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TABLE OF CONTENTS

COMMENDATIONS

Assistant United States Attorney GAIL ZILLA BARDACH, Southern District of Indiana, has been commended by William H. Webster, Director of the Federal Bureau of Investigation, for her outstanding prosecutive efforts and conviction of Anthony Tino De Angelis.

Assistant United States Attorney SUSAN B. BEVILL, Middle District of Alabama, has been commended by Alice Daniel, Assistant Attorney General of the Civil Division, John T. Manning, Assistant General Counsel, Veterans Administration, and Herbert J. Lewis, District Counsel, Veterans Administration, for her outstanding efforts in the case of City Ambulance of Alabama v. United States.

Special Attorney CREED CARTER BLACK, JR., Northern District of Ohio Strike Force, has been commended by William H. Webster, Director of the Federal Bureau of Investigation, for his outstanding efforts in connection with the prosecution of the matter involving the embezzlement of over $106,000 from a union Welfare and Pension Fund.

Assistant United States Attorney WILLIAM H. BRIGGS, JR., District of Columbia, has been commended by P. E. Sutherland, Jr., Rear Admiral of the United States Navy, for his dedicated and aggressive defense of the government in Trout v. Hidalgo.

Assistant United States Attorney DAPHNE BUDGE, District of Arizona, has been commended by David L. Dale, Chief Deputy State Fire Marshal, for her successful prosecution of the case involving United States v. John Dee Wallace Jr..

Assistant United States Attorneys DALE A. DANNEMAN and STEPHEN M. DICHTER, District of Arizona, have been commended by John J. Hinchcliffe, Special Agent in Charge of the Federal Bureau of Investigation, for their selfless dedication and successful prosecution of Ronald Gregory Felecitti.

Attorney DAVID W. ELBAOR, Organized Crime and Racketeering Section, has been commended by Kenneth J. Mighell, United States Attorney for the Northern District of Texas, for his successful prosecution of Milton K. Curry, Jr., Walter B. Johnson and Reginald M. Leffall involving ERISA fraud, government fraud and bank fraud relating to Bishop College in Dallas, Texas.

Assistant United States Attorney DONALD ETRA, Central District of California, has been commended by C. E. Michaelson, Inspector in Charge of the United States Postal Service, for his successful prosecution of defendants involved in theft of a mail truck containing nearly two million dollars in registered shipments of jewels, precious metals and furs.

Assistant United States Attorney RICHARD K. HARRIS, Eastern District of Tennessee, has been commended by Attorney General Benjamin R. Civiletti, and Secretary of Interior Cecil D. Andrus, for his successful prosecution of two coal mine operators who had interfered with and beaten an office of Surface Mining Inspector.

Assistant United States Attorney RON HOEVET, District of Oregon, has been commended by Ralph B. Short, District Director of the Internal Revenue Service, for his excellent representation of Special Agent Norman Weiler.

Executive Assistant United States Attorney JOHN J. KENNY, Chief Assistant United States Attorney WILLIAM M. TENDY, and Assistant United States Attorney CHARLES M. CARBERRY, Southern District of New York, have been commended by William H. Webster, Director of Federal Bureau of Investigation, for the professional and competent manner in which they handled the kidnapping investigation in the Michele Sindona case.

Assistant United States Attorney FRED KERLEY, District of Guam, has been commended by Steve G. Oberg, Counsel, Department of the Navy, for his able representation and dismissal in two cases involving the Department of the Navy.

Assistant United States Attorney SCOTT KRAGIE, District of Columbia, has been commended by Marian L. Tipton, Directorate for UNESCO Affairs, Department of State, for his thorough representation of an individually sued defendant in Horman v. Kissinger.

Assistant United States Attorney J. ANDREW SMYSER, Middle District of Pennsylvania, has been commended by M. Faith Angell, Regional Counsel of the Interstate Commerce Commission, for his cooperation and skill in the successful prosecution of United States v. Paul Fredenburgh and Nationwide Van Lines of Pennsylvania, Inc.

Assistant United States Attorney MARY STOWELL, Northern District of Illinois, has been commended by William H. Webster, Director of the Federal Bureau of Investigation, for her determination and enthusiasm throughout the investigation and trial which resulted in the successful prosecution of Larry Edmond Posey.

Assistant United States Attorney DAVID ZUERCHER, District of South Dakota, has been commended by Craig W. Rupp, Regional Forester of the U.S. Department of Agriculture, for his excellent work in United States v. 6.80 Acres of Land.

VOL. 28 AUGUST 29, 1980 NO. 18

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Acting Director

POINTS TO REMEMBER

Principles of Federal Prosecution

On July 28, 1980 Attorney General Civiletti announced the issuance of a new publication, Principles of Federal Prosecution. A copy has already been sent to each United States Attorney. A larger distribution, for Assistant United States Attorneys is presently underway. In addition, copies will go to all Federal Judges, U. S. Public Defenders, most law enforcement agencies and any interested members of the public.

The publication is a significant event in the administration of federal criminal justice. It is the authoritative statement of prosecutorial policies and practice for all United States Attorneys and Assistant United States Attorneys. All Attorneys are urged to read their copy as soon as the distribution schedule permits.

Please note that with regard to pleas of guilty the Principles require that, when a plea of guilty is accepted to a less serious offense than that which the Government was prepared to prove at trial, a statement is to be prepared for both the court and the public as to what the actual offense was. Assistant U. S. Attorneys are reminded that a similar responsibility exists with regard to the U. S. Parole Commission, because a description of the actual offense that took place is to be included on the Form USA 792. The completion of that form is a mandatory requirement when the court imposes a prison sentence of more than one year. See U.S.A.M. 9-34.220.

(Executive Office)

Witness Security Program

United States Attorneys and Assistant United States Attorneys should be extremely careful when allowing anyone including GAO auditors to review files which may include information about relocated witnesses.

Any file which contains information about a relocated witness should be carefully reviewed before being made available to Defense Attorneys or others so that any information concerning a witness', new identity, location, phone number, etc., can be removed.

If you have any questions regarding Witness Protection Information, please call Mr. Philip Wilens, FTS 633-3684.

(Executive Office)

Speedy Trial Act Section

The General Accounting Office has conducted a study of the operation of the Speedy Trial Act. This report is expected to be issued in September. The study will have two findings that are of particular interest to U. S. Attorneys. One is that, based on a study of cases in the U. S. District Court for the District of Columbia, clerks of court are making a substantial number of unintentional errors in recording exclusions and counting days under the Speedy Trial Act.

Of 246 felony cases examined, 134 had at least one counting or recording error. This demonstrates the importance of the U. S. Attorney's office keeping track of Speedy Trial Act time and events. This is especially so for cases that are likely to come close to the Speedy Trial Act time limits.

The second finding is that the practice of dismissing complaints and subsequently indicting the same cases as grand jury originals may be fairly widespread. The report will bring this to the attention of the Congress. In an amendment to U. S. Attorneys' Manual section 9-17.111, dated June 20, 1980, the Deputy Attorney General urged that this practice be used only where no reasonable alternative exists, and that exclusions be used whenever possible to meet the interval I 30 day time limit. We remain concerned that if this practice is used excessively Congress may act to restrict or prohibit it.

(Executive Office)

SELECTIVE SERVICE VIOLATIONS

I. Evolving Prosecutive Policy

Registration under the Military Selective Service Act began July 21, 1980. Section 462(a) of title 50 Appendix, United States Code, provides punishment for one "who . . . evades or refuses registration" with the Selective Service System.

There are three principles which will establish a broad perimeter for Selective Service prosecutions. First, the primary goal of any prosecution policy must be to encourage and to facilitate registration. Second, a failure to register should be viewed as a serious matter. Third, section 462(c) requires that the Department of Justice proceed expeditiously with prosecutions at the request of the Director of the Selective Service.

We will await further information from the Selective Service concerning registration statistics before we create a comprehensive policy.

II. "Counseling" Violations

Section 462(a) also provides punishment for a person "who knowingly counsels, aids, or abets another to refuse or evade registration . . ." A "counseling" violation may exist even if the person counseled does not refuse or evade registration. See Gara v. United States, 178 F.2d 38, 40 (6th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596, 598 (10th Cir. 1949), cert. denied, 338 U.S. 947 (1950).

Since prosecutions under the counseling prohibition of section 462 are liable to generate sharp First Amendment issues, such prosecutions, absent exigent circumstances, should not be undertaken without prior approval by the General Litigation and Legal Advice Section (FTS 724-7144).

(Criminal Division)

TERMINATION OF ACCEPTABLE SURETY ON FEDERAL BONDS

The Department of the Treasury, by Supplement No. 22 to Department Circular 570, notified the Department of Justice that the First General Insurance Company of Atlanta, Georgia, was terminated as an acceptable surety on federal bonds, effective June 30, 1980.

United States Attorneys' Offices having outstanding appearance bond forfeiture judgments against the First General Insurance Company should send a copy of the judgment and pertinent papers to the Criminal Division Collection Unit, Office of Legal Support Services, Washington, D.C. 20530. Action should also be taken to secure new appearance bonds in lieu of bonds executed by or on behalf of the First General Insurance Company.

(Criminal Division)

Civil Division Weekly Report

Every Wednesday the Civil Division sends the Attorney General and the Associate Attorney General a report summarizing developments in significant Civil Division matters. The Civil Division would like to include descriptions of significant new filings, important developments, and recent decisions in civil cases handled in the United States Attorneys' office. Please send any items to Alice Daniel, Assistant Attorney General of the Civil Division. A sample is printed below to acquaint all attorneys with the proper format for inclusion in the Civil Division Weekly Report.

A. Cases

1. The district court in Independent Gasoline Marketers v. Duncan enjoined continued operation of the President's oil import fee program. While our expedited appeal was awaiting oral argument, Congress took action legislatively terminating the program. Congress then overrode the President's veto of that legislation, making continued litigation fruitless. Accordingly, upon the issuance of a Presidential Proclamation rescinding the oil import fee program in its entirety (the Congressional action arguably had no retroactive effect), the government moved the Court of Appeals for an order dismissing for mootness the government's appeals and vacating the district court's judgment. The Court of Appeals has just done so, remanding the case to the district court with directions to vacate its judgment and dismiss the actions as moot, citing Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979); United States v. Munsingwear, Inc., 340 U.S. 36 (1950). (Appellate Staff)

(Civil Division)

CIVIL DIVISION
Assistant Attorney General Alice Daniel

State of Arkansas ex rel. Arkansas State Highway Department v. Neil Goldschmidt, Secretary of Transportation of the United States, No. 80-1574 (8th Cir. August 4, 1980) DJ# 145-18-738

MOOTNESS DOCTRINE: EIGHTH CIRCUIT HOLDS THAT STATE OF ARKANSAS' CHALLENGE TO PRESIDENT'S IMPOUNDMENT OF HIGHWAY FUNDS AND SECRETARY'S ALLOCATION OF REMAINING FUNDS IS MOOT BECAUSE OF JULY 8, 1980 SUPPLEMENTAL APPROPRIATIONS ACT

This case is one of several actions brought by states against the Secretary of Transportation to challenge the validity of (1) the President's deferral of the obligation of $1.15 billion in federal-aid highway funds and (2) the Secretary's allocation formula for distribution of the remaining funds among the states. The district court ruled in Arkansas' favor on both counts, holding the deferral invalid and imposing an allocation formula resulting in more funds for the State than would be available under the Secretary's approach. A stay of the lower court's order to obligate the additional funds was obtained and an appeal filed. Shortly after the appeal was filed, however, Congress passed the Supplemental Appropriations and Rescission Act, 1980, which specifically addressed these matters and, in the government's view, constituted a legislative resolution of the controversy which rendered this case moot. Upon the enactment of this legislation on July 8, 1980, we moved the Eighth Circuit to vacate the district court's judgment and remand with instructions to dismiss the complaint as moot.

The court of appeals expeditiously set the motion for argument and has just issued a decision accepting our argument and, accordingly, vacating the judgment as moot. The Court reasoned that the new legislation on its face disposes of all the funds at issue in this suit and dictates the allocation formula that must be used by the Secretary in distributing the remaining funds. Moreover, even if there were any ambiguity, it would be dispelled by the accompanying conference report, which makes Congress' intention indisputably clear. Thus, "the new Act cuts the basis from under the controversy that the District Court decided, making it purely academic and therefore moot."

This decision should be very helpful in persuading the Second Circuit and Tenth Circuit to issue similar decisions in the related Vermont and New Mexico cases now pending on appeal. The Vermont case was argued in the Second Circuit on July 24, and the New Mexico case was argued in the 10th Circuit on August 8.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Alan A. Parker

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

AUGUST 5, 1980 - AUGUST 19, 1980

Stanford Daily. On the evening of Monday, August 4, with no warning and no debate, the Senate took up and passed S. 1790, the bill reversing the Stanford Daily decision and requiring the Attorney General to write guidelines regarding searches for records held by innocent third parties. The House Rules Committee has granted a rule, and the House version, parts of which Justice opposes, can come to the floor any time following the recess.

Drugs on the High Seas. The House accepted some of the Senate amendments to this bill which would specifically give U.S. law enforcement officials the authority to search for drugs intended for import on vessels which are still on the high seas and not within U.S. territorial waters. The bill has been sent back to the Senate to deal with the two or three remaining minor amendments, and these should be accepted by the Senate without controversy.

Foreign Currency Transactions. Unanticipated opposition from both the far right and the far left in the House led to the defeat of this bill under suspension of the rules in late July. It may be possible to drop the most controversial section of the bill and seek passage of the remaining two sections which would still improve greatly the chances of apprehending and convicting narcotics traffickers in their attempts to take the proceeds of their illicit operations out of the country.

Cuban/Haitian Entrant Status Bill. The Administration's proposal (drafted and transmitted to the Hill by the Department) to create a special Cuban/Haitian Entrant status was introduced by Senator Kennedy by request on August 5, 1980, as S. 3013. Kennedy also introduced an amendment in the nature of a substitute, to require that the Cubans and Haitians be given refugee status rather than the special status created in the proposal. Under Refugee Act provisions, reimbursement to the states would be 100 percent, rather than the 75 percent called for in the proposal.

According to Judiciary Committee staff, no hearings will be held on S. 3013. It is possible, however, that if S. 1763, the INS efficiency bill, is brought up on the floor, Kennedy will offer S. 3013 as an amendment to it.

Telecommunications. On July 31, the House Commerce Committee favorably reported H.R. 6121 (Telecommunications Act of 1980). The vote was 33-7, with Congressmen Eckhardt, Markey, Mottl, Matusi, Dannemeyer, Maguire, and Scheuer voting against reporting the bill. An amendment to Section 219(h), offered by Congressman Markey, which would have given the Federal Communications Commission the authority to make structural adjustments to deal with changing circumstances, was defeated 26-16. Also defeated was an amendment to Section 218 offered by Congressman Eckhardt which would have required the FCC to specifically determine the economic impact of AT&T entry into a

particular unregulated market, before AT&T could enter that market.

Chairman Rodino (House Judiciary Committee) has requested that the bill be referred to the Judiciary Committee. A short referral appears likely.

Amendments to 6103 and 7609 of the Internal Revenue Code. A compromise bill has been worked out between the Administration and Senator Nunn on amendments to the disclosure provisions of section 6103 of the Internal Revenue Code. Senator Nunn is expected to reintroduce the bills (S. 2402, S. 2404 and S. 2405) shortly after the August recess. A concerted effort by the Department and Senator Nunn to get the bill reported out of the Senate Finance and House Ways and Means Committee is underway.

Motor Vehicle Theft. On August 1, 1980 the House Interstate and Foreign Commerce Subcommittee on Consumer Protection and Finance reported out H.R. 4178. Three amendments were added to the bill. However, only one, which deleted authority for the Secretary of Transportation to develop standards that would require motor vehicles be equipped with anti-theft devices, significantly altered the bill reported.

Lobbying. On August 5, 1980 Chairman Ribicoff of the Senate Governmental Affairs Committee gave lobby disclosure one last chance for a markup. Senator Mathias attempted to raise his own disclosure bill (S. 1782) with technical amendments. Senator Chiles, whose bill was defeated, walked out postponing any vote for lack of a quorum. Because of the similarities between S. 1782 and the Judiciary Committees "soft" version it may get to the floor this session. Currently, there is no markup scheduled.

Judicial Discipline. On July 31, the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice unanimously reported to the full Committee a Kastenmeier draft on judicial discipline. The bill will now be introduced and taken up by the full Committee after the August recess.

The Subcommittee bill is more modest than the Senate approach, although the two can be reconciled. There is some question, however, as to whether or not the Senate will go along with the House draft.

Paperwork. On August 5, by a vote of 11 to 0, the Senate Governmental Affairs Committee ordered favorably reported to the full Senate, S. 1411, the paperwork reduction bill. The Department had negotiated for exemptions from the bill, and was successful in obtaining exemptions for criminal investigations and litigation, civil litigation, intelligence activities, and CIDs issued by the Antitrust Division. We anticipate no problem in Senate passage of the bill and have been assured that Chairman Brooks will encourage the House to accept the Senate version, thus avoiding a conference. This legislation will have to be watched closely, however, since the House version contains no exemptions and is therefore totally unacceptable to the Department.

Fair Housing. On August 1, the Senate Judiciary Committee completed consideration of S. 506, the Fair Housing amendments. The bill had earlier been ordered favorably reported to the full Senate, although dissenting views will be filed by a number of Republicans by August 15. The only damaging amendments which passed narrowed the definition of aggrieved party (Heflin) and imposed an intent test for demonstrating a violation by appraisers (Hatch).

Since this bill is an Administration priority, we are hopeful that the Majority Leader will schedule it for a floor vote before the Session ends, despite the threat of a filibuster. The House has already passed its own Fair Housing bill, H.R. 5200.

Federal Rules of Criminal Procedure

Rule 52(a). Harmless Error and Plain Error. Harmless Error.

Rule 8(b). Joinder of Offenses and Defendants. Joinder of Defendants.

Defendant and codefendant were tried jointly under an indictment which charged two broad offenses, the first involving both defendants, and the second involving only the codefendant. As the second offense was a direct outgrowth of the first, and it therefore made sense to try the two together, the trial judge denied defendant's severance motion. Defendant's appeal of his conviction on the ground of improper joinder in violation of Rule 8(b) was initially successful, but the Court granted a rehearing on the Government's motion. The Government contended that even if there was erroneous joinder, defendant was not prejudiced since all evidence submitted in support of the second charge would have been admissible in support of the first charge, therefore, it was merely harmless error under Rule 52(a). Defendant argued that the Fourth Circuit's rule was that the harmless error rule was inapplicable in cases of misjoinder, regardless of whether prejudice was caused.

The Court first pointed out that applying Rule 52(a) under the circumstances, and thus avoiding an unnecessary retrial, would further Rule 8(b)'s purpose of promoting judicial economy and efficiency. Examining precedents dealing with the question, the Court expressed the view that the trend in legal opinions and among legal authorities is toward the view that misjoinder can be considered under the harmless error rule, Rule 52(a). Cases cited by the defendant were found to be distinguishable, mere dicta, or weakened by subsequent decisions. The Court concluded that there was no reason to ignore Rule 52(a) in a case where no prejudice to the defendant could have resulted from the misjoinder.

(Earlier opinion vacated in part, and judgments of conviction affirmed.)

United States v. Alan Jeffrey Seidel, 620 F.2d 1006 (4th Cir. February 20, 1980)

Federal Rules of Criminal Procedure

Rule 8(b). Joinder of Offenses and Defendants. Joinder of Defendants.

See Rule 52(a), this issue of the Bulletin for syllabus.

United States v. Alan Jeffrey Seidel, 620 F.2d 1006 (4th Cir. February 20, 1980)

Federal Rules of Criminal Procedure

Rule 17(e)(1). Subpoena. Place of Service. In United States.

The Government sought an order holding a foreign corporation in contempt for disobeying grand jury subpoenas duces tecum. The foreign corporation made a special appearance to challenge the Court's jurisdiction to consider the application.

The Court held that a foreign corporation is "in" the U.S. for purposes of service of a grand jury subpoena under Rule 17(e)(1) only to the extent that it would be subject to comparable civil process under International Shoe Company v. Washington, 326 U.S. 310 (1945). This foreign corporation, which maintained no office in the U.S., did not hold itself out as doing business in the U.S., had no significant property in the U.S., but did maintain a bank account in the U.S., would not be subject to in personam civil jurisdiction, and was, therefore, not subject to the grand jury subpoenas.

(Motion denied.)

In Re Arawak Trust Company (Cayman) Ltd., 489 F.Supp. 162 (E.D.N.Y. May 1, 1980)