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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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COMMENDATIONS

Assistant United States Attorneys W. LEON BARFIELD AND J. MICHAEL FAULKNER, Southern District of Georgia, were commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for their outstanding performance in the prosecution of Larry Douglas Evans and others involved in narcotics smuggling activities.

Assistant United States Attorney GUY R. COOK, Southern District of Iowa, was commended by Mr. Vernon N. Bennett, President, Teamsters Local 147, Des Moines, Iowa, for his professional handling of a death threat made on the life of Mr. Bennett.

Assistant United States Attorney THOMAS T. COURIS, Eastern District of California, was commended by United States Attorney Stanley Marcus, Southern District of Florida, for his efforts in a joint investigation concerning United States v. Acosta, a drug enforcement matter. All goals were accomplished at the times designated, due largely in part to the exceptional coordination effected by Assistant United States Attorney COURIS.

Assistant United States Attorney DONALD D. DANIELS, Western District of Michigan, was commended by Mr. Bernard LaForest, Special Agent in Charge, Detroit Office of the Bureau of Alcohol, Tobacco & Firearms, for his successful prosecution of United States v. James Beary, a case involving the purchase or seizure of 125 firearms, approximately one-half of which were stolen. This case resulted in the conviction of 12 of the 14 defendants, with one defendant being placed on deferred prosecution.

Assistant United States Attorney ROGER W. DOKKEN, District of Arizona, was commended by Mr. Michael J. Spear, Regional Director, Fish and Wildlife Service, Department of the Interior, for his assistance during the U.S. Fish and Wildlife Service's Law Enforcement Refresher Training in Yuma, Arizona, during the week of April 30.

Assistant United States Attorney SUSAN A. EHRLICH, District of Arizona, was commended by the United States Court of Appeals for the Ninth Circuit, Honorable Carl A. Muecke, presiding judge. The court stated in its opinion in Berry v. Department of Justice, footnote 5, page 27: "The government attorney working on this case has demonstrated extraordinary diligence and strength of character. The decisions in both Lykins and Crooker v. United States Parole Commission, . . . were promptly brought to this

court's attention by government counsel, despite the fact that Lykins is directly contrary to the government's position in this case. We commend attorney Susan Ehrlich for her work before this court." Also, United States Attorney A. MELVIN MCDONALD added his commendation of Assistant United States Attorney EHRLICH for her outstanding efforts in representing the interest of the United States and her contributions to the office in the appellate arena.

Assistant United States Attorney EDWARD H. FUNSTON, Western District of Missouri, was commended by Mr. John T. Murphy, General Counsel, Veterans Administration, for his efforts, while an Assistant Director of the Executive Office, in furthering the joint efforts of the Veterans Administration and the Department of Justice to collect debts owed to the federal government as a result of Veterans Administration benefit programs. In commending Assistant United States Attorney FUNSTON, Mr. Murphy said, "[i]t had been largely due to your effort that the collection program now being carried on by this agency has been successful and relatively problem free."

Assistant United States Attorney JOHN F. GISLA, Eastern District of California, was commended by Mr. David O. Williams, Administrator, Office of Program and Fiscal Integrity, Employment and Training Administration, U.S. Department of Labor, for his successful handling of the bankruptcy of California Tribal Chairmen's Association. The bankrupt organization had received a number of grants from various federal agencies. The total bankrupt estate, less fees and expenses, was paid to the United States.

Assistant United States Attorney PAUL W. JOHNSON, District of Massachusetts, was commended by Mr. Michael R. Deland, Regional Administrator, Environmental Protection Agency, for his meritorious work in the prosecution of the South Essex Sewerage District case.

Assistant United States Attorney JOHN W. KENNEDY, Eastern District of California, was commended by Mr. Charles W. Varnon, Chief, U.S. Probation Officer, for his representation of the government in a probation violation hearing of Robert E. Dungan. As a result of the excellent assistance received, Mr. Varnon has requested assistance from the United States Attorney's office in developing training in the area of framing probation violation allegations and preparing for contested hearings.

Assistant United States Attorney C. BRIAN MCDONALD, District of Massachusetts, was commended by Mr. Stanley A. Mestel, Regional Labor Counsel, Office of Labor Law, U.S. Postal Service, for his successful representation in DePasquale v. Bolger.

Assistant United States Attorney CHRISTOPHER LEE MILNER, Northern District of Texas, was commended by Commissioner Roscoe Egger and Acting Deputy Commissioner Joseph F. Jeck, Internal Revenue Service, for his efforts in prosecuting Lester Irvin Reeves for corrupt or forcible interference with the Internal Revenue Service, a violation of 26 U.S.C. §7212a. The Reeves case will set precedent nationwide and give hope to IRS agents who experience the frustration of having frivolous liens placed against their personal property simply because they are attempting to do their jobs.

Assistant United States Attorney HAROLD F. SALSBERRY, JR., Northern District of West Virginia, was commended by Mr. William P. Clevenger, District Director, Internal Revenue Service, for his successful prosecution of the Folio and Freda Gallo trials.

Assistant United States Attorney EDWARD C. WEINER, Southern District of California, was commended by Mr. Philip T. White, Director, Office of International Affairs, Criminal Division, for the professionalism he showed in the preparation of extradition documents for use in Columbia against Lieselotte Esser.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

CLEARINGHOUSE

Victim And Witness Protection Act: Appeal Briefs in United States v. Welden (No. 83-7444, 11th Cir.) Available

Copies of the appeal briefs filed on behalf of defendants and of the United States in United States v. Welden (see, Casenotes, United States Attorneys' Bulletin, Vol. 32, No. 1, January 13, 1984) are now available upon request from the Executive Office by contacting Ms. Susan A. Nellor, Assistant Director, Legal Services, at FTS 633-4024. Please ask for item number CH-6.

(Executive Office)

Victim and Witness Protection Act: Appeal Briefs on Behalf of the United States Available

The appeal brief filed on behalf of the United States is now available for United States v. Florence (No. 83-2537, 8th Circuit). Defendant pleaded guilty to charges of armed bank robbery (18 U.S.C. §2113(a) and (c)). He was sentenced to an indeterminate period of confinement under the Youth Corrections Act (18 U.S.C. §5010(b)) and was ordered to make restitution in the amount of $2,694. The appeal involves issues of (a) whether the restitution statutes are constitutional or whether they violate the Due Process and Equal Protection Clauses of the Constitution or the Seventh Amendment; (b) whether the trial court abused its discretion in ordering appellant to pay restitution to the victims of his offenses; (c) whether imposition of a restitution order is appropriate where sentencing was under the Youth Corrections Act; and (d) the propriety of ordering restitution of a defendant found to be financially unable to retain his own counsel such that he received court-appointed counsel.

The Florence appeal brief provides one of the most recent statements of the Department's position on the constitutional issues which have arisen as a result of the passage of the Victim and Witness Protection Act of 1982.

Appeal briefs on behalf of the United States are also available for the following cases:

1. United States v. Brown (No. 83-1454, 2d Circuit). This case involves an appeal resulting from defendant's conviction for fraud arising out of a scheme in which he falsely held himself out

to be an attorney (18 U.S.C. §§1343 and 2314). Defendant was ordered to make restitution to his victims in the amount of $20,030 during the five-year period following his release from prison. On appeal, he raises the following issues regarding the restitution provisions of the Victim and Witness Protection Act of 1982: (a) his restitutionary sentence is unconstitutional because he is presently indigent; (b) the restitution order is unconstitutionally vague because the standard "reasonable ability to pay" does not provide the fair notice of required conduct mandated by the Fifth Amendment; and (c) the restitution order deprived him of his Seventh Amendment right to a jury trial to determine his restitutionary obligation.

2. United States v. Hall (No. 84-1016, 2d Circuit). Defendant was convicted of the wrongful conversion of passengers' money while acting in her capacity as an Inspector for the United States Customs Service (18 U.S.C. §654). At the sentencing hearing, defendant was ordered to make restitution to victims in the amount of $2,200. The following issues regarding the Act have been raised on appeal: (a) the restitution statutes violate defendant's Seventh Amendment right to jury trial; and (b) the district court failed to consider, pursuant to 18 U.S.C. §3580, defendant's financial resources, earning ability and prospective job loss, in determining the restitutionary sentence.

3. United States v. Sharp (No. 83-4030, 5th Circuit). Defendant, as a result of a plea agreement, pleaded guilty to one count of interstate transportation of a stolen aircraft (18 U.S.C. §2312) and the government dismissed the count of disposing of the aircraft in violation of 18 U.S.C. §2313. Sharp was ordered to make partial restitution to the owner of the airplane in the amount of $5,000 as soon as possible after his release from prison. The following restitution issues are before the appellate court: (a) the trial court failed to consider the financial resources of the defendant in accordance with 18 U.S.C. §3580 before imposing the restitutionary sentence; and (b) defendant is not liable for restitution for damage to the aircraft since the damage did not result from the crime for which he was convicted (interstate transportation of a stolen aircraft).

4. United States v. Richard (No. 83-1903, 10th Circuit). The defendant is appealing the partial restitution order imposed on him pursuant to his conviction for armed bank robbery (18 U.S.C. §2113 (a) and (d)). He was sentenced to 12 years imprisonment and ordered to make partial restitution of $5,000 within five years from the end of the term of imprisonment. The appeal raises (a) contentions that the district court erred in ordering restitution rather than refusing to do so on the ground

that a determination of restitution would unduly prolong the sentencing process; and (b) assertions that the restitution statutes are unconstitutional as applied or on their face. The United States, in its reply brief, raises as an additional issue whether defendant may, for the first time on appeal, assert constitutional challenges to the restitution statutes (18 U.S.C. §§3579 and 3580).

5. United States v. Watchman (No. 83-2256, 10th Circuit). Defendant pleaded guilty to assault with intent to murder, in violation of 18 U.S.C. §§1153 and 113(a). He was sentenced to seven years imprisonment and ordered to make restitution in the amount of $15,376.63, of which $13,556.88 represents the amount of the doctor's bills incurred by the victim as a result of defendant's actions. The determination of the amount of medical expenses forms the basis for his appeal of the restitution order. Defendant challenges (a) the Victim and Witness Protection Act as violative of due process and/or equal protection and (b) asserts a right to jury trial for the determination of the amount of restitution ordered.

To receive a copy of the Florence appeal brief, please contact Ms. Susan A. Nellor, Assistant Director, Legal Services, at FTS 633-4024 and request item number CH-7. For a copy of any of the other briefs, please request item number CH-7 and specify which of the above briefs (by caption) you want to receive.

If you have questions regarding issues raised in the above briefs, please contact Ms. Karen Skrivseth, Appellate Section, Criminal Division, at FTS 633-3793.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Department Of Justice Policy Regarding Use Of The United States Marshals Service For Personal Service Of Process

By memorandum from Deputy Attorney General Schmults dated March 1, 1983, all United States Attorneys were advised of the Department's policy regarding use of the Marshals Service for service of process in light of the 1983 amendments to Rule 4 of the Federal Rules of Civil Procedure. To reiterate that policy, the Marshals Service will continue to serve summonses and complaints on behalf of the United States, except where individual United States Attorneys' offices make their own arrangements for service. Generally, the Marshals will initially attempt service by mail, pursuant to Rule 4(c)(2)(C)(ii), Federal Rules of Civil Procedure. If mail service is unsuccessful, the Marshals will follow up with personal delivery. The Marshals will attempt personal service in the first instance only when so requested. Requests for such personal service should be severely limited and fully explained and justified by the requesting attorney on the Form USM-285 used to request service. United States Attorneys and their Assistants should not request personal service in the first instance by the Marshals Service unless a fully justified emergency situation exists.

(Executive Office)

Ethical Question--Hatch Act: Assistant U.S. Attorney Running As Candidate For State Court Judge

The Executive Office has recently received several requests from Assistant United States Attorneys for permission to run as candidates for the office of state court judge while keeping their positions as Assistants. As a matter of general policy, the Executive Office does not encourage employees of United States Attorneys' offices to campaign for judicial office. However, when such requests are received by this office, the following standards are applied.

The Hatch Act restricts the ability of federal employees to participate actively in partisan political activity, including partisan elections. However, federal employees retain the right to actively participate, as candidates, in nonpartisan elections. See 5 C.F.R. §733.111(10). A nonpartisan election is defined as an election at which none of the candidates are nominated or elected as representing a political party. See 5 C.F.R. §733.101(e)(1).

In one case, the constitution for the state where an Assistant United States Attorney sought to run as a candidate

provides that judicial offices are nonpartisan and that judges are elected through a nonpartisan election process. Therefore, neither the Hatch Act nor Department of Justice regulations precluded the Assistant from declaring his candidacy for the position of a state court judge.

However, there are restrictions which would limit Assistant United States Attorneys' activities during the campaign. First, Department policy prohibits employees from using official authority or influence for the purpose of interfering with or affecting the result of an election. See 5 C.F.R. §733.121. Therefore, the Executive Office for United States Attorneys and the Office of Legal Counsel have advised Assistant United States Attorneys to refrain from using their official titles in a campaign or election. Second, Assistants should use extreme caution to avoid the appearance of impropriety. There should be no conflict of interest with the performance of their official duties. Campaign activity should be restricted to off-duty hours or the United States Attorney must approve annual leave or leave without pay for any time spent on a campaign during official duty hours. Furthermore, the use of any federal property or resources such as supplies, xerox machines, or telephones for campaign purposes is strictly prohibited. See 28 C.F.R. §45.735.16.

If you have any questions regarding the above, or the Department's standards of conduct, please contact the Legal Services Section, Executive Office for United States Attorneys, at FTS 633-4024.

(Executive Office)

Ethical Question--Hatch Act: Assistant U.S. Attorney Running For Election For The Position Of Delegate To A State Constitutional Convention

The Hatch Act restricts the ability of federal employees to participate actively in partisan political activity, including partisan elections. However, federal employees retain the right to actively participate as candidates in nonpartisan elections. See 5 C.F.R. §733.111(10). A nonpartisan election is defined as an election in which none of the candidates are nominated or elected as representing a political party. See 5 C.F.R. §733.101(e)(1).

If the procedure for electing delegates to a state constitutional convention requires listing only the name and domicile of the candidates on the ballots, and candidates are neither nominated nor elected as representing a political party, the election of delegates to the constitutional convention is a nonpartisan election. Thus, a Justice Department employee is not precluded by the Hatch Act from declaring his/her candidacy for the position of delegate to that particular convention.

However, there are restrictions which limit an employee's activities as a candidate or delegate to a constitutional convention. First, Department policy prohibits employees from using official authority or influence for the purpose of interfering with or affecting the result of an election. See 5 C.F.R. §733.121. The Executive Office for United States Attorneys and the Office of Legal Counsel have advised, for example, Assistant United States Attorneys to refrain from using their title in a non-partisan campaign or election. Second, employees should use extreme caution to avoid the appearance of impropriety. There should be no conflict of interest between the performance of their official duties and their campaign activities, and they should restrict campaigning to off-duty hours. Also, federal property or resources such as supplies, xerox machines and telephones may not be used for campaign purposes or for purposes of being a delegate. See 28 C.F.R. §45.735-16.

If you have any questions regarding this or the Department's standards of conduct, please contact the Legal Services Section, Executive Office for United States Attorneys, at FTS 633-4024.

(Executive Office)

Ethical Question--Outside Practice Of Law: Representation Of Relatives By Department Of Justice Attorneys

Department attorneys are generally prohibited from engaging in the private practice of law. See 28 C.F.R. §45.735-9. There are certain exceptions, one exception being the representation of the employee's parents, spouse, or child.

When an Assistant United States Attorney seeks to represent a parent, spouse, or child, the Assistant should first obtain authorization from the Executive Office for United States Attorneys. If authorization is granted, the Assistant should:

1. Limit any time away from official responsibilities to the absolute minimum consistent with fair representation of the relative;

2. Terminate the representation as soon as possible;

3. Advise the court of his/her status as an Assistant United States Attorney and of the Department's authorization; and

4. Ensure full compliance with 28 C.F.R. §45.735-9, and other applicable regulations.

Representation of relatives other than a parent, spouse, or child requires prior authorization from the Deputy Attorney General. Such requests should be forwarded to the Executive Office for United States Attorneys for processing.

Previous instances where authorization has been granted involved the representation of a sister in a contract dispute; a sister-in-law in a personal injury suit; an uncle's estate for purposes of settlement; a brother-in-law in an employment termination hearing; and a sister-in-law in a divorce and custody proceeding.

Representation of relatives other than a parent, spouse, or child, when authorized, must conform to the requirements of 28 C.F.R. §45.735-9(f). Under that paragraph, a Department attorney may not represent a relative other than a parent, spouse, or child if the subject matter involves any criminal matter or proceeding, or any other matter or proceeding in which the United States (including the District of Columbia government) is a party or has a direct and substantial interest.

Instances where requests for permission to represent a relative have been refused involved the representation of a brother-in-law in litigation regarding a National Defense Student Loan where the real party in interest remained the United States; and a sister-in-law in connection with obstructing city government administration and harassment against a meter maid which involved a quasi-criminal proceeding.

If you have any questions regarding the above guidelines or the Department's standards of conduct, please contact the Legal Services Section, Executive Office for United States Attorneys, at FTS 633-4024.

JURIS Data Base Sheet

The Legal Research and Training Service of the Justice Management Division, has provided as an appendix to this issue of the Bulletin the JURIS Data Base Sheet, an update of the legal documents on the JURIS System. This information will be updated and published in the Bulletin.

(Justice Management Division)

Victim and Witness Protection Act of 1982--New United States Parole Commission Procedures

The United States Parole Commission has announced new procedures to assure that victims of the crimes for which federal prisoners are incarcerated will have ample opportunity to be heard when the prisoners apply for parole.

The new procedures will also assure that, if they possess the means to do so, parole applicants will make restitution for the damage caused by their crimes.

The changes being implemented now exceed the requirements of the Victim and Witness Protection Act of 1982 (Pub. L. No. 97-291, 96 Stat. 1248) in significant ways.

The Act required that notice be given to victims and witnesses of an offender's release date and made restitution orders possible in prison terms, as well as a condition of any grant of parole. Under the Parole Commission's new procedures, victims who request it will be notified in advance of the parole hearing so that they have every opportunity to contribute their views, either in writing or by attendance at the hearing. When a presumptive parole date is set, the victim will also be notified of that decision and the reasons for it.

In addition, the Parole Commission's rules are being amended to permit denial of parole to a prisoner who is under an order to pay restitution if the Parole Commission believes (s)he has concealed money or property to escape making payment. The prisoner will be required to satisfy the Parole Commission that there are no concealed assets before (s)he can be paroled.

(Executive Office)

Teletypes To All United States Attorneys

A listing of the teletypes sent during the period from July 9, 1984, through July 20, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari in Commodities Futures Trading Commission v. Gary Weintraub, No. 82-2420 (7th Cir.). The case is a subpoena enforcement action brought by the CFTC against Gary Weintraub, attorney for a commodities brokerage firm now in liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978. Weintraub declined to answer certain of the CFTC's questions, asserting the attorney-client privilege on behalf of the debtor corporation. The bankruptcy trustee then waived the privilege on behalf of the corporation. Nevertheless, the court of appeals reversed the district court's order compelling Weintraub to answer the questions. The court of appeals held that the trustee does not have the power to waive the corporation's attorney-client privilege as to any information occurring before the date the petition for bankruptcy was filed. The government's position is that the trustee acts for the corporation in deciding whether to exercise the privilege. The trustee is the successor management of the corporation, and he, rather than the former officers and directors (even if they remain in office during liquidation), is the person empowered to make decisions for the corporation.

A brief as amicus curiae in Marek v. Chesny, No. 83-1437. The question presented is whether a plaintiff who rejects an offer of judgment under Federal Rules of Civil Procedure 68 and then obtains a less favorable final judgment may require the defendant to pay the plaintiff's post-offer attorneys' fees under statutes such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, that authorize fee awards "as part of the costs." The United States takes the position that post-offer fee-shifting is barred in such circumstances by Rule 68, which provides that such a plaintiff is liable for "the costs incurred" after the rejection of the offer.

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United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), ___ U.S. ___, Nos. 82-1349 and 82-1350 (June 19, 1984). D.J. # 157-12C-997.

SUPREME COURT RULES THAT DISCRETIONARY FUNCTION EXCEPTION TO FEDERAL TORT CLAIMS ACT BARS SUITS BASED ON ALLEGED NEGLIGENCE OF FAA EMPLOYEES IN ISSUING SAFETY CERTIFICATES TO AIRPLANE MANUFACTURERS.

Pursuant to the Federal Aviation Act of 1958, the Federal Aviation Administration (FAA) certifies the airworthiness of aircraft types to be used in commercial aviation. In these two cases, the survivors of two air crashes and the owners of the planes involved sued the United States, inter alia, under the Federal Tort Claims Act (FTCA) alleging that the FAA had been negligent in issuing "type certificates" (signifying that the basic design meets criteria specified in the FAA's safety regulations) to certain aircraft which thereafter crashed as a result of the design defects assertedly left undetected by the FAA. The Ninth Circuit, relying on a "Good Samaritan" theory, held that the government could be liable under the FTCA for the FAA's failure to discover these safety defects while carrying out its duty of certifying the airworthiness of aircraft in commercial aviation.

On June 19, 1984, the Supreme Court reversed. In a unanimous opinion, the Court held that the FTCA's "discretionary function" exception immunizes from tort liability the FAA certification process at issue. In so doing, the Court emphasized that "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals," and noted that under agency regulations and procedures, the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. The agency's decision to police compliance by conducting "spot checks" of the manufacturer's work, the Court held, is "plainly discretionary activity of the 'nature and quality' protected by" the discretionary function exemption, as are the actions of FAA employees in carrying out the spot checks.

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The Court's decision represents a major victory for the government in light of the wide range of areas in which federal agencies issue safety certifications in connection with activities conducted by private individuals. Moreover, the Court's analysis of the discretionary function exception to the FTCA may also prove useful in cases involving other administrative actions by agencies outside of the safety inspection area.

Attorneys: Leonard Schaitman
FTS 633-3441

John Hoyle
FTS 633-3547

Donald Regan v. Ruth Wald, ___ U.S. ___, No. 83-436. D.J. # 145-3-2452.

SUPREME COURT UPHOLDS TREASURY REGULATIONS RESTRICTING TRAVEL TO CUBA.

Since 1963 the United States has maintained an embargo against Cuba under the Trading With The Enemy Act (TWEA). In early 1977, President Carter eased travel restrictions to Cuba, including issuing a general license permitting most transactions incident to travel to Cuba. Later that year, the TWEA was amended and new procedures to regulate economic transactions during a national emergency were prescribed by the International Emergency Economic Powers Act (IEEPA). Congress, however, created a provision grandfathering existing uses of TWEA authority. In May 1982 the embargo was tightened to restrict travel-related financial transactions with Cuba (i.e., payments by tourists and businessmen to hotel and airlines). Such payments had been licensed during the Carter Administration.

In a suit brought by individuals seeking to travel to Cuba, the First Circuit concluded that the 1982 regulation restricting travel-related transactions was not within the provisions of the Grandfather Clause, and because the new IEEPA procedures had not been utilized, the new regulation had to be enjoined.

The Court, in a 5-4 decision, reversed the First Circuit and upheld Treasury's regulations. The majority reasoned that in grandfathering existing uses of TWEA authority, Congress did not intend to confine the President's exercise of that authority to

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the specific restrictions which were in place in 1977. Rather, since the authority to regulate travel was in fact being exercised in 1977 by virtue of the general license, the Court concluded that Congress anticipated that the President could use some discretion in both tightening and relaxing the embargo. Finally, the Court held that Treasury's restrictions on travel-related transactions posed no undue burden on the freedom to travel. The weighty foreign policy interests at stake, curtailing the flow of hard currency to Cuba, easily offset the incidental restrictions on travel to Cuba.

Attorneys: Robert Kopp
Michael Hertz
FTS 633-3311

Harold Krent
FTS 633-3159

Davis v. Scherer, ___ U.S. ___, No. 83-490 (June 28, 1984). D.J. # 145-0-1349.

SUPREME COURT HOLDS THAT A STATUTORY OR REGULATORY VIOLATION DOES NOT DIVEST A PUBLIC OFFICIAL OF QUALIFIED IMMUNITY IN A CONSTITUTIONAL DAMAGES SUIT.

Plaintiff, a former Florida state police officer, sued his superior officers for damages on the claim that they had discharged him in violation of the procedural due process requirements of the Fourteenth Amendment. The defendants invoked qualified immunity on the ground that they had violated no "clearly established" constitutional right. The district court held (1) that defendants' actions violated plaintiff's constitutional rights to pre-termination notice and hearing, (2) that those rights were not "clearly established" in 1977, when plaintiff's discharge occurred, and (3) that the defendants nonetheless would be stripped of their qualified immunity defense because their actions violated state procedural regulations. The district court entered a $4000 judgment against defendants. The Eleventh Circuit affirmed the judgment without opinion. The Supreme Court, in a 5-4 decision, has just reversed the judgment against defendants. The Court adopted the position we had urged as amicus curiae, and held that only a "clearly established" constitutional violation, not a violation of statutes or

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regulations, defeats the qualified immunity defense in constitutional damages suits.

Attorneys: Barbara Herwig
FTS 633-5425

John Cordes
FTS 633-4214

Banzhaf v. Smith, No. 84-5304 (D.C. Cir. June 25, 1984). D.J. # 145-12-5592.

D.C. CIRCUIT REVERSES DISTRICT COURT ORDER REQUIRING APPOINTMENT OF INDEPENDENT COUNSEL TO INVESTIGATE WHETHER HIGH-RANKING OFFICIALS COMMITTED CRIMES IN OBTAINING ACCESS TO CARTER CAMPAIGN MATERIALS IN 1980.

Plaintiffs in this case gave the Attorney General information from newspapers and magazines concerning the Reagan campaign's use of Carter campaign documents in 1980, and claimed that persons who currently are high-ranking officials may have committed a crime in obtaining the documents. Plaintiffs demanded appointment of an independent counsel under the Ethics in Government Act. The Attorney General declined to invoke the Ethics Act on the ground that he had not received sufficiently "specific" allegations against high-ranking officials. Plaintiffs then filed this lawsuit, and on May 14 obtained an order from the district court requiring the Attorney General to seek appointment of independent counsel within seven days. We obtained an emergency stay pending appeal from the court of appeals. The entire court, sua sponte, then decided to hear this case en banc and on an expedited basis. The en banc court heard oral argument on June 20, and just five days later unanimously overturned the district court order requiring independent counsel. The court agreed fully with our position that the structure and history of the Ethics Act demonstrate "a specific congressional intent to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate particular allegations and

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not to seek appointment of independent counsel."

Attorneys: Leonard Schaitman
FTS 633-3441

John Cordes
FTS 633-4214

National Juvenile Law Center v. Regnery, No. 83-1644 (June 22, 1984). D.J. # 145-0-1253.

D.C. CIRCUIT REVERSES DISTRICT COURT'S AWARD OF "CONTINUATION FUNDING" TO ADVOCACY CENTER FOR PENDING CASES.

The Law Center, an advocacy institute funded since 1978 by Juvenile Justice Act grants, and two of its clients filed this action in the district court challenging the decision of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) not to renew the grant and seeking "interim" monetary relief. Rejecting our arguments that exclusive review was in the court of appeals following exhaustion of administrative remedies, the district court affirmatively enjoined OJJDP to continue funding the advocacy institute, holding, inter alia, that the juvenile clients of the grantee have a constitutionally protected right of access to the courts that is violated by the premature termination of federal funding, and that a federal agency may and should in these circumstances be equitably "estopped" to deny continued funding.

A unanimous panel of the D.C. Circuit (Judge Wright, joined by Judges Bork and Scalia) has just reversed. Without deciding the "thorny question" of whether the grantee could circumvent the direct appellate review scheme in cases where "interim" relief is sought, the court of appeals held that the district court had jurisdiction to hear the claims of the juveniles. On the basis of this jurisdictional foothold, the court went on separately to reject each of plaintiffs' claims (including the estoppel claim advanced solely on behalf of the Law Center) on its merits. The court emphasized the right of new executive administrators to effectuate policy changes in discretionary grant programs, and

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flatly rejected plaintiffs' claim that the termination of federal funding for pending cases unconstitutionally interfered with the authority of the Judicial Branch.

Attorneys: Carolyn Kuhl
FTS 633-5421

Mark Gallant
FTS 633-3425

Faught v. Heckler, No. 83-2609 (8th Cir. June 15, 1984). D.J. # 145-16-2281.

EIGHTH CIRCUIT UPHOLDS HHS REGULATION APPLYING THE "LUMP SUM PROVISION," 42 U.S.C. §602(a)(17), TO ALL AFDC FAMILIES.

The Omnibus Budget Reconciliation Act of 1981 (OBRA) enacted a number of measures designed to cut costs in the AFDC program, including a new provision for the treatment of "lump sum" income. Previously, when an AFDC family received a lump sum payment, such as an inheritance, workmen's compensation award, or personal injury settlement, the family could reapply for AFDC benefits as soon as it spent the lump sum. Under the new provision, the family is ineligible for AFDC benefits for a set number of months, derived by dividing the lump sum payment by the family's monthly need standard. Thus, lump sum income is pro-rated over a period of time, and the family must budget the income as if it were AFDC assistance for the entire period of ineligibility.

In this action plaintiffs, a class of AFDC families who received lump sum income, claimed that the new lump sum provision should not be applied to them because they did not have earned income. The Eighth Circuit upheld the Secretary's regulation applying the lump sum provision to all AFDC families, regardless of whether or not they have earned income. The court of appeals held that the legislative history showed that Congress intended to effect cost-savings by requiring AFDC families to budget lump sum income over time, rather than spending it immediately.

CIVIL DIVISION
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The Eighth Circuit's decision, which follows that of the First Circuit in Sweeney v. Murray, Nos. 83-1738, 83-1739 (April 27, 1984) (reported in 32 USAB 12), should be helpful to us in defending against challenges to the lump sum provision that have been filed in more than thirty districts nationwide. The same issue is currently pending before the Third, Sixth, and Ninth Circuits.

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CIVIL RIGHTS DIVISION
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Firefighters Local Union No. 1784 v. Stotts, ___U.S.___, Nos. 82-206 and 82-229 (June 12, 1984). D.J. # 170-72-32.

SUPREME COURT REVERSES SIXTH CIRCUIT'S JUDGMENT AFFIRMING ISSUANCE OF INJUNCTION.

The case involves the propriety of a preliminary injunction entered in 1981 prohibiting the City of Memphis, Tennessee, from laying off and demoting personnel in its fire department on the basis of its seniority system, insofar as it would decrease the percentage of blacks in certain ranks. The purpose of the order was to preserve gains in minority employment that had been made in the fire department as a result of a Title VII consent decree previously entered in the case.

In a 6-3 decision, the Supreme Court reversed the Sixth Circuit's judgment affirming issuance of the injunction. The Court first held that the case was not rendered moot by the facts that the preliminary injunction purportedly applied only to the 1981 layoffs, that all white employees laid off as a result of the injunction were restored to duty one month after their layoff, and that others who were demoted had been offered back their former positions.

On the merits, the Court held that the injunction cannot be justified as an effort to enforce the consent decree or as a valid modification of the decree. In so ruling, the Court stated that, because Title VII protects bona fide seniority systems, it was inappropriate for the lower courts to deny an innocent employee the benefits of his seniority. The Court also stated that the injunction was not only inconsistent with the ruling in Teamsters v. United States, 431 U.S. 324 (1977), that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also with the policy behind Section 706(g) of Title VII of providing make-whole relief only to such victims.

Justices O'Connor and Stevens filed concurring opinions. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined. We participated as amicus curiae, urging reversal.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
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United States v. 125.2 Acres of Land, More or Less, Situated in the Town and County of Nantucket, Massachusetts, and Owners Unknown; Joan Fisher, Executrix of the Estate of Matthew Jaeckle, No. 83-1835 (1st Cir. Apr. 13, 1984). D.J. # 33-22-493.

CONDEMNATION; TITLE VESTED UPON THE FILING OF THE DECLARATION OF TAKING AND CANNOT BE UPSET BY A LANDOWNER WHO RECEIVED NO NOTICE OF SAME.

In 1947, the United States filed a declaration of taking to acquire 125.2 acres of land on Nantucket Island, Massachusetts. The title-holders to the property were listed as "persons unknown" and the judgment on declaration of taking on the land was posted. In 1952, the United States learned of some 50 individuals with a possible interest in the land, but no service was effected. The United States posted the property with a notice of the valuation proceedings and published a similar notice for three consecutive weeks in the local newspaper. None of the individuals identified in the notice appeared at the just compensation proceedings. In 1953, the district court entered summary judgment in favor of the United States.

Jaeckle learned of the taking and in 1972 requested return of the land, alleging denial of due process. Alternatively, he requested the value of the property as of 1967, the year he first learned of the United States claim. The district court held that title vested in the United States, and the funds on deposit representing that portion of land to which Jaeckle claimed an interest were paid over to him.

Jaeckle appealed. The First Circuit held that title vested in the United States upon the filing of the declaration of taking and cannot be upset by a landowner who received no notice of same. The court did, however, remand the case for a determination of value because it found that due process required, at a minimum, notice by mail or other direct means to Jaeckle and that in the absence of such notice to Jaeckle, the 1953 just compensation proceedings were not binding upon him.

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United States v. Chua Han Mow, 730 F.2d 1308 (9th Cir. Apr. 12, 1984). D.J. # 8-10-544.

THE NINTH CIRCUIT UPHELD THE EXTRATERRITORIAL APPLICATION OF 21 U.S.C. §959 AGAINST A FOREIGN NATIONAL

The Ninth Circuit upheld the extraterritorial application of 21 U.S.C. §959 against a foreign national for the distribution of a Schedule I substance in his own country. The court upheld the 1980 conviction of Chua Han Mow, who was charged in connection with the sale of eighty-eight pounds of Chinese heroin to United States undercover officers in Penang, Malaysia, in 1973. Forty-four pounds of that heroin was seized at the San Francisco International Airport and led to the arrest and conviction of two of Chua's confederates. The case is the first reported conviction of a foreign national under Section 959, and remains one of the largest single seizures of heroin in the history of the West Coast.

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LAND AND NATURAL RESOURCES DIVISION
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Summa Corp. v. California ex rel. Lands Comm'n., ___U.S.___, No. 82-708 (Apr. 17, 1984). D.J. # 90-1-24-88.

CALIFORNIA BARRED FROM ASSERTING PUBLIC TRUST EASEMENT ON 1851 U.S. PATENT.

Adopting the government's amicus position and reversing a California Supreme Court decision that recognized a state public trust easement over certain privately owned tidelands, the dispute centered on property that became subject to United States sovereignty under the Treaty of Guadalupe Hildago. Under the treaty, the United States agreed to preserve the pre-existing property interests of Mexican landowners and Congress enacted legislation in 1851 establishing a comprehensive land claims settlement and confirmation. At the end of these proceedings, the United States confirmed, by patent, the title of certain tidelands now owned by the Summa Corporation. California argued that the proceedings also preserved, albeit silently, a public trust easement originating in Mexican law, and that this easement had since vested in California. The Supreme Court unanimously rejected the argument, holding that "California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursuant to an 1851 Act of Congress'" (slip op. 10-11).

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Escondido Mutual Water Co. v. LaJolla Band of Mission Indians, ___ U.S. ___, No. 82-2056 (May 15, 1984). D.J. # 11-17-82.

FERC REQUIRED TO GIVE DEFERENCE TO OTHER LICENSING AGENCIES IN SETTING CONDITIONS.

This case resolves a long-standing dispute between Interior, Agriculture, and Defense, on the one hand, and the Federal Energy Regulatory Commission (FERC), on the other hand, over what role the former agencies play in hydroelectric licensing proceedings in which reservations (broadly defined under the Federal Power Act (FPA) to include, inter alia, Indian reservations, national forests, and military reservations) are proposed for inclusion in hydroelectric projects. Section 4(e) of the FPA, 16 U.S.C. §797(e), provides that licenses issued within a reservation "shall

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be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization" of the reservation. FERC maintained that, although it was required to give deference to conditions developed by these land management agencies, it could accept, reject, or modify any such conditions because Section 10(a) of the FPA, 16 U.S.C. §803(a), charged it with the responsibility to adopt projects which "in the judgment of the Commission" were best adapted to a comprehensive plan for hydroelectric development. The Supreme Court rejected this argument, affirming the Ninth Circuit (692 F.2d 1223, amended 701 F.2d 826), on this point. Relying upon the plain language of Section 4(e) and its legislative history, the Supreme Court concluded that FERC could not modify the Section 4(e) conditions. Those conditions were only subject to review by the court of appeals pursuant to the judicial review provision of the FPA, 16 U.S.C. §8251(b).

On two other points, the Supreme Court reversed the Ninth Circuit. The Supreme Court concluded that the land management agencies authority to develop Section 4(e) conditions, applied only to reservations that were physically occupied by project works. FERC was not required to accept Section 4(e) conditions for three Mission Indian Reservations located downstream from the project, although FERC must consider the impact of the project upon those reservations pursuant to its public interest review under Section 10(a) of the FPA. As well, the Supreme Court held that Section 8 of the Mission Indian Relief Act, enacted in 1891, which empowered Mission Indian Bands to issue right-of-way permits across their reservations, did not require FERC licensees to obtain a right-of-way permit from the Bands for reservation lands occupied by the project.

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LAND AND NATURAL RESOURCES DIVISION
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Kirby Forest Industries v. United States, ___ U.S. ___, No. 82-1994 (May 21, 1984). D.J. # 33-45-1525-77.

UNITED STATES DOES NOT PAY INTEREST IN STRAIGHT CONDEMNATION CASE PRIOR TO PAYMENT OF AWARD.

In a 9-0 opinion written by Justice Marshall, the Supreme Court affirmed the decision of the Court of Appeals for the Fifth Circuit that no interest is due in a complaint-only condemnation case. Prior to the payment of the condemnation award, the Court held, under 40 U.S.C. §257, there is no taking of a landowner's property that would require the payment of interest "even when the pendency of the proceedings has effected a substantial reduction of the attractiveness of the property to potential purchasers . . . ." Slip op. 13. However, the Court noted that, where property has increased in value between the date of valuation (which, in a complaint case, is usually the date of trial) and the date of payment of just compensation (the taking itself), a landowner must be given an opportunity to present evidence that the amount of just compensation be increased to reflect what he is constitutionally entitled to receive for his property.

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South-Central Timber Development, Inc. v. Wunnicke, ___ U.S. ___, No. 82-1608 (May 22, 1984). D.J. # 96-1-4-2601.

COMMERCE CLAUSE BARS ALASKA'S "PRIMARY MANUFACTURE" WITHIN THE STATE ON CONDITION OF SALE.

Alaska's requirement that state-owned timber receive "primary manufacture" within the state as a condition of sale, was challenged by South-Central Timber on the ground that the requirement violates the Commerce Clause. The Ninth Circuit had held that Congress had "implicitly authorized" the state requirement in light of the federal policy of imposing a primary manufacture requirement on timber taken from federal lands. The United States, as amicus curiae, urged the Supreme Court to reject the "implicit authorization" theory, and argued that the state's requirement was an impermissible burden which could not otherwise be saved under the "market participant" theory.

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The Supreme Court agreed and reversed the Ninth Circuit. The Court held that congressional intent must be "unmistakably clear" in order for a state regulation to be removed from the reach of the dormant Commerce Clause. The Court also found that Alaska was acting as a market regulator, instead of a market participant, and was, hence, not exempt from Commerce Clause scrutiny. Finally, the state primary manufacture requirement was held to fall within the rule of virtual per se invalidity of laws that block the flow of interstate commerce at a state's borders.

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Julio Quinones Lopez v. Coco Lagoon Development Corp., No. 83-1353 (1st Cir. Apr. 26, 1984). D.J. # 90-1-9-1902.

CORPS' DETERMINATION NOT TO REQUIRE SECTION 10 PERMIT SUSTAINED.

In the late 1960's, with a Section 10 dredging permit in hand, Coco Lagoon had filled a large area of its property with spoil, largely destroying an ecologically valuable mangrove wetland. After a hiatus, the filling resumed in the late 1970's --without the CWA Section 404 permits required by the 1972 Amendments. The Corps of Engineers issued a cease-and-desist order, and Coco Lagoon applied for a permit. The Corps, after consultation with several federal and Puerto Rican agencies, concluded that the area to be filled was presently of "marginal ecological value" (i.e., its value had been largely destroyed in the 60's) and that grant of the Section 404 permit was in the public interest. Two conditions were to be imposed: (1) removal of recently placed fill impinging on a still valuable mangrove area; and (2) creation of about 30 acres of mangrove wetland in mitigation for the loss of the roughly 100 acres of poor quality wetlands to be filled. The Corps' Environmental Assessment under NEPA concluded that the "net environmental effect" would be "positive," and that there was no significant impact requiring an Environmental Impact Study. The district court upheld the Corps' Finding of No Significant Impact, and the First Circuit affirmed.

LAND AND NATURAL RESOURCES DIVISION
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Both decisions are fact-bound, with the consensus of several agencies--after much investigation--given great weight.

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County of Del Norte v. United States; Association of California Water Agencies v. United States, No. 83-1761, (9th Cir. May 11, 1984). D.J. # 90-1-4-2294.

AGENCY DECISION WILL NOT BE INVALIDATED BECAUSE OF TECHNICAL IRREGULARITY IF ERROR IS TRIVIAL AND NO ONE WAS PREJUDICED.

Former-Secretary of the Interior Andrus, acting in response to a request by then-Governor Brown of California, designated parts of five northern California rivers for inclusion as components of the National Wild and Scenic River System. Several California counties, together with timber and water interests challenged the Secretary's actions. The district court held that the Secretary's action was defective because of procedural irregularities with regard to Council on Environmental Quality's (CEQ's) NEPA regulations. The first regulation, 40 C.F.R. §1506.9, requires Environmental Impact Studies (EIS) to be filed with EPA, also that an EIS should not be filed before it is transmitted to commenting agencies and made available to the public. The second regulation, 40 C.F.R. §1506.10, requiring published notice in the Federal Register of an EIS that has been filed with EPA during the preceding week. No decision on the proposed action may be made until at least 30 days after Federal Register publication. 40 C.F.R. §1506.10(b)(2). Here, the EIS was filed with EPA before complete distribution was made. An Interior employee incorrectly signed a form statement to that effect. Under a technical reading of the two regulations, the Secretary's designation was premature and could not have been made until two days after the Carter administration had left office.

On appeal, the Ninth Circuit reversed, holding that the deviations from two timing regulations promulgated by CEQ were "insignificant" and "trivial" within the meaning of CEQ's regulations and case law. The record showed that all available information was available on the proposed action for more than 30

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days before final action was taken, and the oversight based on the false declaration (which was not made in bad faith) was not prejudicial. Indeed, a court for the first time relied on the provision of the CEQ regulations which state that trivial violations shall not form the basis for independent causes of action. At most the court held the alleged procedural error was a trivial violation. The court viewed its ruling as consistent with the general rule of administrative law that "insubstantial errors in an administrative proceeding that prejudice no one, do not require administrative decisions to be set aside." The court also held that a state court decision questioning whether the state could "permanently administer" the rivers within the meaning of the federal law, had in fact been drawn to the Secretary's attention before he made his decision. Since the state court decision was in the administrative record, the court applied the well-established presumption of administrative regularity and concluded that it had been properly considered. Finally, the court concluded that at least the governmental entities had standing so there was no need to consider the standing of the other plaintiffs.

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