



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*

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| COMMENDATIONS | 721 |
| POINTS TO REMEMBER | |
| Report on Convicted Prisoners Form 792 | 723 |
| CASENOTES | |
| Civil Division | |
| FTCA: Ninth Circuit Affirms Dismissal of Suit Brought Against the United States Under FTCA Seeking Damages for Injuries Allegedly Sustained as a Result of Exposure to Radiation while Claimant was on Active Military Duty and for Birth Defects of Serviceman's Daughter Caused by Change in the Father's Chromosomes as a Result of his Exposure to Radiation | |
| <u>Monaco v. United States</u> | 725 |
| FTCA: Ninth Circuit Holds that Government is not Liable to a Serviceman for Injuries Sustained as a Result of Exposure to Radiation During Nuclear Bomb Tests, but also says that Government's Failure to Warn and Monitor any Possible Injuries Arising from his Exposure to Radiation Might be Cognizable under the FTCA if the Government Learned of the Danger after the Claimant Left the Service | |
| <u>Broudy v. United States</u> | 726 |
| HUD: Eighth Circuit holds that the United States is Entitled to Foreclose where Mortgage Note is in Default, and that Mortgagor's Equitable Defenses are Unmeritorious | |
| <u>United States v. Victory Highway Village</u> | 727 |
| FTCA: Alleged Irregularities in HHS Vaccine Licensing Program held Actionable Under the FTCA by the Eighth Circuit | |
| <u>Lora E. Loge v. United States</u> | 728 |
| Civil Rights Division | |
| Conditions of Confinement | |
| <u>Thomas v. Gloor</u> | 729 |

| | <u>Page</u> |
|---|-------------|
| Section 504 of the Rehabilitation Act <u>Glad v. KCET</u> | 729 |
| Employment Discrimination <u>United States v. City of Chicago</u> | 730 |
| Conditions of Confinement <u>Ruiz and United States v. Estelle</u> | 730 |
| Criminal Division Drug Prosecution <u>United States v. Harrington</u> | 731 |
| SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES | 733 |
| APPENDIX: FEDERAL RULES OF CRIMINAL PROCEDURE These pages should be placed on permanent file, by Rule, in each United States Attorney's office library | 739 |
| REPORT ON CONVICTED PRISONERS FORM 792 | 743 |
| PAROLE COMMISSION'S GUIDELINES TABLE | 745 |
| LIST OF U. S. ATTORNEYS | 753 |

COMMENDATIONS

Assistant United States Attorney JOHN C. COOK, Eastern District of Tennessee, has been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his effective cross-examination and impeachment of Ms. Dobbs in the case of Dobbs v. United States- a civil damage action brought against the United States.

Assistant United States Attorney TIMOTHY DI SCENZA, Western District of Tennessee, has been commended by G.R. Dickerson, Director, Bureau of Alcohol, Tobacco and Firearms, for his success in the trial of Arthur Wayne Baldwin, a significant organized crime figure who was sentenced to a prison term following his conviction for violations of the Federal explosives statutes.

Assistant United States Attorney ROBERT E.L. EATON, Jr., District of Columbia, has been commended by Mr. William E. Hall, Director, United States Marshals Service, for his outstanding efforts in the successful defense of a race discrimination claim in Derrickson v. United States.

Assistant United States Attorney LOUISE L. HILL, Northern District of Ohio, has been commended by Mr. Richard M. Brooks, Regional Counsel, Interstate Commerce Commission, Philadelphia, Pennsylvania, for the successful prosecution of the case United States v. Norfolk & Western Railway Co. which involved a highly complex tariff matter.

Assistant United States Attorney MARK E. KALMANSOHN, Central District of California, has been commended by Mr. Ronald E. Saranow, Chief, Criminal Division, Internal Revenue Service in Los Angeles, California, for his superior performance in United States v. Yoakum which involved false claims against the government by fictitious tax returns.

Assistant United States Attorney WARREN REESE, Southern District of California, has been commended by Mr. D. Lowell Jensen, Assistant Attorney General, Criminal Division and Mr. John M. Fedders, Director, Division of Enforcement, Securities and Exchange Commission, for an excellent job on a very complex fraud case relating to Walter Wencke and Bookkeepers, Ltd.

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, DirectorPOINTS TO REMEMBERReport on Convicted Prisoners Form 792

It is the duty of all United States Attorneys, Assistant United States Attorneys, and all attorneys in the Criminal Division to prepare and submit a completed Form 792 as soon as a defendant in a criminal case has been sentenced to a prison term of one year or more. Completion of the form ensures that the Parole Commission is given a concise accurate account of the offense behavior which led to the conviction, and of any other circumstances (mitigating or aggravating) which should be made known to the Commission.

It is especially important that the Commission be apprised of the specific data it needs for decision making under its guidelines (dollar values involved, drug amounts, extent of a conspiracy, etc.).

All United States Attorneys, Assistant United States Attorneys, and Department attorneys are expected to complete the report as an essential, concluding step in a just prosecutorial effort. More effective sentencing advocacy including providing appropriate information to the Parole Commission was one of the initial recommendations of the Attorney General's Task Force on Violent Crime.

Additional information, see the United States Attorneys' Manual 9-34.220 and 9-27.000.

A copy of the current Form 792 appears in the appendix of this issue of the Bulletin. Additional copies are available by requisition or from this office. Department of Justice, Executive Office for United States Attorneys, Tenth and Constitution Avenue, N.W., Washington, D.C. 20530.

Note: Normally, the United States Marshal will be advised of the institution to which the 792 Form is to be sent. However, jail-space problems have necessitated early removal of prisoners, without final designation, in some districts. In these cases, contact the Bureau of Prisons' Community Programs Officer (the United States Marshal will have the number) and send the 792 Form to that officer for transmittal to the institution.

All prosecuting attorneys should be familiar with the Parole Commission's guidelines, both in plea negotiations and in completing the 792 Form. The Commission's most recent guidelines table (full text to appear at 28 C.F.R. §2.20) is reprinted in the appendix of this issue of the Bulletin following the current Form 792.

(Executive Office)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Monaco v United States, 9th Cir. No. 79-4787 (November 9, 1981). D.J. #157-11-2551.

FTCA: NINTH CIRCUIT AFFIRMS DISMISSAL OF SUIT
BROUGHT AGAINST THE UNITED STATES UNDER FTCA
SEEKING DAMAGES FOR INJURIES ALLEGEDLY
SUSTAINED AS A RESULT OF EXPOSURE TO RADIATION
WHILE CLAIMANT WAS ON ACTIVE MILITARY DUTY AND
FOR BIRTH DEFECTS OF SERVICEMAN'S DAUGHTER
CAUSED BY CHANGE IN THE FATHER'S CHROMOSOMES
AS A RESULT OF HIS EXPOSURE TO RADIATION.

While in the Army and stationed at the University of Chicago, plaintiff Daniel Monaco was required to perform calisthenics on Stagg Field above the laboratory in which the "Manhattan Project" was being conducted. After he got out of the service, Mr. Monaco discovered that he had been exposed to atomic radiation and that he had cancer of the colon. The Ninth Circuit affirmed the dismissal of Mr. Monaco's suit on the ground that it was barred by the Feres doctrine which provides that the government is not liable under FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service. The Ninth Circuit ruled that "[t]here is no salient difference between a cause for injuries manifest before and injuries manifest after the claimant leaves service."

The court also affirmed the dismissal of Denise Monaco's claims for damages for birth defects caused by chromosomal changes in her father due to his exposure to radiation. Although Denise is not eligible for benefits under the Veterans Benefits Act, and was never in the military herself, the court held that her claims are barred by Feres because her injuries were sustained as a result of an injury to her father while he was on active duty and a trial would require the court to examine the government's activity in relation to military personnel on active duty. The court expressed the hope that Congress will grant relief to individuals in Denise's circumstances or will amend the FTCA to allow recovery in the federal courts.

Attorneys: John C. Hoyle (Civil Division)
FTS (633-3547)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Broudy v. United States, 9th Cir. No. 79-3829 (November 9, 1981). D.J. #157-12C-1761.

FTCA: NINTH CIRCUIT HOLDS THAT GOVERNMENT IS NOT LIABLE TO A SERVICEMAN FOR INJURIES SUSTAINED AS A RESULT OF EXPOSURE TO RADIATION DURING NUCLEAR BOMB TESTS, BUT ALSO SAYS THAT GOVERNMENT'S FAILURE TO WARN AND MONITOR ANY POSSIBLE INJURIES ARISING FROM HIS EXPOSURE TO RADIATION MIGHT BE COGNIZABLE UNDER THE FTCA IF THE GOVERNMENT LEARNED OF THE DANGER AFTER THE CLAIMANT LEFT THE SERVICE.

Marine Major Charles Broudy was ordered to participate in military exercises in the immediate vicinity of two atmospheric nuclear tests conducted in Nevada. After he was discharged, Major Broudy was diagnosed as having cancer and later died from the disease. The court held that his widow's claims must be dismissed under the Feres doctrine insofar as they relate to the exposure of Major Broudy to radiation during his military service. With regard to the claim that the government should be liable because it failed to warn Major Broudy of the danger and to monitor and treat him for the effects of exposure, the court held that recovery cannot be predicated on an action occurring while Major Broudy was in the service even if that act continues after his discharge. The court, however, also said that "if the Appellant can allege and prove an independent post-service negligent act, the claim would be cognizable." The court remanded this part of the case to the district court because plaintiff's complaint is "somewhat confused." The court concluded that "[t]he Government's failure to warn Major Broudy of and monitor any possible injuries arising from his exposure to radiation might constitute [a claim under FTCA] if the Government learned of the danger after Major Broudy left the service," and remanded this part of the case for such additional proceedings as may be necessary.

Attorney: John Hoyle (Civil Division)
FTS (633-3547)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

United States v. Victory Highway Village, 8th Circuit No. 80-1740
(October 28, 1981). D.J. #130-39-1553.

HUD: EIGHTH CIRCUIT HOLDS THAT THE UNITED STATES IS ENTITLED TO FORECLOSE WHERE MORTGAGE NOTE IS IN DEFAULT, AND THAT MORTGAGOR'S EQUITABLE DEFENSES ARE UNMERITOUS.

The United States commenced foreclosure proceedings against the owner of a mobile home trailer park following the latter's default in making interest payments on mortgage notes held by HUD. The mortgagor had been unable to make modified payments specified in a provisional work-out arrangement entered into between the mortgagor and HUD after the mortgage had originally gone into default. The district court refused to order foreclosure on equitable grounds, and held that the mortgagor need only bring current the payments called for by the work-out arrangement. On the government's appeal, the Eighth Circuit reversed, holding that the government was entitled to outright foreclosure unless the mortgagor paid the entire accelerated debt. The court of appeals held that "it is essential to the confidence of public and private lenders that the clear written terms of mortgages be implemented and expressed by the courts."

Attorney: Michael Kimmel (Civil Division)
FTS (633-5714)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Lora E. Loge, et al. v. United States, et al., 8th Cir. No. 80-1886 (November 6, 1981). D.J. #157-10-131.

FTCA: ALLEGED IRREGULARITIES IN HHS
VACCINE LICENSING PROGRAM HELD ACTIONABLE
UNDER THE FTCA BY THE EIGHTH CIRCUIT.

Plaintiff contracted polio from the vaccine administered to her son by a private physician. She and her husband sued the United States under the FTCA, claiming that HHS was negligent both in licensing the manufacturer of the vaccine in 1962 and in its performance of pre-distribution testing of the vaccine ultimately given to their son. Additionally, plaintiffs sued unknown government officials in their individual capacities for alleged Fifth Amendment violations. The district court dismissed the action on two grounds. First, the court held that there was no jurisdiction over plaintiffs' claim of negligent failure to promulgate safety testing regulations to govern the virus shed by live, oral polio vaccine. And, second, the court held that plaintiffs failed to state a claim for relief with respect to the remainder of their case: with respect to the claim of negligent operation of the vaccine licensing program, the court held that plaintiffs failed to state a claim under the "Good Samaritan" rule applicable in Arkansas; additionally, the plaintiffs' Bivens-type claims were held to be deficient.

On appeal, the Eighth Circuit affirmed in part and reversed in part. The court of appeals agreed that HHS' decision not to promulgate regulations governing a particular aspect of its vaccine licensing program was a discretionary function and therefore exempt from suit under the FTCA. Additionally, the court agreed that the allegations of constitutional violations failed to state a claim for relief. The court of appeals reversed the district court, however, on the question of negligent implementation of the vaccine licensing program, holding that plaintiffs did state claims for relief under the "Good Samaritan" rule. The case was remanded to the district court and HHS must now prove that the government followed its own mandatory safety testing regulations both when it licensed the production of live, oral polio vaccine and when it approved for distribution the vaccine which was ultimately administered to the plaintiffs' infant.

Attorney: Katherine S. Gruenheck (Civil Division)
FTS (633-4825)

December 4, 1981

CIVIL RIGHTS DIVISION

Assistant Attorney General Wm. Bradford Reynolds

Thomas v. Gloor, No. CA 77-H-0683S (M.D. Ala.) DJ 168-2-28

Conditions of Confinement

On October 22, 1981, the court entered an order, holding the Jefferson County, Alabama Sheriff, the Alabama Commissioner of Corrections and the Temporary Receiver of the Alabama Prison System (Gov. Fob James) in civil contempt of court. Thomas, in which we are amicus, deals with conditions of confinement at the Jefferson County jail and was settled by consent order in 1978. The contempt sanction was invoked for failing to comply with those parts of the consent decree relating to overcrowding. The court had, on several occasions, issued contempt citations for noncompliance but had imposed no sanctions and had given defendants additional time to purge themselves of contempt. The court had also, in a May 1981 order, announced that fines would be imposed for continued noncompliance. In the October 22 order, the court finally invoked sanctions, fining county officials \$32,600 and State officials, \$174,500. The court further announced that future contempt would be accompanied by fines computed at \$100 per day for each inmate over capacity and stated that if defendants were not in compliance by early 1982 he would have to consider releasing prisoners to remedy the situation. A portion of the fine (approximately \$35,000) will be disbursed to inmates of the jail based on \$1 per day per inmate. The remainder of the fine will remain with the court and may be utilized for compliance efforts.

Attorney: Stephen Whinston (Civil Rights Division)
FTS 633-3479

GLAD v. KCET, No. 78-4715 (C.D. Cal.) DJ 171-17B-0741

Section 504 of the Rehabilitation Act

On October 29, 1981, at the conclusion of trial, the Court ordered from the bench that the Departments of Education (DOE) and Health and Human Services (HHS) and the Attorney General be enjoined from "making any grants disbursing any monies for the preparation or the grant of any monies to any television stations for the purpose of airing programs that have been made with public monies until they have set forth either regulations or by contract have provided for full compliance with Section 504 by the recipient." The court made a specific finding that, at least on the basis of the evidence

December 4, 1981

presented at trial, "closed captioning is not a reasonable alternative for deaf people to have access to television." Because a number of assistance contracts will be affected immediately, the Civil Division will move for a stay of the injunction on the ground that the court lacks jurisdiction to enjoin funding in the present posture of this case and that closed captioning, acceptable under DOE regulations, is an adequate method to ensure compliance with Section 504. Deputy Assistant Attorney General Robert J. D'Agostino testified at the trial as to our Division's plans to include a compliance standard for federally assisted television within our revised Section 504 coordination regulation.

Attorney: Philip Breen (Civil Rights Division)
FTS 724-2243

United States v. City of Chicago, No. 80-2008 (7th Cir.)
DJ 170-28-81

Employment Discrimination

On November 2, 1981, the Seventh Circuit decided this case after rehearing the case en banc. While the court reaffirmed the propriety of establishing a goal to remedy the City's discrimination against minority applicants for sergeant positions in the police department, it held that the lower court should have lowered the goal from 40 percent to 25 percent in light of changed circumstances.

Attorney: Irv Gornstein (Civil Rights Division)
FTS 633-4491

Ruiz and United States v. Estelle, Nos. 81-2224, 81-2320, 81-2390 (5th Cir.) DJ 144-75-1523

Conditions of Confinement

On November 16, 1981, we filed our brief as appellee in this case, challenging the conditions of confinement within the Texas prison system. While our brief generally supports the judgment of the district court, we suggest that the district court exceeded its authority in restricting the size, organization, and location of prison units, and in imposing two specific requirements governing the manner of relieving overcrowding.

Attorneys: Dennis Dimsey (Civil Rights Division)
FTS 633-4381
Bill Yeomans (Civil Rights Division)
FTS 633-4126

CRIMINAL DIVISION
Assistant Attorney General D. Lowell Jensen

United States v. Harrington, 520 F. Supp. 93, No. S-80-157 (E.D. Cal.
August 3, October 22, 1981)

Drug Prosecution

In this drug prosecution, defendant moved to suppress all evidence obtained from a court approved search of his residence by Customs agents. The motion to suppress was based on the ground that Customs had no authority to procure and execute search warrants in "domestic" drug cases because of Reorganization Plan No. 2 of 1973, 87 Stat. 1091, 1973 U.S. Code, Cong. & Admin. News 3554 (creating the Drug Enforcement Administration). The Government argued that the Reorganization Plan did not deprive Customs officers of their authority under 26 U.S.C. 7607(1) to obtain search warrants, and also that the Customs agents were authorized to obtain and execute the warrant under Federal Rule of Criminal Procedure 41. However, the district court ordered suppression of the evidence because it read the Reorganization Plan as stripping Customs of any responsibility and authority to enforce the drug laws away from the border.

The Government moved for reconsideration and reversal of the suppression order based upon the previous arguments and three additional theories. First, it was stressed that the Customs agents had independent authority to obtain the warrant under the currency laws (31 U.S.C. 1105) inasmuch as the case started out as an investigation of a large scale currency conspiracy and only later revealed related drug violations that became the predominant focus of the investigation. Second, the Government argued that even assuming that the agents had no authority to obtain the warrant, application of the exclusionary rule was inappropriate because defendant's constitutional rights were not violated. Lastly, the Government contended that Customs had authority to obtain the warrant under both the Reorganization Plan and the Controlled Substances Act, because the investigation had been conducted under the direction of an Assistant U.S. Attorney.

The Court stood by its initial decision because it felt that the search warrant only contained probable cause as to drug violations, not currency violations, and it interpreted the case of U.S. v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979) as requiring application of the exclusionary rule whenever an officer acts without authority regardless of the lack of any constitutional violation. The Court did not address the point that the investigation had been conducted under the direction and authority of the Assistant U.S. Attorney.

Attorney: Victor Stone (Criminal Division) FTS 633-2841
Thomas Couris (A.U.S.A.) FTS 448-2331
Steven Basha (Customs) FTS 566-2482

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

NOVEMBER 10, 1981 - NOVEMBER 24, 1981

Banking Deregulation. The Department has commented on several bills that would provide increased competitive opportunities for regulated depository institutions. The bills provide new merger product expansion possibilities for these regulated financial institutions. Generally, the Department believes that the existing antitrust laws are adequate to prevent anti-competitive increases in financial market concentration. However, certain modifications to the legislation are necessary to permit the antitrust laws to prevent otherwise anti-competitive acquisitions of depository institutions.

Tax Disclosure Amendments. On November 9, Deputy Attorney General Edward C. Schmults testified before the Senate Finance Subcommittee on IRS concerning amendments to the disclosure provisions of the Internal Revenue Code. The hearing focused on Senate Nunn's bill, S. 732, however, the Administration submitted its own package which Mr. Schmults and the Treasury Department representatives focused upon. The Department supports changes in the Code to allow the IRS to make more disclosures to the Department which could be vital in prosecuting narcotics traffickers and organized crime figures.

Posse Comitatus. On November 3, the House and Senate concluded their conference on a provision in the DOD appropriation bill which would provide military assistance to civilian law enforcement. The conference report does not amend the Posse Comitatus Act, but does provide for indirect assistance by the military to civilian law enforcement with certain proscribed restrictions.

Violence Against Minorities. On November 12, Assistant Attorney General William Bradford Reynolds, Civil Rights Division, testified before the House Judiciary Subcommittee on Criminal Justice. The subject of the hearing was violence against minorities.

Federal Tort Claims Act. On November 13, Deputy Attorney General Edward C. Schmults testified before the Senate Judiciary Subcommittee on Agency Administration in support of S. 1775. The legislation, introduced at the Department's request by Senator Grassley, would amend the Federal Tort Claims Act to waive sovereign immunity for constitutional torts and insulate federal employees from liability for actions taken within the scope of their employment.

Freedom of Information Act. The Subcommittee on the Constitution of the Senate Judiciary Committee held a hearing on November 12 on legislation to revise the FOIA. William Webster, Director, FBI, testified on behalf of the Department.

INS Management. On November 12, the House Subcommittee on Immigration, Refugees, and International Law of the Judiciary Committee held a hearing on Administrative Improvements in the Immigration and Naturalization Service and the request of the INS for additional resources. David Hiller, Special Assistant to the Attorney General; Alan Nelson, Deputy Commissioner, INS; Kevin Rooney, Assistant Attorney General, JMD; and Doris Meissner, Acting Commissioner, INS; represented the Department.

Criminal Code Reform. On November 18, the Senate Judiciary reported out S. 1630, the Senate criminal code reform bill. The vote was 11-5.

International Narcotics Trafficking. On November 18, the Senate Governmental Permanent Subcommittee on Investigations completed two weeks of hearings on international narcotic trafficking. Representatives from all the federal law enforcement agencies who assist in the fight against narcotic trafficking testified, including several witnesses from the Department. The subcommittee was supportive of law enforcement but was very critical of the Administration's budget cuts in law enforcement and received several admissions from agency witnesses that the effort against narcotic trafficking will be hampered due to the cuts.

Federal Assistance to State and Local Prisons. The Senate Subcommittee on Criminal Law of the Committee on the Judiciary held hearings on federal assistance to state and local prisons on November 19. Jeffrey Harris, Deputy Associate Attorney General, offered the views of the Department on S. 186, a bill to establish a federal program of assistance to state and local criminal justice agencies for the planning and construction of criminal justice facilities; S. 1587, to establish a corporation for prison industries; and S. 1690, to assure that prisoners have a marketable job skill and basic literacy before being released on parole. The Department does not support these three bills.

Amerasian Immigration Act. On November 17, the House Judiciary Committee's Subcommittee on Immigration, Refugees and International Law held a hearing on the following bills: H.R. 808, to provide preferential admission treatment for certain children of United States Armed Forces personnel; H.R. 1871, to allow adjustment of status of natives of Korea, India, China or the Phillipines who were evacuated with the direct assistance of the United States from Vietnam and paroled into the United States before May 30, 1975, and who have been physically present in Guam for five years; H.R. 1872, to waive the non-immigrant visa requirements for aliens visiting Guam for not more than 15 days; and H.R. 3405, to amend the Immigration and Nationality Act to allow immigration benefits to be based on relationships between illegitimate children and their natural fathers. The members of the Subcommittee were particularly interested in the Administration's views on H.R. 3405. Mr. Thomas Simmons represented the Immigration and Naturalization Service.

Private Relief Bill/S. 312. On November 19, the Senate Judiciary Committee Subcommittee on Immigration and Refugee Policy held a hearing on S. 312, a bill for the relief of seven Soviet Pentecostals residing in the United States Embassy in Moscow. Doris Meissner, Acting Commissioner, Immigration and Naturalization Service, represented the Department.

Court of Appeals for the Federal Circuit. On November 18, the House voted to suspend the rules and pass H.R. 4482, the Court of Appeals for the Federal Circuit bill. Final vote was 322 to 76. On the Senate side, the Committee report to accompany S. 1700 was also filed on November 18.

Busing. On November 19, William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, testified before the House Judiciary Subcommittee on Civil and Constitutional Rights. The subject of the hearing was school desegregation.

Motor Fuel Marketer Preservation Act/S. 326. The Senate Judiciary Committee has favorably reported, with an amendment, S. 326. This legislation would preclude major refiners from operating retail gasoline stations. It would also establish a daily wholesale transfer price for motor fuel and would generally require a supplier of motor fuel to sell only at that price. Because of its anticompetitive effects and the regulatory system it would establish, the Department opposes S. 326.

Motor Carrier Rate Commission. On November 18, William Baxter, Assistant Attorney General, Antitrust Division, testified before the Motor Carrier Rate Commission. Mr. Baxter stressed that truck transportation can efficiently function without collective ratemaking and that collective ratemaking interferes with the operation of the free market and causes a misallocation of economic resources.

International Aspects of Antitrust. On November 19, Assistant Attorney General, Antitrust Division, testified before the House Subcommittee on Monopolies and Commercial Law of the Judiciary Committee concerning international aspects of antitrust law. Discussed at the hearing was the application of the antitrust laws to transnational business operations, the investigative policies of the Department, international discussions and agreements in antitrust matters, and H.R. 2812 and H.R. 2459. H.R. 2812 would limit the circumstances in which foreign governments could bring suit for violation of the antitrust laws. H.R. 2459 would establish an international antitrust study commission.

Nominations:

On November 13, 1981 the United States Senate confirmed the nomination of Clyde H. Hamilton to be U.S. District Judge for the District of South Carolina.

On November 16, 1981 the United States Senate confirmed the following nominations:

Edward R. Becker, of Pennsylvania, to be U.S. Circuit Judge for the Third Circuit.

Christopher K. Barnes, to be U.S. Attorney for the Southern District of Ohio.

Richard C. Turner, to be U.S. Attorney for the Southern District of Iowa.

James P. Jonker, to be U.S. Marshal for the Northern District of Iowa.

Wallace L. McLendon, to be U.S. Marshal for the Northern District of Florida.

On November 18, 1981, the United States Senate confirmed the following nominations:

Lawrence W. Pierce, of New York, to be U.S. Circuit Judge for the Second Circuit.

Emmett R. Cox, to be U.S. District Judge for the Southern District of Alabama.

Cynthia H. Hall, to be U.S. District Judge for the Central District of California.

Clarence A. Beam, to be U.S. District Judge for the District of Nebraska.

John B. Jones, to be U.S. District Judge for the District of South Dakota.

Robert J. Wortham, to be U.S. Attorney for the Eastern District of Texas.

Alan H. Nevas, to be U.S. Attorney for the District of Connecticut.

John W. Gill, Jr., to be U.S. Attorney for the Eastern District of Tennessee.

Joseph R. Russoniello, to be U.S. Attorney for the Northern District of California.

738

VOL. 29

DECEMBER 4, 1981

No. 25

Philip N. Hogen, to be U.S. Attorney for the District of South Dakota.

J. Jerome Perkins, to be U.S. Marshal for the Northern District of Indiana.

Denny L. Sampson, to be U.S. Marshal for the District of Nevada.

Federal Rules of Criminal Procedure

Rule 32(c). Sentence and Judgment. Presentence Investigation.

Rule 35. Correction or Reduction of Sentence.

Defendant was found guilty of first degree murder in violation of 18 U.S.C. 1111 and received a mandatory sentence of life imprisonment. He sought a reduction of his sentence pursuant to Rule 35 because the judge who sentenced him acted without a presentence report as required by Rule 32(c).

The Court held that the judge violated Rule 32(c) in sentencing defendant without first obtaining a presentence report or finding that there was sufficient information in the record to enable the meaningful exercise of his sentencing discretion. The Court stated that although the sentence was mandatory the judge's decision also included other important considerations, such as whether to make a parole recommendation or a recommendation as to where the defendant should be confined. The Court held that the information provided by the report of a trained probation officer, together with the evidence presented at trial itself, are the only reliable bases for the exercise of a judge's sentencing discretion.

(Vacated and remanded to a different judge.)

United States v. James Ralph Long, 656 F.2d 1162 (5th Cir., September 25, 1981).

Federal Rules of Criminal Procedure

Rule 35. Correction or Reduction of Sentence.

See Federal Rules of Criminal Procedure, Rule 32(c), this issue of the Bulletin for syllabus.

United States v. James Ralph Long, 656 F.2d 1162 (5th Cir., September 25, 1981).

NAME _____
CONVICTED OF _____
TERM IMPOSED _____
CRIMINAL CASE NO. _____
U.S.C. _____
DISTRICT _____

NOTE: This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

I. DESCRIPTION OF THE OFFENSE: Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

II. CORROBORATING EVIDENCE: If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

III. COOPERATION: Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unwarded as a possible circumstance in mitigation of punishment.

IV. RECOMMENDATION RELATIVE TO PAROLE: This section is optional. (See the paroling policy guidelines at 28 CFR § 2.20)

DISCLOSURE INSTRUCTIONS (to institution staff):

_____ This report may be disclosed to the prisoner.

_____ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208 (c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

NOTIFICATION REQUEST:

_____ I wish to be notified of the date and place set for this prisoner's parole hearing.

_____ I wish to be notified of the Commission's decision in this case.

For the United States Attorney

DATE

Signed: _____
Assistant U.S. Attorney

Disposition of copies: This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed. (The U.S. Marshal can put you in contact with your local CPO.)

GUIDELINES FOR DECISION-MAKING

[Guidelines for Decision-Making, Customary Total Time to be Served before Release (including jail time)]

| OFFENSE CHARACTERISTICS: Severity of Offense Behavior (Examples) | OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981) | | | |
|--|---|-----------------|-----------------|-----------------|
| | Very Good (10 - 8) | Good (7 - 6) | Fair (5 - 4) | Poor (3 - 0) |
| LOW | ADULT RANGE | | | |
| Alcohol or Cigarette law violations, including tax evasion (amount of tax evaded less than \$2,000) ^{1/} | <=6 months | 6-9 months | 9-12 months | 12-16 months |
| Gambling law violations (no managerial or proprietary interest) | | | | |
| Illicit drugs, simple possession | (YOUTH RANGE) | | | |
| Marihuana/hashish, possession with intent to distribute/sale [very small scale (e.g., less than 10 lbs. of marihuana/less than 1 lb. of hashish/less than .01 liter of hash oil)] | (<=6) months | (6-9) months | (9-12) months | (12-16) months |
| Property offenses (theft, income tax evasion, or simple possession of stolen property) less than \$2,000 | | | | |
| LOW MODERATE | ADULT RANGE | | | |
| Counterfeit currency or other medium of exchange [(passing/possession) less than \$2,000] | <=8 months | 8-12 months | 12-16 months | 16-22 months |
| Drugs (other than specifically categorized), possession with intent to distribute/sale [very small scale (e.g., less than 200 doses)] | | | | |
| Marihuana/hashish, possession with intent to distribute/sale [small scale (e.g., 10-49 lbs. of marihuana / 1-4.9 lbs. of hashish / .01-.04 liters of hash oil)] | | | | |
| Cocaine, possession with intent to distribute/sale [very small scale (e.g., less than 1 gram of 100% purity, or equivalent amount)] | (YOUTH RANGE) | | | |
| Gambling law violations - managerial or proprietary interest in small scale operation [e.g., Sports books (estimated daily gross less than \$5,000); Horse books (estimated daily gross less than \$1,500); Numbers bankers (estimated daily gross less than \$750)] | (<=8) months | (8-12) months | (12-16) months | (16-20) months |
| Immigration law violations | | | | |
| Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than \$2,000 | | | | |
| MODERATE | ADULT RANGE | | | |
| Automobile theft (3 cars or less involved and total value does not exceed \$19,999) ^{2/} | 10-14 months | 14-18 months | 18-24 months | 24-32 months |
| Counterfeit currency or other medium of exchange [(passing/possession) \$2,000 - \$19,999] | | | | |
| Drugs (other than specifically categorized), possession with intent to distribute/sale [small scale (e.g., 200-999 doses)] | (YOUTH RANGE) | | | |
| Marihuana/hashish, possession with intent to distribute/sale [medium scale (e.g., 50-199 lbs. of marihuana / 5-19.9 lbs. of hashish / .05-.19 liters of hash oil)] | (8-12) months | (12-16) months | (16-20) months | (20-26) months |

| | Very Good (10 - 8) | Good (7 - 6) | Fair (5 - 4) | Poor (3 - 0) |
|---|-----------------------|-------------------|-------------------|-------------------|
| <u>MODERATE (continued)</u> | | | | |
| Cocaine, possession with intent to distribute/sale [small scale (e.g., 1.0-4.9 grams of 100% purity, or equivalent amount)] | | | | |
| Opiates, possession with intent to distribute/sale [evidence of opiate addiction and very small scale (e.g., less than 1.0 grams of 100% pure heroin, or equivalent amount)] | 10-14 months | 14-18 months | 18-24 months | 24-32 months |
| Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun) | | | | |
| Gambling law violations - managerial or proprietary interest in medium scale operation [e.g., Sports books (estimated daily gross \$5,000-\$15,000); Horse books (estimated daily gross \$1,500-\$4,000); Numbers bankers (estimated daily gross \$750-\$2,000)] | | | | |
| Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) \$2,000-\$19,999 | (8-12) months | (12-16) months | (16-20) months | (20-26) months |
| Smuggling/transporting of alien(s) | | | | |
| <u>HIGH</u> | | | | |
| Carnal Knowledge ^{3/} | | | | |
| Counterfeit currency or other medium of exchange [(passing/possession) \$20,000 - \$100,000] | | | | |
| Counterfeiting [manufacturing (amount of counterfeit currency or other medium of exchange involved not exceeding \$100,000)] | | | | |
| Drugs (other than specifically listed), possession with intent to distribute/sale [medium scale (e.g., 1,000-19,999 doses)] | 14-20 months | 20-26 months | 26-34 months | 34-44 months |
| Marihuana/hashish, possession with intent to distribute/sale [large scale (e.g., 200-1,999 lbs. of marihuana / 20-199 lbs. of hashish / .20-1.99 liters of hash oil)] | | | | |
| Cocaine, possession with intent to distribute/sale [medium scale (e.g., 5-99 grams of 100% purity, or equivalent amount)] | | | | |
| Opiates, possession with intent to distribute/sale [small scale (e.g., less than 5 grams of 100% pure heroin, or equivalent amount) except as described in moderate] | | | | |
| Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons) | (12-16) months | (16-20) months | (20-26) months | (26-32) months |
| Gambling law violations - managerial or proprietary interest in large scale operation (e.g., Sports books (estimated daily gross more than \$15,000); Horse books (estimated daily gross more than \$4,000); Numbers bankers (estimated daily gross more than \$2,000)] | | | | |
| Involuntary manslaughter (e.g., negligent homicide) | | | | |

| | Very Good (10 - 8) | Good (7 - 6) | Fair (5 - 4) | Poor (3 - 0) |
|--|-----------------------|-------------------|-------------------|-------------------|
| HIGH (continued) | | | | |
| Mann Act (no force - commercial purposes) | ADULT RANGE | | | |
| Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) \$20,000 - \$100,000 | 14-20 months | 20-26 months | 26-34 months | 34-44 months |
| (YOUTH RANGE) | | | | |
| Threatening communications (e.g., mail/phone) - not for purposes of extortion and no other overt act | (12-16) months | (16-20) months | (20-26) months | (26-32) months |
| VERY HIGH | | | | |
| Robbery (1 or 2 instances) | ADULT RANGE | | | |
| Breaking and entering - armory with intent to steal weapons | ADULT RANGE | | | |
| Breaking and entering/burglary - residence; or breaking and entering of other premises with hostile confrontation with victim | ADULT RANGE | | | |
| Counterfeit currency or other medium of exchange [(passing/possession/manufacturing) / amount more than \$100,000 but not exceeding \$500,000] | 24-36 months | 36-48 months | 48-60 months | 60-72 months |
| Drugs (other than specifically listed), possession with intent to distribute/sale [large scale (e.g., 20,000 or more doses) except as described in Greatest I] | ADULT RANGE | | | |
| Marihuana/hashish, possession with intent to distribute/sale [very large scale (e.g., 2,000 lbs. or more of marihuana / 200 lbs. or more of hashish / 2 liters or more of hash oil)] | ADULT RANGE | | | |
| Cocaine, possession with intent to distribute/sale [large scale (e.g., 100 grams or more of 100% purity, or equivalent amount) except as described in Greatest I] | ADULT RANGE | | | |
| Opiates, possession with intent to distribute/sale [medium to a very large scale (e.g., 5 grams or more of 100% pure heroin, or equivalent amount) unless the offense is described in Greatest I or Greatest II] | (YOUTH RANGE) | | | |
| Extortion [threat of physical harm (to person or property)] | (20-26) months | (26-32) months | (32-40) months | (40-48) months |
| Explosives, possession/transportation | ADULT RANGE | | | |
| Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) more than \$100,000 but not exceeding \$500,000 | ADULT RANGE | | | |
| GREATEST I | | | | |
| Aggravated felony (e.g., robbery: weapon fired or injury of a type normally requiring medical attention) | ADULT RANGE | | | |
| Arson or explosive detonation [involving potential risk of physical injury to person(s) (e.g., premises occupied or likely to be occupied) - no serious injury occurred] | (YOUTH RANGE) | | | |
| | (30-40) months | (40-50) months | (50-60) months | (60-76) months |

| | Very Good (10 - 8) | Good (7 - 6) | Fair (5 - 4) | Poor (3 - 0) |
|---|---|-------------------|-------------------|-------------------|
| <u>GREATEST I (continued)</u> | | | | |
| Drugs (other than specifically listed), possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 200,000 doses)] | ADULT RANGE | | | |
| Cocaine, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 1 kilogram of 100% purity, or equivalent amount)] | 40-52 months | 52-64 months | 64-78 months | 78-100 months |
| Opiates, possession with intent to distribute/sale [managerial or proprietary interest and large scale (e.g., offense involving more than 50 grams but not more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)] | ----- | | | |
| Kidnaping [other than listed in Greatest II; limited duration; and no harm to victim (e.g., kidnaping the driver of a truck during a hijacking, driving to a secluded location, and releasing victim unharmed)] | (YOUTH RANGE) | | | |
| Robbery (3 or 4 instances) | (30-40) months | (40-50) months | (50-60) months | (60-76) months |
| Sex act- force (e.g., forcible rape or Mann Act (force)) | ----- | | | |
| <u>GREATEST II</u> | | | | |
| Murder | ADULT RANGE | | | |
| Voluntary manslaughter | ADULT RANGE | | | |
| Aggravated felony - serious injury (e.g., robbery: injury involving substantial risk of death or protracted disability, or disfigurement) or extreme cruelty/brutality toward victim | 52+ months | 64+ months | 78+ months | 100+ months |
| Aircraft hijacking | ----- | | | |
| Espionage | (YOUTH RANGE) | | | |
| Kidnapping (for ransom or terrorism; as hostage; or harm to victim) | (YOUTH RANGE) | | | |
| Treason | (YOUTH RANGE) | | | |
| Opiates, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e.g., offense involving more than 1 kilogram (1000 grams) of 100% pure heroin or equivalent amount)] | (40+) months | (50+) months | (60+) months | (76+) months |
| | Specific upper limits are not provided due to the limited number of cases and the extreme variation possible within category. | | | |

GENERAL NOTES

- A. These guidelines are predicated upon good institutional conduct and program performance.
- B. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
- C. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
- D. If an offense behavior involved multiple separate offenses, the severity level may be increased.
- E. In cases where multiple sentences have been imposed (whether consecutive or concurrent, and whether aggregated or not) an offense severity rating shall be established to reflect the overall severity of the underlying criminal behavior. This rating shall apply whether or not any of the component sentences has expired.

OTHER OFFENSES

- (1) Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense. A consummated offense includes one in which the offender is prevented from completion only because of the intervention of law enforcement officials.
- (2) Breaking and entering not specifically listed above shall normally be treated as a low moderate severity offense; however, if the monetary loss amounts to \$2,000 or more, the applicable property offense category shall be used. Similarly, if the monetary loss involved in a burglary or breaking and entering (that is listed) constitutes a more serious property offense than the burglary or breaking and entering itself, the appropriate property offense category shall be used.
- (3) Manufacturing of synthetic drugs for sale shall be rated as not less than very high severity.
- (4) Bribery of a public official (offering/accepting/soliciting) or extortion (use of official position) shall be rated as no less than moderate severity for those instances limited in scope (e.g., single instance and amount of bribe/demand less than \$20,000 in value); and shall be rated as no less than high severity in any other case. In the case of a bribe/demand with a value in excess of \$100,000, the applicable property offense category shall apply. The extent to which the criminal conduct involves a breach of the public trust, therefore causing injury beyond that describable by monetary gain, shall be considered as an aggravating factor.
- (5) Obstructing justice (no physical threat)/perjury (in a criminal proceeding) shall be rated in the category of the underlying offense concerned, except that obstructing justice (threat of physical harm) shall be rated as no less than very high severity.
- (6) Misprision of felony shall be rated as moderate severity if the underlying offense is high severity or above. If the underlying offense is moderate severity or less, it shall be rated as low severity.
- (7) Harboring a fugitive shall be rated as moderate severity if the underlying offense is high severity or above. If the underlying offense is moderate severity or less, it shall be rated as low severity.

REFERENCED NOTES

1. Alcohol or cigarette tax law violations involving \$2,000 or more of evaded tax shall be treated as a property offense (tax evasion).
2. Except that automobile theft (not kept more than 72 hours; no substantial damage; and not theft for resale) shall be rated as low severity. Automobile theft involving a value of more than \$19,999 shall be treated as a property offense. In addition, automobile theft involving more than 3 cars, regardless of value, shall be treated as no less than high severity.
3. Except that carnal knowledge in which the relationship is clearly voluntary, the victim is not less than 14 years old, and the age difference between offender and victim is less than four years shall be rated as a low severity offense.

DEFINITIONS

- a. 'Other media of exchange' include, but are not limited to, postage stamps, money orders, or coupons redeemable for cash or goods.
- b. 'Drugs, other than specifically categorized' include, but are not limited to, the following, listed in ascending order of their perceived severity: amphetamines, hallucinogens, barbiturates, methamphetamines, phencyclidine (PCP). This ordering shall be used as a guide to decision placement within the applicable guideline range (i.e., other aspects being equal, amphetamines will normally be rated towards the bottom of the guideline range and PCP will normally be rated towards the top).
- c. 'Equivalent amounts' for the cocaine and opiate categories may be computed as follows: 1 gm. of 100% pure is equivalent to 2 gms. of 50% pure and 10 gms. of 10% pure, etc.
- d. The 'opiate' category includes heroin, morphine, opiate derivatives, and synthetic opiate substitutes.
- e. Managerial/Proprietary Interest (Large Scale Drug Offenses):

Managerial/proprietary interest in large scale drug cases is defined to include offenders who sell or negotiate to sell such drugs; or who have decision-making authority concerning the distribution/sale, importation, cutting, or manufacture of such drugs; or who finance such operations. Cases to be excluded are peripherally involved offenders without any decision-making authority (e.g., a person hired merely as a courier).

NOTICE OF ACTION - PART II - SALIENT FACTORS (SFS 81)

Register Number _____ Name _____

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE).....

- None = 3
- One = 2
- Two or three ... = 1
- Four or more ... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS (ADULT OR JUVENILE)..

- None = 2
- One or two = 1
- Three or more .. = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS.....

- Age at commencement of the current offense:
- 26 years of age or more = 2 ***
 - 20-25 years of age = 1 ***
 - 19 years of age or less = 0

***EXCEPTIONS: If five or more prior commitments of more than thirty days (adult or juvenile), place an "x" here _____ and score this item = 0.

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS).....

- No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense..... = 1
- Otherwise = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS VIOLATOR THIS TIME.....

- Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time..... = 1
- Otherwise = 0

Item F: HEROIN/OPIATE DEPENDENCE.....

- No history of heroin/opiate dependence = 1
- Otherwise = 0

TOTAL SCORE.....

NOTE: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt of an admission of guilt before a judicial body shall be treated as as conviction, even if a conviction is not formally entered.

U.S. ATTORNEY'S LIST AS OF December 4, 1981

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