U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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COMMENDATIONS

Assistant United States Attorney HAROLD J. BENDER, Western District of North Carolina, has been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding prosecutive efforts in a complex case involving several subjects charged in the robbery of the Wachovia Bank and Trust Company.

Assistant United States Attorneys DENISE L. COTE, DAVID W. DENTON, JAMES MOSS and K. CHRIS TODD, Southern District of New York, have been commended by Vice Admiral R. I. Price, United States Coast Guard, for the successful prosecution of a case involving an attempt by the master and crew of the vessel JOSE GREGORIO to smuggle marijuana into the United States.

Assistant United States Attorney J. ANDREW SMYSER, Middle District of Pennsylvania, has been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for significant prosecutive contributions to the success achieved in the cases involving members of the Huey family et al.

Assistant United States Attorney MICHAEL L. TABAK, Southern District of New York, has been commended by Mr. William S. Slattery, Chief, Investigations-Frauds, New York District, Immigration and Naturalization Service, for his fine work in a joint Department of State and Immigration Service Passport fraud case.

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

CLEARINGHOUSE

United States v. J. P. Reed, Unreported, No. 80-1948 (8th Cir., May 7, 1981) DJ 51-9-104.

Perjury prosecution allowed where the events forming the basis of the testimony in question are non-prosecutable because of the statute of limitations.

The defendant allegedly received kickbacks while holding public office. This occurred from 1970 through 1972 but the government took no action before 1978 when the defendant was called before a Grand Jury. After the defendant denied taking kickbacks, the government indicted him for perjury. Arguing that the government could not do indirectly what it could not do directly, the district court dismissed the indictment since proof of perjury would mean proving the kickbacks which the statute of limitations had already exempted from prosecution. The appellate court reversed, holding that only the statute of limitations for the perjury charge was relevant. The court found the length of time between the kickbacks and the Grand Jury appearance, where the perjury allegedly occurred, to be inconsequential. This allows the government to prosecute the kickbacks, in effect, by instituting the later perjury charge, thereby avoiding the statute of limitations defense.

Attorneys: USA George W. Proctor and
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Ark. E.

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

POINTS TO REMEMBER

Internal Revenue Service Project 719

In an attempt to assist United States Attorneys in collecting various debts and judgments, the Civil Division participates in Internal Revenue Service Project 719, a program which uses Internal Revenue Service computerized records to provide current address information upon specific request.

To participate in the program, the requesting office must send to the Civil Division two items: (1) the debtor's name, and (2) the debtor's Social Security Number. If the Social Security Number is not provided, it is impossible for the request to be forwarded to the Internal Revenue Service.

If the debtor has filed a federal income tax return within three years, the Internal Revenue Service computer will automatically print an IBM card with the street and city address reported by the debtor on the tax return and send it to the Civil Division. If the debtor failed to file a tax return within three years, the IBM card will read "no record". All of the IBM cards are forwarded to the United States Attorneys.

IRS Project 719 is also used by the Criminal Division and is specifically discussed at USAM 9-120.210.

(Civil Division)

APPELLATE MATTERS - CIVIL DIVISION

1. Sending papers to the Department. A question has been raised as to what papers filed during an appeal of a Civil Division case, where the appeal has been assigned to a United States Attorney's Office, should be sent to the Department of Justice (Director, Appellate Staff, Civil Division). In the past, letters assigning appeals requested that the United States Attorney's Office send to the Department two copies of the government's brief and two copies of all other documents which may be filed. Recently, these assignment letters have been modified. Now these letters for the most part request that copies of only the government's brief and the decision of the court of appeals be sent to the Department (and to the agency involved). This will confirm that only the government's brief (two copies) and the decision of the court of appeals should be sent to the Department (one copy of each to the agency), unless the Appellate Staff should specifically request that additional materials be sent, or unless the attorney handling the appeal wishes to bring a particular filing to the attention of the Department. This procedure will eliminate unnecessary paperwork.

2. Adverse district court decisions. On another matter involving appeals, United States Attorney's Offices are reminded that immediately upon the filing of an adverse decision by a district court in a Civil Division case, a copy of the adverse decision should be sent without delay to the Director of Appellate Staff, Civil Division, and to the General Counsel of the agency involved (with a request that the agency send its appeal recommendation to the Civil Division within 15 days). See the United States Attorneys' Manual, para. 2-3.220, 2-3.221. Promptness is necessary in order for the Civil Division to obtain the appeal recommendation of the agency and a determination thereon by the Solicitor General as soon as possible, preferably before the time when it would be necessary to file a protective notice of appeal. In cases tried by a United States Attorney's Office, the attorney trying the case should follow up any notice of an adverse decision with his own summary of the evidence and recommendation regarding appeal.

3. Notice of appeal by adverse party. Finally, where an adverse party files a notice of appeal from a judgment in a Civil Division case, the notice of appeal should be sent without delay to the Director of the Appellate Staff, Civil Division, so that assignment of responsibility for defense of the appeal can be made promptly. See United States Attorneys Manual, para. 2-3.210, 2-3.222. To assist in determining such assignments, the notice of appeal should be accompanied with a copy of the judgment and the memorandum from which the decision was appealed.

If there should be any general questions regarding the foregoing matters, please call William Kanter (FTS 8-633-1597).

CIVIL DIVISION
Acting Assistant Attorney General Stuart E. Schiffer

American Public Transit Association v. Lewis (D.C. Cir. No. 80-1497) (May 26, 1981) D.J. # 145-18-659

MASS TRANSIT FOR THE HANDICAPPED: D.C. CIRCUIT REMANDS FOR DETERMINATION OF WHETHER DOT REGULATIONS GOVERNING ACCESSIBILITY OF MASS TRANSPORTATION TO THE HANDICAPPED, HELD UNAUTHORIZED UNDER THE REHABILITATION ACT OF 1973, CAN BE SUSTAINED UNDER TWO OTHER TRANSPORTATION STATUTES.

In this action, APTA, a group of state and local transportation authorities, challenged the Department of Transportation's regulations governing mass transportation for the handicapped that require each mode of transportation (e.g., bus, light rail, and rapid rail systems) to be made accessible to the mobility handicapped. The district court sustained the regulations.

The Court of Appeals concluded that the Secretary had relied exclusively on Section 504 of the Rehabilitation Act of 1973 (as interpreted in certain guidelines issued by HEW) in adopting the challenged regulations. Given that fact, the Court held that it must look exclusively to the Rehabilitation Act for support for the regulations, instead of inquiring whether they could be sustained under two other transportation statutes upon which the district court had relied. Based on the Supreme Court's decision in Southeastern Community College v. Davis, the Court of Appeals held that Section 504 did not authorize DOT to require the major expenditures envisioned by its regulations. Accordingly, it ordered the case remanded to Judge Oberdorfer to enable DOT to explain whether the regulations can also be based on the two transportation statutes and if so, to justify the regulations in terms of those statutes.

Attorneys: Melissa Clark (Civil Division)
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Barbara Gordon (Civil Division)
FTS 633-4776

National Treasury Employees Union v. Campbell (D.C. Cir. No. 80-1118) (June 5, 1981) D.J. # 145-156-238

D.C. CIRCUIT RULES OUT PRIVATE AND CONGRESSIONAL CAUSES OF ACTION UNDER THE FEDERAL "ANTI-LOBBYING" STATUES.

Joined by Congressman William Carney, the NTEU brought suit to enjoin, as prohibited "lobbying", former OPM Director Alan Campbell's dissemination of a mailing requesting editorial support for the Carter administration's proposed federal pay reform legislation. We defended the district court's award of summary judgment

to Campbell inter alia on the ground that neither the criminal anti-lobbying statute (18 U.S.C. 1913) nor the anti-lobbying rider of the General Appropriations Act -- which both prohibit the unauthorized expenditure of appropriated funds for activities designed to affect the passage of pending legislation -- extends a private right of action. We also argued that, since Campbell recently resigned and the allegations of the complaint pertained to his personal conduct, the action was moot.

A majority of the Court of Appeals (per Judge MacKinnon) held that the action was moot (Rule 43(c), FRAP notwithstanding) except for plaintiffs' claim that Campbell should be ordered to reimburse the Treasury for the allegedly unlawful expenditures he authorized. On the basis of that claim, the court undertook a detailed analysis of both anti-lobbying statutes and concluded that neither confers a cause of action upon lobbying groups or members of Congress subjected to allegedly unlawful lobbying. Judge Wald filed a separate opinion agreeing that the case had been substantially mooted and then resting on the conclusion that neither statute provides a cause of action to recover funds spent on prohibited lobbying activities. The majority opinion, the concurrence points out, is much broader and holds that no declaratory or injunctive relief will lie under the anti-lobbying statutes either.

Attorney: Mark Gallant (Civil Division)
FTS 633-4776

George Kurzon v. Department of Health and Human Services, No. 80-1695 (May 22, 1981) D.J. # 145-16-1016

FOIA EXEMPTION 6; "SIMILAR FILES": FIRST CIRCUIT HOLDS THAT NAMES AND BUSINESS ADDRESSES OF SCIENTISTS WHOSE GRANT APPLICATIONS HAVE NOT BEEN FUNDED BY THE NATIONAL CANCER INSTITUTE DO NOT CONSTITUTE "SIMILAR FILES" WITHIN EXEMPTION 6 OF FOIA.

Plaintiff brought suit under FOIA seeking the release of names of scientists who had made grant applications to the National Cancer Institute and whose applications had been turned down. The addresses were sought administratively and on appeal. Plaintiff, a physician, sought the names with the alleged purpose to test his theory that the peer review system by which the National Institutes of Health (NIH) evaluate grant applications is biased against unorthodox proposals. The district court denied release based on exemption 6 of the FOIA and held that disclosure would be a serious, unwarranted invasion of privacy and could substantially injure the professional reputation of the applicants.

The court of appeals reversed and held that the information sought in this case is not sufficiently personal or private to satisfy the "similar files" requirement. The court then balanced the public and private interests in disclosure and found that the privacy interest threatened does not warrant the protection of exemption 6.

Attorney: Sandra Simon (Civil Division)
FTS 633-5684

United States of America v. Lannon E. Miller, etc.; United States of America v. Tydes William Alley, Jr., et al.; United States of America v. Glenn D. Graves, et al. (C.A. 5, Nos. 80-3353, 80-3358, 80-3457 and 80-3470) (May 20, 1981)

FALSE CLAIMS ACT: FIFTH CIRCUIT REVERSES DISTRICT COURT'S DISMISSAL OF GOVERNMENT'S FALSE CLAIMS ACT COMPLAINTS IN THREE CONSOLIDATED CASES SEEKING STATUTORY FORFEITURES AND DOUBLE DAMAGES FOR FALSE HUD MORTGAGE INSURANCE APPLICATIONS.

In these three separate actions the government alleged that certain real estate brokers caused to be submitted applications for HUD Mortgage insurance falsely representing the credit worthiness of low-income families. District Judge Stagg, relying on United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977), dismissed the government's False Claims Act actions in all three cases.

On our appeal, the court of appeals reversed. The Court found that the Hibbs Court did not mean to exclude statutory forfeitures under the Act. Moreover, with respect to double damages it found Hibbs distinguishable, because, unlike that case, defendant's false statements related to credit worthiness, and accordingly, the government should be allowed to prove that the false statements were causally related to the subsequent defaults. The Court rejected our argument that Hibbs was incorrectly decided, and that the relevant false act was the submission of the false insurance application which led ultimately to the payment of insurance benefits, rather than the false statements about credit worthiness. Under the government's theory there would be no requirement to show an actual causal connection between the false statement and the subsequent default.

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Al Daniel (Civil Division)
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Gilley v. U.S.A. (No. 80-1072) (May 27, 1981) D.J. # 35-72-34

FEDERAL EMPLOYEE TRANSFERS: SIXTH CIRCUIT RULES THAT INJUNCTION AGAINST TRANSFER OF FEDERAL EMPLOYEE WAS IMPROPERLY GRANTED UNDER THE GUIDELINES OF SAMPSON v. MURRAY.

Gilley was a Correctional Supervisor at the Federal Correctional Institution (FCI) in Memphis, Tennessee with more than eleven years of service with the Bureau of Prisons. Gilley was involved in an incident in which he went to the aid of another staff member who was being assaulted by an inmate. Following an investigation, the warden of FCI Memphis advised Gilley that he proposed disciplinary action because Gilley had used excessive force in subduing the inmate and had failed to preserve evidence. Finding Gilley's credibility and effectiveness as a supervisor destroyed, the warden concluded that demotion and reassignment would be warranted.

Though he was advised in writing of his right to respond, Gilley did not do so. Thereafter the recommendation of the warden was accepted by the Bureau and Gilley was demoted and reassigned to the United States Penitentiary at Leavenworth, Kansas. Gilley filed an appeal with the MSPB and sought a stay of the reassignment order, which was denied. Gilley then sought, and was granted, a preliminary injunction in the district court, enjoining his involuntary transfer to Leavenworth.

On appeal the Sixth Circuit ruled that Gilley had not met the test for irreparable injury under Sampson v. Murray, 415 U.S. 61 (1974) so that the entry of preliminary injunctive relief by the district court was improper. The Court rejected Gilley's claim, which the district court had accepted, that his transfer would burden his ability to pursue his administrative appeal and that that burden amounted to irreparable injury.

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Coleman A. Young, et al. v. Malcolm D. Baldrige, et al., Nos. 80-1751 & 81-1027 (June 15, 1981) D.J. # 145-9-518

CENSUS CASES: SIXTH CIRCUIT HOLDS THAT DETROIT LACKS STANDING TO CHALLENGE CENSUS BUREAU'S POPULATION COUNT IN 1980 DECENNIAL CENSUS.

This case involves a challenge by the Mayor and City of Detroit to the Census Bureau's conduct of the 1980 Decennial Census. Plaintiffs alleged a disproportionate undercount of Blacks and Hispanics, as compared to Whites, and argued that the Constitution requires a statistically defensible adjustment of the official census count under these circumstances. The district court agreed and ordered the Bureau to develop a statistically defensible method to adjust for the alleged undercount throughout the entire nation. In the meantime, the district court enjoined the Bureau from reporting (1) the 1980 census statewide population totals to the President by the statutory deadline of December 31, 1980, for apportioning United States Representatives among the states, and (2) the 1980 census sub-state population totals to the states by the statutory deadline of April 1, 1981. Following the Court of Appeals' denial of a stay, Justice Stewart, sitting as Circuit Justice, stayed the district court's injunctive orders pending disposition of the government's appeal to the Sixth Circuit.

On appeal, the Sixth circuit -- in a two-to-one split decision -- reversed the judgment of the district court. The court of appeals accepted the government's threshold argument that Detroit lacks standing to challenge the Bureau's 1980 census count, since it is the State of Michigan -- and not the Census Bureau -- that is responsible for congressional re-districting within the state. Because of this ruling of non-justiciability, the court of appeals found it unnecessary to reach the merits of Detroit's contentions and did not discuss the authority for or reasonableness of the Bureau's actions.

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Civil Division)

William R. Young v. United States of America, United States District Court, Eastern District of Texas, Paris Division, Civil Action No. P-79-12-CA (May 28, 1981)

FEDERAL TORT CLAIMS ACT: DISTRICT COURT HOLDS GOVERNMENT NOT LIABLE FOR VA HOSPITAL'S RELEASE OF SCHIZOPHRENIC PATIENT WHO SHOT AND INJURED PLAINTIFF FOUR YEARS LATER

In this Federal Tort Claims case, the Plaintiff was shot and injured by his neighbor, a former patient of the Veterans Administration Hospital and chronic schizophrenic. The shooting occurred some four years after the patient's last release from the Veterans Administration Hospital. The District Court held that there was no negligence on the part of the Government concerning the release. The proximate cause issue was consequently not reached. The District Court discussed at length the standard of care to be applied in cases of this type, and particularly the weight to be given the recent trends in psychiatric care in applying the standard. The Court, in summarizing, stated that weight must be given to the nature of the psychiatric profession and the legal and therapeutic developments surrounding psychiatric committment. Specifically, account should be taken of the considerations favoring increased freedom for mental patients, the difficulty of predicting long-term dangerousness, and the amorphous nature of psychiatric diagnosis and treatment.

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Assistant U.S. Attorney
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July 3, 1981

CIVIL RIGHTS DIVISION
Acting Assistant Attorney General James P. Turner

White v. United States Pipe and Foundry Company, No. 79-3863 (5th Cir.) DJ 170-1-88

Title VII

On May 29, 1981, the Court of Appeals for the Fifth Circuit issued an opinion in this case. The court vacated a lower court opinion which held that mandatory appointment of lawyers for Title VII complaints violated the lawyers' Thirteenth Amendment rights. The court held that the district court erred in addressing the constitutional question before it even attempted to determine whether counsel should be appointed for those complainants, and whether there was counsel who would take the appointment voluntarily. The court also held that the district court had no standing to raise objections of lawyers not before the court. We participated in the case by filing a joint amicus brief with EEOC.

Attorney: Mark Gross (Civil Rights Division)
FTS 633-2172

Daniel v. Zant, CA No. 79-110-MAC (M.D. Ga.) DJ 144-19M-1234

Conditions of Confinement

On June 5, 1981, Judge Wilbur Owens entered a final order in this case, thereby approving the consent decree proposed by plaintiffs, defendants, and amicus United States. An amended complaint was filed in July 1979 alleging constitutional violations as to the conditions of confinement in and summary assignment of prisoners under death sentence to the segregated unit at the Georgia Diagonostic and Classification Center,known as H House. The United States was appointed as amicus in September 1980. We conducted discovery and thereafter initiated settlement discussions among all the parties. The consent decree approved by Judge Owens resolves all issues raised in the amended complaint.

Attorney: Mary McClymont (Civil Rights Division)
FTS 633-3473

July 3, 1981

United States, et al. v. Jefferson County, et al. CA No. 75-P-0666-S (N.D. Ala.) DJ 170-1-59

Employment Discrimination

On June 8, 1981, the district court entered an order provisionally approving two consent decrees in the consolidated actions in this case. The court also scheduled a hearing for August 3, 1981, at which it will consider any objections which may be filed to either of the decrees. The decrees are with two of the principal defendants in these actions, the City of Birmingham, Alabama and the Jefferson County Alabama Personnel Board. Two groups of private plaintiffs have joined in the decrees. The decrees resolve all of the plaintiffs claims of employment discrimination against blacks and women by these defendants. The decree with the City of Birmingham provides for broad prospective injunctive relief. It prohibits, inter alia, future acts of discrimination against blacks and women in hiring, promotion and training, and other terms and conditions of employment. It also provides for correcting the effects of past discrimination. The decree with the Personnel Board enjoins the Board from instituting any tests or other selection procedures which have an adverse impact on blacks or women absent proof that such tests or procedures have been validated in compliance with the Uniform Guidelines. It also provides for correcting the effects of prior alleged unlawful testing and other selection practices. Both decrees provide for interim goals and for back pay.

Attorney: Richard Ritter (Civil Rights Division)
FTS 633-4085

City of Port Arthur v. United States, CA No. 80-0648 (D.C.D.C.) DJ 166-75-18

Section 5 of the Voting Rights Act

On June 12, 1981, the three-judge court hearing this case entered a memorandum opinion and order. In a 61 page opinion written by Judge Richey, the court denied, in the context of the proposed election plans, the city's request for Section 5 preclearance of the voting changes occasioned by the consolidation of Port Arthur with the virtually all-white towns of Lakeview and Pear Ridge, Texas and the subsequent annexation of the Sabine Pass area. Section 5 preclearance was also denied (1) for the 4-4-1 election plan (four single-member districts, four seats plus the mayor election at-large); (2) for the 8-0-1 election plan (all at-large); (3) and for the ordinance creating advisory councils from Pear Ridge and Lake-

view to assist in governing Port Arthur. The court found that the consolidation and annexation will have a discriminatory effect on black voters of Port Arthur since it will significantly reduce black voting strength, given the racially polarized voting which exists. The court ordered the city to submit within 15 days "a written proposal detailing the steps that will be taken to adopt a new electoral system."

Attorneys: Robert Berman (Civil Rights Division)
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United States v. Cruz, et al, No. 81-0013 (D.P.R.) DJ 144-65-445

18 U.S.C. 242

On June 9, 1981, Cruz Laureano was convicted of violating two counts of 18 U.S.C. 242. One count involved the shooting and wounding of Francisco Ramos Gonzalez by Cruz on December 11, 1978, and the other involved the unlawful eviction of Ramos from his residence and the destruction of his property after Ramos was taken to a local hospital. Defendants Jose Ramon Gonzalez Vasquez and Anastacio Martinez Tirado were acquitted of violating 18 U.S.C. 242 (eviction of Ramos and destruction of his property). All three defendants were acquitted of violation of 18 U.S.C. 241. Cruz and Ramon Gonzalez are former Caguas, Puerto Rico Marshals, and Martinez is a non-police officer.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JUNE 11, 1981 - JUNE 23, 1981

Posse Comitatus. On June 9, 1981 the House Judiciary Committee approved an amendment to the Department of Defense authorization bill authorizing the armed services to aid in drug investigations and training of local law enforcement officers in use of military equipment. The Committee removed from the amendment a provision that would have allowed military personnel to make arrests, searches and seizures under certain circumstances.

Crime Statistics. On June 10, 1981 the House Judiciary Subcommittee on Crime held a hearing on crime statistics. The Subcommittee wishes to draw attention to the importance of crime statistics because many government funded projects are developed in response to statistics, and also to show that statistics can be misleading depending upon criteria used to develop them. Charles Kinderman, Acting Director, Statistics Division, Bureau of Justice Statistics testified for the Department.

Speedy Trial Act. The House Judiciary Subcommittee on Crime hearing on the Speedy Trial Act scheduled for June 17, 1981 has been postponed indefinitely.

Capital Punishment. On June 9, 1981 the Senate Judiciary Committee reported out S. 114, a bill to reinstitute the death penalty for certain federal crimes. Also passed was a provision creating the death penalty for the attempted assassination of the President.

Federal Tort Claims Act. Chairman Danielson advises that he will probably schedule hearings in late June or early July in his Judiciary Subcommittee on Administrative Law and Governmental Relations on H.R. 24, his Federal Tort Claims Act amendments. Also to be considered at the Danielson hearings is H.R. 3799, Congressman Kastenmeier's bill to have the torts of National Guardsmen in training covered by the FTCA. A similar bill passed the Senate unanimously last year but died in the closing days of the 96th Congress.

Inspector General. On June 18, 1981 Stanley E. Morris, Associate Deputy Attorney General, appeared before the Senate Committee on Governmental Affairs to discuss the Department's reservations concerning the blanket extension of the Inspector General Act of 1978 to the Department of Justice.

Threatened Air Traffic Controllers Strike. On June 18, the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation began hearings on the then threatened Air Traffic Controllers strike. Acting Assistant Attorney General Stuart Schiffer and Mr. Dennis Linder, Director of the Federal Programs Branch represented the Department at the hearings. Mr. Schiffer testified that the Department would not "countenance" violations of the Federal law prohibiting federal employees from striking.

Regulatory Reform. On June 17, the House Judiciary Subcommittee on Administrative Law and Governmental Relations began markup of H.R. 746, Chairman Danielson's regulatory reform bill. No issues of major concern to the Department were resolved at this first session. Markup continues June 23 and 25.

Copyright Laws in Cases of Record and Tape Piracy. The House Judiciary Subcommittee on Courts hearing scheduled for June 18 on H.R. 3530, a bill to strenghthen the copyright laws in cases of records and tape piracy, has been postponed indefinitely. However, the Senate Judiciary Subcommittee on Criminal Laws had a hearing on a companion Senate bill, S. 691 on June 19. Renee Szybala, Special Assistant to the Associate Attorney General, testified for the Department.

Virgin Islands Alien Workers. On June 18, 1981 Andrew Carmichael of the Immigration and Naturalization Service was part of a panel which included representatives from the Departments of Labor, State and Interior which testified before the House Subcommittee on Immigration on H.R. 3517, a bill to grant permanent status to aliens working and living in the U.S. Virgin Islands. Another panel consisted of the sponsor, Delegate de Lugo, the Governor and two Senators from the U.S. Virgin Islands. The panels disagreed as to the constitutionality of a provision which would prohibit the petitioning for entry of fourth and fifth preference relatives (married sons and daughters and brothers and sisters). Chairman Mazzoli requested that the Department provide his Subcommittee with a position on that issue.

DOJ Authorization. The Senate began floor consideration of the Department's authorization bill, S. 951, on June 16. Senator Helms offered as an amendment the Collins' anti-busing language recently adopted in the House version of the DOJ authorization bill. Senator Weicker then countered with an amendment to the Helms amendment adding the proviso that the Helms provision should not be interpreted "to limit in any manner the Department . . . in enforcing the Constitution . . . ." Debate on the busing issues is expected to continue through Friday, June 19, 1981.

DOJ Authorization - House. On June 9 the House passed the DOJ authorization bill for FY 1982, H.R. 3462, by a vote of 353 to 42.

On a voice vote the House agreed to a Levitas amendment requiring the Attorney General to report to the Congress in any case in which the Department contests or refrains from defending any statute because of a Department position that such a provision is unconstitutional (this is identical to the requirement which has been levied on the Department in past authorization bills).

Representative Collins' anti-busing amendment was agreed to by a 265 to 122 vote. The language of the Collins amendment, which is virtually identical to that which passed both Houses in 1980 as part of the DOJ appropriations bill and was subsequently vetoed by the then President Carter, is as follows:

> No part of any sum authorized to be appropriated by this Act shall be used by the Department of Justice to bring any sort of action to require directly or indirectly the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education as a result of being mentally or physically handicapped.

By voice vote, the House adopted an amendment by Congressman Gilman which would raise the maximum age limit for Bureau of Prisons (BOP) hiring for law enforcement positions from 35 to 45. The BOP is concerned that the Gilman amendment could have the effect of taking BOP out of the retirement system for federal law enforcement agencies which allows retirement starting at age 50 after 20 years of service.

Agents Identities Protection. The Senate Judiciary Subcommittee on Security and Terrorism is tentatively planning to markup the proposed Intelligence Identities Protection Act, S. 391, during the week of June 22.

Nominations. On June 10, 1981 the United States Senate confirmed the following nominations:

Robert A. McConnell to be Assistant Attorney General, Office of Legislative Affairs;

Francis A. Keating, II, to be United States Attorney for the Northern District of Oklahoma, and

David L. Russell to be United States Attorney for the

Western District of Oklahoma.

On June 19, 1981, the Committee on the Judiciary of the United States Senate held a hearing on the nomination of Rex E. Lee to be Solicitor General.

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Federal Rules of Criminal Procedure

Rule 12(e). Pleadings and Motions before Trial; Defenses and Objections. Ruling on Motion.

See Rule 12(b), this issue of the Bulletin for syllabus.

United States v. John R. Barletta, 644 F.2d 50 (1st Cir. March 17, 1981).

Federal Rules of Criminal Procedure

Rule 12(b). Pleadings and Motions before Trial; Defenses and Objections. Pretrial Motions.

Rule 12(e). Pleadings and Motions before Trial; Defenses and Objections. Ruling on Motion.

After defendant's first trial resulted in a mistrial, the government sought to have certain evidence which had been excluded at the first trial admitted at retrial, and moved for a pretrial ruling on this issue. The government appealed the denial of the motion and while the appeal was pending, the defendant changed his position and joined the government in contending that a pretrial ruling should be made. The Court then remanded the case for reconsideration to allow the district court to take into account the defendant's change of position. On remand, the district court reaffirmed its earlier decision and held that Rule 12(e) did not mandate a pretrial ruling in this case. United States v. Barletta, 500 F.Supp. 739 (D. Mass. 1980), discussed at 29 USAB 203 (No. 6; 3-13-81). Faced with the government's appeal once more after the district court's reaffirmance, the Court recognized that the appeal raised what it termed an important issue of first impression - whether and under what circumstances a district court may defer such a ruling until trial under Rules 12(b) and 12(e) without "adversely affecting" the government's right to appeal under 18 U.S.C. 3731.

The court extensively examined the interplay between Rules 12(b) and 12(e) and 18 U.S.C. 3731, and concluded that the government may appeal from any pretrial ruling, but this did not dictate the conclusion that a district court may be compelled to rule prior to trial on all such issues. The Court noted that Rule 12(e) allows the trial court to defer such rulings for "good cause", and found the appropriate criterion for evaluating "good cause" to be the phrase "capable of determination without the trial of the general issue" in Rule 12(b). Under this standard,

the court must rule on an issue entirely segregable from the evidence to be presented at trial because there can be no "good cause" under Rule 12(e) to defer the ruling, while issues requiring review of a substantially complete portion of the evidence to be presented at trial are excluded from pretrial review. Where the issue falls between these two extremes, the timing of the decision is vested in the sound discretion of the court. Applying this standard to the instant case, the Court concluded that the evidentiary issue was "capable of determination without the trial of the general issue" despite the fact that evidence relevant to it arguably overlaps some of the proof to be introduced at trial, because the judge had presided over the first trial and was thus already familiar with the evidence.

(Writ of mandamus ordering the district court to vacate its order and enter a pretrial ruling on the government's motion)

United States v. John R. Barletta, 644 F.2d 50 (1st. Cir. March 17, 1981).