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VOL. 30 MAY 28, 1982 NO. 10

VOL. 30 MAY 28, 1982 NO. 10

TABLE OF CONTENTS

Page

COMMENDATIONS

Assistant United States Attorney DOUGLAS JONES, Northern District of Alabama, has been commended by Mr. Jimmie L. Bivins, Special Agent in Charge of the Bureau of Alcohol, Tobacco and Firearms in Birmingham, Alabama, for his initiative and dedication to duty in United States v. Harris involving the first use of "Petition for Dangerous Special Offender Status," 18 U.S.C. § 3575, in the Northern District of Alabama.

Assistant United States Attorney GREGORY J. LEONARD, Middle District of Georgia, has been commended by Mr. Fred W. Harris, Jr., Regional Attorney, Office of the General Counsel, Department of Agriculture in Atlanta, Georgia, for his exceptional work in the Allen case dealing with prior liens, which resulted in a favorable decision.

Assistant United States Attorney VERNON E. LEWIS, District of Kansas, has been commended by Mr. Wm. Bradford Reynolds, Assistant Attorney General of the Civil Rights Division, for making a notable contribution to the enforcement of the federal criminal civil rights laws in United States v. Parish which resulted in a conviction for violation of 18 U.S.C. § 242.

Assistant United States Attorney JACKIE N. WILLIAMS, District of Kansas, has been commended by Mr. Clarence M. King, Jr., District Director of the Internal Revenue Service in Wichita, Kansas, for his successful prosecution of United States v. Mitchell which involved evasion of a substantial estate tax liability.

Assistant United States Attorney GEORGE A. YANTHIS, Northern District of New York, has been commended by Mr. Marino H. Milano, Assistant Special Agent-In-Charge of DEA's New York District Office, for his outstanding performance in obtaining convictions of twenty-one defendants on narcotic charges in the United States v. Lilla cases.

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

POINTS TO REMEMBER

Relationships With Client Agencies

A policy to ensure that all United States Attorneys keep their client agencies fully informed of case progress, development and decisions, is outlined in the following steps which have proved useful in a number of United States Attorney's offices:

1. Promptly upon receipt of a complaint against an agency, the Division or United States Attorney's office, as appropriate, should mail a notification letter to the General Counsel of the agency or to his or her designee. (Where time does not permit, e.g., where a motion for a TRO has been filed, it may be necessary to notify the agency by telephone.) At the same time, or as soon thereafter as possible, the agency should be provided with the name(s) and telephone number(s) of the Justice Department attorney(s) to whom the case has been assigned. The agency should be requested, in turn, to provide the Justice Department attorney(s) with the name, direct mailing address, and telephone number of the agency attorney to whom communications with respect to the case should be directed.

2. With respect to affirmative cases, receipt of a referral from a client agency should be acknowledged promptly and names of attorneys exchanged as in Paragraph 1.

3. Unless reasons of economy indicate otherwise, copies of all significant documents filed in court in both defensive and affirmative cases should be sent, immediately upon receipt or service, to the client agency. If a client agency specifically requests, copies of all documents filed should be sent. (Service of a summons and complaint on the client agency may normally be assumed, and copies of exhibits forwarded by the client agency need not be reproduced and returned.)

4. In non-delegated cases, the United States Attorney should also send copies of all documents filed in court to the Division responsible for the case.

5. An agency should be notified in advance of any significant hearings, oral arguments, depositions, or other proceedings.

6. Appropriate steps should be taken to consult adequately with agencies in advance regarding positions we intend to urge in court. Under no circumstances should a case be compromised or settled without advance consultation with a client agency, unless the agency has clearly indicated that some other procedure would be acceptable.

I appreciate your cooperation in this important matter.

The above-stated policy has been reprinted at USAM 1-9.110 and USAM 4-1.520.

(Executive Office)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

United States v. Sells Engineering Inc., Supreme Court No. 81-1032 (May 2, 1982). D.J. #46-12-1907.

FALSE CLAIMS ACT AND ACCESS TO GRAND JURY MATERIAL: SUPREME COURT GRANTS CERTIORARI IN CASE RAISING QUESTION OF ABILITY OF CIVIL DIVISION ATTORNEYS TO VIEW GRAND JURY MATERIAL AS A MATTER OF RIGHT UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE.

This case involves an investigation into the activities of a defense contractor and several of its officers. Following the investigation, the officers were called before a grand jury and were indicted for tax fraud and fraud against the United States in connection with their contracts with the Defense Department. The officers pled guilty, and our civil frauds unit then sought access to the grand jury material in order to determine if a False Claims Act suit should be brought. The Division claimed automatic access to the material for the Civil Division attorneys under Federal Rule of Criminal Procedure 6(e), which grants such access to "attorneys for the Government." (This term has been interpreted as generally being limited to Justice Department attorneys.) We also sought access for personnel to assist the attorneys under a standard more relaxed than the strict one set for disclosure of such material to private parties. The district court granted the requested access, basing its ruling on a Fifth Circuit case we had won. On appeal, the Ninth Circuit reversed, ruling that Civil Division attorneys do not have automatic access rights under the rule and that such attorneys and their assisting personnel must meet the same standard as any private party. Following denial of rehearing, we petitioned for certiorari on the basis of the conflict with the Fifth Circuit decision. Before acting on the petition, the Court asked us to address the question of mootness because the Civil Division had access to the grand jury material in question for some two years following a denial of a stay of the district court's order and before the Ninth Circuit actually decided the appeal. We argued that the case was not moot on the ground that further use of the grand

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

jury material might be necessary in the civil fraud action now being prosecuted against the company officials. The Supreme Court has just granted the petition without commenting on the mootness question.

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Attorney: Douglas N. Letter (Civil Division)
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Northwest Airlines, Inc. v. FAA, No. 79-2538, D.C. Circuit (April 23, 1982). D.J. #145-18-704.

MOOTNESS ON APPEAL: D.C. CIRCUIT DISMISSES NORTHWEST AIRLINES' CHALLENGE TO FAA PILOT ALCOHOLISM EXEMPTION PROGRAM AS UNTIMELY, AND RULES THAT CHALLENGE TO THE CONTINUATION OF A PARTICULAR PILOT'S EXEMPTION IS MOOT.

Under the FAA regulations, a commercial airline pilot is disqualified from obtaining the necessary pilot's medical certificate if he suffers from certain medical conditions, including alcoholism. 14 C.F.R. 67.13(d)(1)(i)(c). Under the Aviation Act, 49 U.S.C. 1421(c), however, the Administrator or the FAA can grant exemptions from the requirements of any FAA rule or regulation if he finds that it would be in the public interest. Pursuant to this authority, the Federal Air Surgeon (as the Administrator's delegate) has a policy of exempting individual pilots on a case-by-case basis from the disqualification for alcoholism, provided the pilot has completed an approved treatment program, continues to abstain from alcohol, and submits to certain monitoring requirements.

One such alcoholism exemption was granted in 1977 to a Northwest Airlines pilot, Robert McClellan. Northwest did not seek timely judicial review of the grant of exemption. Instead, when McClellan subsequently allegedly drank beer in 1978, Northwest grounded him, notified the FAA, and demanded that his

exemption be revoked. Before the administrative process was completed, McClellan, who was nearing mandatory retirement age, voluntarily surrendered his exemption from termination, and the FAA dismissed the matter as moot.

On petition for review, Northwest claimed that McClellan's exemption was "voidable ab initio" as issued under an invalid policy. Northwest also argued that its administrative challenge to McClellan's exemption was not moot, because if the FAA had continued the proceedings and found against McClellan on the merits, his exemption could have been "retroactively" revoked as of the date of the alleged violation.

The court of appeals agreed with the government that Northwest's challenge to the validity of the FAA's alcoholism exemption policy was essentially a challenge to the original grant of exemption, and was therefore out of time for the 60-day judicial review period provided in 49 U.S.C. 1486(a). The court also agreed with us that once the exemption was voluntarily surrendered and terminated, there was no further action for the FAA to take, and therefore this case is moot.

Attorney: Wendy M. Keats (Civil Division)
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Pratt v. Webster No. 81-1907 and 81-1922, D.C. Circuit (January 22, 1982, as modified on April 28, 1982). D.J. #145-12-3817.

FOIA: D.C. CIRCUIT REVERSES DISTRICT COURT AND RULES THAT FBI COINTELPRO ACTIVITIES AGAINST THE BLACK PANTHER PARTY HAD A LAW ENFORCEMENT PURPOSE.

In this Freedom of Information Act case, the district court ordered release of names of confidential sources and others mentioned in FBI documents concerning its COINTELPRO activities against the Black Panther Party which have been the subject of a Congressional Inquiry and various tort actions. The FBI sought to protect this information under Exemption 7, 5 U.S.C. 552(b)(7), which applies only to "investigatory records compiled for law enforcement purposes." That district court ordered release because it ruled that the COINTELPRO activities lacked a legitimate law enforcement purpose.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

A unanimous panel of the D.C. Circuit reversed. In a 35-page opinion by Judge Edwards, the court ruled that the FBI could not claim that its documents per se are compiled for law enforcement purposes and must make some minimal showing of nexus to legitimate law enforcement. It ruled, however, that a court must accept the FBI's showing unless "pretextual or wholly unbelievable." The court then accepted our argument that the controversial aspect of the COINTELPRO activities at issue was their method not their purpose. It ruled that preventing violence was a legitimate aspect of the FBI's purpose and therefore remanded the case for a determination of whether release would harm the specific interests protected by Exemption 7.

Even though the result reached by the court was favorable, we sought rehearing of that portion of the court's opinion which rejected a per se rule for FBI documents under Exemption 7. The per se rule has been adopted by two other Circuits. Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979). Rehearing was denied. However, a majority of the panel added a statement, to be published as part of the opinion, which makes clear that the Pratt decision should not be read beyond its facts to reject the per se rule. Therefore, this decision should aid us in future cases. It establishes for the first time in the D.C. Circuit a very deferential nexus standard in Exemption 7 cases. At the same time, we remain free to assert and argue a per se rule where appropriate.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Government Employees Hospital Association v. Donald J. Devine, No. 81-2223, D. C. Circuit (April 29, 1982) D.J. # 145-156-318; American Federation of Government Employees v. Donald J. Devine, No. 81-2252, D.C. Circuit (April 29, 1982) D.J. #145-156-318.

GOVERNMENT HEALTH INSURANCE: D.C. CIRCUIT RULES IN OUR FAVOR ON FINAL CHALLENGES TO OPM'S FEDERAL EMPLOYEES HEALTH INSURANCE DECISION.

A district court judge last October ordered the Office of Personnel Management to forego certain reductions in the Federal Employees Health Benefits Program which had been required of insurance carriers by the agency in order to keep the program within the budgetary restraints. We took an emergency appeal to the D.C. Circuit and in December obtained a favorable ruling vacating the district court's injunction and affirming OPM's authority to exercise broad fiscal control over the program. (National Federation of Federal Employees v. Donald J. Devine, D.C. Cir. Nos. 81-2184 and 81-2187). However, the above appeals taken by insurance carriers to challenge the district court's refusal to set aside similar budgetary measures earlier undertaken by OPM were left pending adjudication. On April 29 the court of appeals affirmed the district court's order upholding the validity of those measures under the principles announced in its December decision. This decision should conclude the extensive litigation over OPM's 1982 Health Benefits Program. We prevailed in all such cases in the court of appeals.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Woods Hole Oceanographic Institution v. United States, Nos. 80-1780 and 81-1239 First Circuit (April 28, 1982). D.J. #61-36-338.

ADMIRALTY LAW AND CONTRACT DISPUTES ACT: ON REHEARING FIRST CIRCUIT REVERSES ITSELF IN FAVOR OF NAVY IN RESEARCH SHIP CHARTER CONTROVERSY INVOLVING CONTRACT FORMATION AND CONTRACT DISPUTES ACT OF 1978.

The First Circuit ruled against the Navy in December 1981 on its appeals from a judgment of $40,000 in additional charter hire for Woods Hole's research ship Seaprobe and the dismissal of the Navy's counterclaim to recover $203,000.00 already paid, based on the alleged unseaworthiness of the ship. On petition for rehearing, we persuaded the Court that it had erred in its perception of the facts involving formation of the contract, which was the basis for the claim against the Navy. We also persuaded the Court that the Contract Disputes Act of 1978 did not apply to the Navy's counterclaim, vitiating the basis of the Court's earlier decision, which had affirmed its dismissal. The ship returned before completion of the research mission due to engine failure and was allegedly unable to perform certain experiments because of the lack of trained personnel.

Based on a careful analysis of the trial record, we persuaded the Court that the Navy's standard form ship charter, which was not actually executed until after the ship had returned, had modified their oral charter agreement, and that the "off-hire" clause in the written charter relieved the government of liability for charter hire after the engine failure.

In its original decision, the Court had held that the government's counterclaim was barred because it had not been the subject of a "valid" contracting officer's decision under Section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. 605(a). It had imposed an elaborate requirement of notice and opportunity to respond to any government claim under the Act as a precondition to a "valid" contracting officer decision, which we considered was contrary to the Act and in disregard of normal government contracting procedures. On rehearing, we persuaded the Court that under Section 16, 41 U.S.C. 601 note, the Act did not apply to the government's counterclaim, since it involved a pre-Act contract to which it does not apply at all, except for pending

contractor claims, on which a contractor may elect to proceed under the Act. 41 U.S.C. 601 note. Thus, we ultimately prevailed on our appeals, avoiding liability for an additional $40,000.00 in charter hire and making it possible to pursue the Navy's counterclaim to recover the $203,000.00 already paid.

Attorney: Al J. Daniel, Jr. (Civil Division)
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Wood v. Standard Products Co., Inc., Fourth Circuit Nos. 81-1172 & 1173 (February 24, 198). D.J. #159-79-1538.

FTCA: FOURTH CIRCUIT REVERSES DISTRICT COURT AND RULES THAT THE GOVERNMENT IS NOT LIABLE IN TORT FOR ACTIONS OF A PUBLIC HEALTH SERVICE CONTRACT PHYSICIAN.

In this Federal Tort Claims Act case the district court found the United States liable for the alleged malpractice of a physician who treated seamen and others under a fee-for-services contract with the Public Health Service. The district court agreed that the government was only liable for the torts of its employees and not those of its independent contractors. The court reasoned, however, that the recognized test for employee status -- lack of federal control over the physical performance of the job -- was inapplicable to physicians because the nature of their job requires independent judgment and action. The court, therefore, looked to control by the government over other aspects of the doctor's practice and found that he was a federal employee.

The Fourth Circuit reversed. In a lengthy opinion it ruled that the "control" test for employee status applies to doctors in the same way that it applies to all others, and that the physician in this case was an independent contractor. The court accepted our argument that the doctors' jobs require significant

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

indepedence is evidence that they are not employees rather than a reason to change the control test. Finally the court ruled that the control test applies only to "control over the primary activity contracted for and not the peripheral, administrative acts relating to such activity." This clear and favorable explanation of the test for employee status should be helpful in future cases raising this recurring issue.

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FTS (633-4331)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

United States v. Timmons, 672 F.2d 1372, No. 80-7860 (5th Cir., April 12, 1982) D.J. #90-1-10-1518.

Condemnation judgment res judicata on title issue.

The United States brought an ejectment action against individuals claiming ownership of land in Harris Neck Wildlife Refuge on the coast of Georgia, and defendants (descendants of former slaves) counterclaimed that the United States had improperly acquired the properties from their ancestors. The district court dismissed and granted summary judgment in favor of the United States. The Eleventh Circuit affirmed, holding that (1) defendants' counterclaim was barred by the doctrine of res judicata, since defendants had previously filed a motion in the original condemnation action requesting relief from judgment, and the district court in the separate proceedings had determined that due process had been accorded in the condemnation action; (2) defendants' counterclaim was not excepted from the rule that United States cannot be sued without its consent merely because the independent claim was brought in the same court which rendered the original condemnation judgment or because the principles of the independent claim were used "defensively"; (3) United States, by bringing ejectment action, did not waive its immunity as to defendants' counterclaims (even those arising under the Civil Rights Act, 42 U.S.C. 1981, 1982), since defendants' counterclaims did not arise out of the same transaction or occurrence as the United States claims, and affirmative relief was being sought by defendants; and (4) that defendants' claims were barred by the 12-year statute of limitations or the Quiet Title Act, 28 U.S.C. 2409a, the two-year statute of limitations of the Tort Claims Act, 28 U.S.C. 2401(b), or the six-year statute of limitations relating to any civil action, 28 U.S.C. 2401(a).

Attorneys: Susan V. Cook and Kathryn A. Oberly (Land and Natural Resources Division) FTS 633-3906/2716

Illinois v. Outboard Marine Corp., ____ F.2d ____, Nos. 79-1341, 1725 (7th Cir., April 1, 1982) D.J. #90-5-1-1-979.

Clean Water Act preempts common law for pre-1972 discharges.

The Seventh Circuit had held (619 F.2d 623, 1980) that (1) Illinois stated a viable cause of action under the federal common law of nuisance, which had not been preempted by the Clean Water Act as a remedy for the cleanup of past discharges of PCB's; and (2) Illinois could intervene as a matter of statutory right (33 U.S.C. 1365(b)(1)(B)) in the United States' action against OMC under the Clean Water Act "Refuge Act," and common law of nuisance. The Supreme Court granted certiorari, and vacated for reconsideration in light of Milwaukee v. Illinois, 451 U.S. 304 (1981), which held that federal common law had been displaced by the Clean Water Act from the field of water pollution. On remand, both Illinois and the U.S. (as amicus) argued that as to discharges of PCB's which took place prior to the 1972 FWPCA, the federal common law remedy remained available. The Seventh Circuit disagreed, holding that the Clean Water Act has entirely preempted the common law even though it provides no remedy against OMC for pre-1972 discharges. Congress has "addressed" the problem, the court of appeals found, by the various statutory provisions for federal study and funding for cleanup, including that for in-place toxics like PCB's. Judge Wisdom (C.A. 5) wrote for the court, and a written dissent by Judge Sweigert is to follow.

The court adhered to its earlier holding on the issue of Illinois' intervention, finding nothing in Milwaukee v. Illinois (II) to bring its correctness into question.

Attorneys: Martin W. Matzen and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2850/2731

VOL. 30 MAY 28, 1982 No.10

OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MAY 4, 1982 - MAY 14, 1982

Immigration. On Thursday, May 5, 1982, the Senate Judiciary Subcommittee on Immigration & Refugee Policy marked-up and voted out the Simpson-Mazzoli bill with amendments essentially satisfying all but one of the Administration's concerns.

ABSCAM. The Senate "ABSCAM" Committee has named counsel for its investigation: James Neal and Malcolm Wheeler.

Helms-Johnston Busing Amendment and Proposals to "Strip" the Supreme Court of Jurisdiction. In letters to Chairman Rodino and Chairman Thurmond, respectively, the Attorney General announced the Administration's position on these proposals.

Executive Order on Security Classification. On May 5, Deputy Assistant Attorney General Richard Willard of the Civil Division testified before the House Government Operations Subcommittee on Government Information and Individual Rights concerning the new Executive Order on Security Classification, E.O. 12356. Subcommittee Chairman English and Representative Weiss attacked the new Executive Order, saying it encouraged unnecessary or unjustified classification of government documents. They also criticized the Administration for what they perceived to be insufficient consultation with the Congress while the new order was being drafted. Mr. Willard indicated that the new features of the Executive Order clarified and shortened the provisions of the prior Executive Order and would not have the effect of fostering unneeded classification of documents. He also detailed the Administration's extensive efforts to inform and consult with the Congress during the drafting of the new order.

S. 2332. On Thursday, May 6, Ronald G. Carr, Deputy Assistant Attorney General, Antitrust Division, appeared before the Committee on Energy and Natural Resources of the United States Senate to discuss S. 2332. S. 2332 would extend the antitrust defense associated with U.S. oil company assistance to the International Energy Agency. The Department supports extension of the antitrust defense.

False Identification Crime Legislation. Representative Hughes' Subcommittee on Crime held a hearing on Representative Hyde's false ID crime bill, H.R. 352, on Wednesday, May 5, 1982. Witnesses included John C. Keeney, Deputy Assistant Attorney General, Criminal Division, and representatives of Treasury, HHS Inspector General's Office and various commercial entities concerned over the use of false identification to perpetrate credit card and other fraud. All witnesses supported H.R. 352 as it fills gaps in existing law and strengthens the ability of federal law enforcement agencies to control counterfeiting of and trafficking in false identification documents.

Narcotic Trafficking - The Golden Triangle. Senator Hayakawa's Subcommittee on East Asian and Pacific Affairs of Senate Foreign Relations held hearings on Thursday, May 6, with respect to opium and heroin production in the Golden Triangle area. Apparently, favorable weather conditions have resulted in a bumper opium crop which will increase the threat of expanded opium and heroin exports, especially from Burma. DEA testimony focused on the improved efforts of the Burmese and Thai governments to control narcotics production and trafficking.

Protection of Federal Officials. The Senate passed S. 907 on Wednesday, May 5. This bill, supported by the Administration, would establish federal jurisdiction over assaults on Cabinet Members, Supreme Court Justices, and other high-level officials.

LEAA Phase-out Provision. Senator Thurmond has introduced the Justice Department legislative proposal making technical amendments to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, to facilitate the orderly phasing out of LEAA functions pursuant to the closing of that office on April 15, 1982. The bill is S. 2495, Justice System Improvement Amendments of 1982.

Illegal Technology Transfer to Soviet-bloc Countries. Senate Governmental Affairs Permanent Subcommittee on Investigations held hearings on May 4, 5, and 6 on the transfer of critical and high technology from the United States. Justice Department representatives, including Edward O'Malley, Assistant Director for Intelligence, testified on enforcement and prosecutorial aspects of the problem and counterintelligence efforts. The hearings also focused upon the ability of the Department of Commerce to enforce export controls under the Export Administration Act.

FBI Undercover Operations. On April 29, FBI Director Webster testified before the House Judiciary Subcommittee on Civil and Constitutional Rights concerning the FBI's undercover activities. The Director explained the law enforcement needs that are met by undercover operations and the procedures and guidelines that govern the conduct of such operations. He also covered the specifics of the ABSCAM investigations.

Special Prosecutor Act Amendment. Associate Attorney General Giuliani testified before the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee on April 28, with respect to S. 2059 which would reform and extend the Special Prosecutor Act. Although Subcommittee Members appeared unmoved by the Administration position that Special Prosecutors should be appointed at the discretion of the Attorney General, some of the other suggested changes in S. 2059 urged by Mr. Giuliani received a cordial reception and will likely be accepted. Former Attorney General Elliot Richardson testified as a private citizen and eloquently endorsed the Administration position. Former White House Counsel Lloyd Cutler testified in support of the Special Prosecutor Act generally as written but was supportive of some of the Administration's proposed amendments.

Nominations. On May 4, 1982,the United States Senate confirmed the nomination of William S. Price, to be U.S. Attorney for the Western District of Oklahoma.

On May 11, 1982,the Senate confirmed the nomination Evan L. Hultman to be U.S. Attorney for the Northern District of Iowa.

On May 12, 1982, the Senate confirmed the following nominations:

William A. Kolibash to be U.S. Attorney for the Northern District of West Virginia;

Marvin E. Breazeale to be U.S. Marshal for the Southern District of Mississippi;

Gilbert G. Pompa to be Director, Community Relations Service.

VOL. 30 May 28, 1982 NO. 10

Federal Rules of Criminal Procedure

Rule 6(e). The Grand Jury. Recording and Disclosure of Proceedings.

The subjects of a Special Grand Jury moved the district court for access to certain ministerial records in the court files. The district court found that they lacked standing to raise issues concerning alleged irregularity of the grand jury since they had not yet been indicted, and denied their motion.

On appeal, the Court determined that movants were not seeking to challenge the grand jury, but to inspect ministerial court records, and that several questions of first impression were involved. The Court decided that, as members of the public, movants had a common law right of access to court records, subject to the rule of grand jury secrecy. The Court further held that disclosure of records that generally relate to procedural aspects of the empanelling and operation of the Special Grand Jury would not violate Rule 6(e), even if construed narrowly, particularly where movants' proposed order explicitly excluded all "matters occurring before the grand jury," but that such disclosure could still violate the secrecy doctrine. The Court thus concluded that the district court with supervisory power over the grand jury should work out the scope of the access in an appropriate way.

(Reversed and remanded.)

In re Special Grand Jury (For Anchorage, Alaska), No. 81-3527, ___F.2d___ (9th Cir. March 17, 1982).

VOL. 30 May 28, 1982 NO. 10

Federal Rules of Criminal Procedure

Rule 43. Presence of the Defendant.

Defendant was convicted of drug offenses, and was ordered to report and post bond on a certain date. Defendant failed to report, and three and a half months later the district court imposed sentence in defendant's absence, concluding that defendant had waived his right to be present at sentencing by knowingly and voluntarily absenting himself for that time. After defendant was apprehended, he moved to vacate or correct the sentence on the ground that it was illegal for the court to sentence him in absentia.

The court noted the long standing rule that a defendant may waive his right to be present at trial and voluntary absence has been held to constitute such a waiver. However, once a trial has been concluded by the return of a verdict, the danger that a defendant's misconduct may immobilize or frustrate the criminal justice system, to which part (b) of Rule 43 is addressed, has largely disappeared. The court also noted the existence of many different policy considerations for sentencing which militate against a rule allowing the presence of the defendant at sentencing to be waived, and concluded that Rule 43 must be read literally to say that a defendant's presence at sentencing may not be waived.

(Motion to vacate sentence granted.)

United States v. James Turner, 532 F.Supp. 913 (N.D. Cal. February 24, 1982)

U.S. ATTORNEY'S LIST AS OF June 1, 1982

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Alabama, N	Frank W. Donaldson
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Alabama, S	J. B. Sessions, III
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Arkansas, E	George W. Proctor
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Missouri, W	Robert G. Ulrich

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Virginia, E	Elsie L. Munsell
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	David A. Faber
Wisconsin, E	Joseph P. Stadtmueller
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