note. Do not be misled. Section 1153 has been amended. Sexual offenses committed by Indians in Indian country are prosecutable only under 18 U.S.C. §1153, and only if they are felonies under chapter 109A. A technical amendment will be proposed to delete the now superfluous offense of "felonious molestation of a minor."

(Criminal Division)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	:	
vs.	:	1:87-cv-2776-RCF
GEORGE NAPPER, et al. Defendants,	:	
THE ATLANTA JOURNAL & THE ATLANTA CONSTITUTION, et al., Intervenors	:	

ORDER

This action is before the court on plaintiff's motion for summary judgment and on intervenor's motion to dismiss.

The material facts in the case are not in dispute. Between 1979 and 1981, the Federal Bureau of Investigation (FBI) assisted state and local law enforcement agencies in the investigation of the "Atlanta Child Murder Cases." During this time the FBI provided the City of Atlanta Police Department with documentary information that related to the investigation. Most of the documents provided to the City police contained the following declaration:

> This document contains neither recommendations nor conclusions of the F.B.I. It is the property of the F.B.I. and is loaned to your agency; it and its contents are not to be distributed outside your agency.

In January 1987, several members of the media, including intervenors in the present case, sued the City under state law to obtain access to some of the files generated during the Atlanta Child Murder investigation. Georgia Television Co. v. Napper, No. D-40209 (Super. Ct. Fulton Cty. filed Jan. 15, 1987). As a result of that action, the City was required to release to the media plaintiffs many of the Atlanta Child Murder investigative files. See Napper v. Georgia Television Co., 257 Ga. 156, 356 S.E.2d 640 (1987). After releasing the files to the media, the City placed the documents in the City's public reading room. Many of the files released contained documents that the FBI had developed and had given to the Atlanta police.

In August 1987, the Atlanta Journal and Constitution began to run a series of articles about the Atlanta Child Murders investigation. Through this series of articles plaintiff United States learned that some of its documents had been released to the media and the public.[1] Plaintiff then filed a motion to intervene in the state court action. The media plaintiffs voiced strong opposition to the intervention of the United States, and the motion to intervene was denied. In November 1987, plaintiff formally requested the return of its documents from the City and from the media. After the City and the Atlanta papers refused to return the documents, plaintiff instituted the present suit.

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[1] Intervenors contend that plaintiff should have known prior to August 1987 that FBI documents were the subject of the state court action.

Plaintiff contends that many of the released documents are FBI documents that were loaned to the City pursuant to a sharing policy that has been in existence throughout the history of the FBI. Plaintiff further contends that the FBI documents would be exempt from disclosure under Freedom of Information Act (FOIA) exemption 7D, 5 U.S.C. § 552(b)(7)(D). Plaintiff objects to the continued disclosure of the FBI documents and, by this suit, seeks their return.

Intervenors contend that the action must be dismissed because no case or controversy exists. See U.S. Const. art. III. Intervenors assert that plaintiff and defendants desire the same result--prevention of disclosure of the documents. Plaintiff admits that it is seeking to prevent further dissemination of documents it considers confidential. The court takes judicial notice of the state court litigation in which defendants fought long and hard to prevent dissemination of the same documents. Thus, the court agrees that at first blush, it appears that the present suit is a friendly one.

A dispute, however, exists over ownership and possession of the documents because defendants refuse to return the documents that plaintiff claims. The court believes that this dispute over ownership and possession of the documents satisfies the requirement of a case or controversy. In Kentucky v. Indiana, 281 U.S. 163, 50 S. Ct. 275 (1930), the Supreme Court held that a case or controversy existed when both Kentucky and Indiana agreed that a contract between them was valid, but Indiana refused to

comply with the contract while a state court action challenging the contract was pending. The instant case demands the same result. Regardless of the motivation of defendants in refusing to return documents, a valid case or controversy exists.

Intervenors also contend that plaintiff has no standing to bring suit. The court disagrees. Plaintiff claims to be the owner of the documents in question and seeks the physical return of its property. Courts have long recognized the authority of the United States to bring suit to enforce its contractual and property rights. See United States v. California, 332 U.S. 19 (1946); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850). The court here is not concerned with whether the investigatory documents should be released to the public. The question before the court is who owns, and is entitled to possession of, the documents. Plaintiff certainly has standing to bring suit to recover property alleged to belong to the United States regardless of a lack of specific statutory authorization for such a suit.

Intervenors also contend that plaintiff lacks standing to object to disclosure because disclosure has occurred already. The court is not persuaded that plaintiff cannot retrieve the documents merely because some of the documents have been released to the public. Plaintiff has never waived the confidentiality of the documents and objected consistently in its objections to the disclosure of the documents. Under these circumstances plaintiff may continue to raise its objections to disclosure. See United

States v. Sells Engineering, 463 U.S. 418, 422, n. 6, 103 S. Ct. 3133, 3137 n.6 (1983) (rejecting contention that case to allow disclosure was moot because disclosure had already occurred); Lesar v. Department of Justice, 636 F.2d 472, 491 (D.C. Cir. 1980) (agency may still seek to prevent disclosure of confidential documents that have been released through other sources).

Intervenors also urge the court to abstain from exercising jurisdiction in this action because of the presence of important state interests. The underlying consideration of abstention is comity between state and federal government. See Pennzoil Co. v. Texaco, Inc., ___ U.S. ___, ___, 107 S. Ct. 1519, 1525 (1987) (quoting Younger v. Harris, 401 U.S. 37, 43, 91 S. Ct. 746, 750 (1971)). Abstention by a federal court is appropriate when "[s]tate interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." Id. at ___, 107 S. Ct. at 1526. Intervenors argue that a decision favorable to plaintiff will affect negatively the decisions of the state court and will render them null and void. The court, however, views as a more serious consequence that plaintiff has no other forum in which to seek relief.

Plaintiff attempted to intervene in the state court action and was not permitted to do so. Intervenors argue here that intervention was not necessary because defendants in the state court action adequately represented the interests of the United

States. The court recognizes, however, that the City and the United States may have had different interests and motivations in opposing disclosure of the files. It is, therefore, not surprising that the City did not adequately represent the interests of the United States in the state court action. Specifically, the City failed to assert the FOIA exemption upon which the United States relies to demonstrate that the documents in question would be exempt from disclosure. In addition, counsel for the City admitted that he did not understand until August 1987 that FBI documents were not to be released and that he did not have knowledge of the sharing agreement until December 1987. See TRO Hearing before Judge Freeman, December 22, 1987 (TRO Hearing), tr. at 23-24.[2] Having failed to assert a critical argument that affects over 2000 pages of documents, the City cannot be said to have provided adequate representation of plaintiff's interests. Because plaintiff claims to own documents in defendants' possession and plaintiff has no other forum in which to claim its interest in the documents, the court finds that abstention is not proper.

Finally, intervenors contend that the court lacks subject matter jurisdiction under the so-called Feldman-Rooker doctrine. Generally, this doctrine holds that a district court may not review final judgments of a state court because such review is

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[2] Counsel stated, however, that despite the lack of specific knowledge, the City's position in the state court suit was that FBI documents were not to be released. TRO Hearing, tr. at 26.

assigned to the Supreme Court pursuant to 28 U.S.C. § 1257. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149 (1923). Reliance on the Feldman-Rooker doctrine is inapposite. The doctrine is applicable only when a party to the state court action seeks to appeal a final order of the state court to a district court. See Feldman, 460 U.S. at 482, 103 S. Ct. at 1315, Rooker, 263 U.S. at 416, 44 S. Ct. at 150. As noted above, plaintiff in this action was not a party to the state court action. Additionally, the state court did not address the question presently before this court--that is, who owns the documents in question and who is entitled to their possssion. Thus, the court finds that the Feldman-Rooker doctrine does not bar the court's consideration of plaintiff's claims.

Having disposed of intervenors' claims regarding jurisdictional issues, the court will address plaintiff's motion for summary judgment.

The parties do not dispute that approximately 2300 pages of the released documents were created and maintained by the FBI and were loaned to the City by the FBI. The court finds that these documents belong to plaintiff, regardless of whether they are marked with the non-disclosure provision. These documents were loaned pursuant to a policy that is subject to cancellation if unauthorized dissemination takes place. See 28 U.S.C. § 534(b). The City released the documents to the public, in violation of

the agreement. Defendants contend that cancellation of the sharing policy and return of the documents is not warranted because defendants' violation of the sharing agreement was not willful, but only in response to court order.

The court is sympathetic to the City's position. Sympathy, however, cannot change the facts. The City is in possession of documents that belong to plaintiff and the City refuses to return those documents. The City has violated the terms of the loan agreement and, therefore, plaintiff is entitled to cancel the agreement and retrieve its documents. With respect to the 35 documents not ruled upon by the state court, the court notes that these documents were returned to the City pending a determination of ownership by this court. To the extent that this order will require the City to violate the state court order, the supremacy clause mandates that this order supersedes any requirements imposed by the state court. See U.S. Const. art. VI, § 2.

The court notes that it is not ruling upon the merits of plaintiff's contention that the documents would be exempt from mandatory disclosure under FOIA exemption 7D. The court simply holds that the documents in question belong to plaintiff and if intervenors want the documents, they must file an official FOIA request.[3]

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[3] The court notes that plaintiff has released approximately 2825 pages of documents relating to the Atlanta Child Murder cases pursuant to FOIA requests filed by The Washington Post and WAGA television in Atlanta.

Accordingly, intervenor's motion to dismiss is DENIED. Plaintiff's motion for summary judgment is GRANTED. Defendants are DIRECTED to return to plaintiff within thirty (30) days of the entry of this order the disputed documents.

SO ORDERED, this 31st day of August, 1988.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

SEP 2 1988

L.D.T., CLERK

BY DEPUTY CLERK

* U. S. GOVERNMENT PRINTING OFFICE: 1988-241-712:82318