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

William P. Tyson, Director

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Editor-in-Chief: Susan A. Nellor FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

VOL. 33, NO. 12 THIRTY-SECOND YEAR June 21, 1985

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

Assistant United States Attorney JAMES W. BRANNIGAN, JR., Southern District of California, was commended by Mr. Clark S. Miller, Security Director, Great American First Savings Bank, for his successful prosecution of Kourosh Sedeghi.

Assistant United States Attorney RAYMOND EDWARDS, JR., Southern District of California, was commended by Mr. Alan E. Eliason, Chief Patrol Agent, United States Border Patrol, San Ysidro, California, for his outstanding and continuing support of the United States Border Patrol.

Assistant United States Attorney CHARLES F. FLYNN, District of Columbia, was commended by Mr. Michael J. Barrett, Jr., Associate Chief, General Litigation Division, Office of the Judge Advocate General, Department of the Air Force, for his successful efforts in Lanier Business Products, Inc. v. United States Department of the Air Force.

Assistant United States Attorneys WILLIAM B. HOGAN, JR. and DAVID V. MARSHALL, Western District of Washington, were commended by Mr. F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, for their outstanding efforts in the successful prosecution of United States v. Cairns.

Assistant United States Attorney ROBERT E. MAY, Southern District of California, was commended by Senior Judge Howard B. Turrentine, United States District Court for the Southern District of California, for his successful handling of a "boat" case.

Assistant United States Attorney PAMELA J. NAUGHTON, Southern District of California, was commended by Senior Judge Howard B. Turrentine, United States District Court for the Southern District of California, for her successful efforts in a number of Rip-Stop cases.

Assistant United States Attorneys JOHN R. NEECE and NITA L. STORMES, Southern District of California, was commended by Major General Aloysius G. Casey, Commander, Ballistic Missile Office, Department of the Air Force, for their outstanding defense of the Ballistic Missile Office in a Scanwell-type case.

Assistant United States Attorney PATTI B. SARIS, District of Massachusetts, was commended by Mr. Gabriel L. Imperato, Deputy Regional Attorney, Department of Health and Human Services, for her efforts in the litigation of Avery v. Heckler.

Assistant United States Attorney FRANCES H. STACY, Southern District of Texas, was commended by Mr. William P. Bennett, Regional Counsel, United States Postal Service, for her efforts on behalf of the Postal Service in State of Texas v. United States Postal Service.

Assistant United States Attorney BARRY M. TAPP, District of Columbia, was commended by Inspector General (Designate) Paul A. Adams, Department of Housing and Urban Development (HUD), for his successful prosecution of nine individuals for federal crimes involving HUD programs.

Assistant United States Attorney JEFFREY J. TINLEY, Middle District of Florida, was commended by Captain J. A. Umberger, Chief, Boating Safety Division, United States Coast Guard, for his successful efforts in pursuing injunctive relief proceedings against Daytona Marine Service, Inc.

POINTS TO REMEMBER

Cumulative List of Changing Federal Civil Postjudgment Interest Rates.

Appended to this Bulletin is an updated "Cumulative List of Changing Federal Civil Postjudgment Interest Rates," as provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.

(Executive Office)

Department of Justice Standards of Conduct and Employee Responsibilities.

Employees of the United States Attorneys' offices and the Department are reminded of the requirements of the Department's Standards of Conduct, 28 C.F.R. §45.735, which are reprinted in USAM 1-4.100 (1984). Employees should read and be familiar with all applicable regulatory, statutory, and policy provisions of the Department of Justice with regard to the duties and responsibilities they have undertaken by reason of their federal employment. Several of the more important of these considerations are highlighted below and contain references to Title 10 of the United States Attorneys' Manual, where appropriate. Should there arise any circumstance in which there is, or may appear to be, a conflict with an employee's responsibilities, the Executive Office for United States Attorneys' Office of Legal Services should be promptly advised of the relevant facts and considerations concerning the matter in question.

Several provisions of the Standards of Conduct prohibit any Department of Justice employee from participating personally and substantially in matters in which they or any person or organization with whom they are negotiating or have any arrangement concerning prospective employment, or have a personal, political, or financial interest. (28 C.F.R. §§45.735-4, -5; USAM 10-2.661). In short, these sections provide that you should avoid any action which might result in, or create the appearance of giving preferential treatment to any organization or person. (28 C.F.R. §45.735-5(a)).

Section 45.735-9 prohibits private professional practice by Department employees, with narrow exceptions for teaching (see 28 C.F.R. §45.735-12, USAM 10-2.665), pro bono services (see 28 C.F.R. §45.735-9(c), USAM 10-2.667), and representation of certain relatives and personal fiduciaries (see 28 C.F.R. §45.735-6(d), USAM 10-2.663). Because "professional" is not clearly defined in the Standards of Conduct, employees should generally consider the outside performance of acts which are similar to those performed by them as part of their federal employment to be practice of a "profession" and accordingly seek Executive Office advice as to the necessity for authorization to perform the outside tasks. For example, a federal contract specialist who provides contract consulting services on the weekends for firms seeking federal contracts, may be considered to be conducting a private professional practice prohibited by Section 45.735-9 which would require approval from the Deputy Attorney General. As the application of the exceptions to the particular circumstances may also involve policies of this office, please contact the Office of Legal Service for guidance prior to providing outside professional services of any nature.

The use for financial gain for oneself or for another person of information which comes to the employee by reason of their status as a Department employee and which has not become part of the body of public information is proscribed by 28 C.F.R. §45.735-10.

Sections which address outside federal employment involve prohibitions regarding the acceptance of fees for public appearances, publications or speaking engagements where the information disseminated substantially relates to one's official duties or responsibilities. Further, the acceptance of reimbursement for travel or expenses incident to travel on official business is prohibited from any source other than the United States (28 C.F.R. §45.735-14a), and federal property may not be used for other than officially approved activities (28 C.F.R. §45.735.16). Employees should also be aware of 28 C.F.R. §45.735-15, which provides that the failure on the part of an employee without good reason and in a proper and timely manner to honor debts which are acknowledged by the employee to be valid or reduced to judgment by a court or

to make or adhere to satisfactory arrangements for the settlement of the debts may be cause for disciplinary action by the Department.

Supervisory Assistant United States Attorneys, who are at levels I or II and are paid at a rate equivalent to that of GS-16 ($61,296 per annum) or above, are required to submit annually an Office of Personnel Management Standard Form 278, Financial Disclosure Statement for Exective Branch Personnel. (28 C.F.R. §45.735-27(a)(vii); USAM 10-2.662).

Department employees are also reminded of statutory constraints with which they should be familiar, such as the Hatch Act (5 U.S.C. §7324, et seq.) which restricts the ability of federal employees to participate actively in partisan political management and partisan political campaigns. It specifically prohibits employees from using their official authority or influence to interfere with or affect the result of an election and from taking an active part in partisan political management or campaigns. These provisions apply to all personnel, including Special Assistant United States Attorneys, whether they are full-time, temporary and/or part-time, and whether they are on or off duty, or on leave (including Leave Without Pay). (5 C.F.R. §733.111, §733.122; 28 C.F.R. §45.735-19; see also 18 U.S.C. §603 relating to the making of political contributions). Of course, provisions of the Ethics in Government Act of 1978 (28 U.S.C. §528, et seq.) are also applicable to all federal employees.

Current policy statements of the Department of Justice may be located in Part 50 of Title 28 of the Code of Federal Regulations. These sections contain policy statements regarding, for example, the release of information by personnel relating to criminal and civil proceedings (28 C.F.R. §50.2); policy with regard to open judicial proceedings (28 C.F.R. §50.9); and the procedures to be followed by government attorneys prior to filing recusal or disqualification motions (28 C.F.R. §50.19).

Questions or problems involving ethical questions should be directed to the Office of Legal Services at FTS 633-4024. Reports of allegations of misconduct should be immediately forwarded to the Office of Professional Responsibility, with an information copy to the Office of Legal Services, as provided by USAM 1-4.200.

(Executive Office)

Department Guidelines Pertaining to the Transfer of Seized and Forfeited Property.*

The Attorney General approved the Department's "Guidelines Pertaining to the Transfer of Seized and Forfeited Property" on May 24, 1985, a copy of which is being transmitted to each United States Attorney under cover memorandum from the Deputy Attorney General. Please note that the Guidelines, which implement certain asset forfeiture provisions of the Comprehensive Crime Control Act of 1984, are subject to review and modification as the Department gains experience in the application of these new procedures and as developing circumstances warrant.

Guideline Provisions

The Guidelines contain procedures regarding the retention of forfeited property for official use as well as the equitable transfer of forfeited property to interested agencies at various levels of government. Generally, the Guidelines provide that the head of the Department of Justice agency that participated in the investigation and seizure has the first claim to the forfeited property. If the agency does not elect to place the forfeited property into official use, the property may be equitably distributed. The final decision authority as to the equitable transfer depends upon the value of the property and the type of forfeiture involved.

1. In matters involving administrative forfeiture of property valued at $100,000 or less, the head of the Department investigative component determines the equitable distribution.

2. In matters involving judicial forfeiture of property valued at $100,000 or less, the United States Attorney or the Criminal Division section chief decides the disposition of the property, after consultation with the investigative agency and the United States Marshals Service.

3. Where the property is valued at greater than $100,000 and less than $750,000, the Department's Asset Forfeiture Office makes the final decision after consultation with the involved United States Attorney or Criminal Division section chief.

* Reprinted text from memorandum of June 4, 1985 to All United States Attorneys from Susan A. Nellor, Director, Office of Legal Services, Executive Office for United States Attorneys.

4. The Deputy Attorney General will make the final determination of equitable distribution of any asset with an appraised value of $750,000 or more.

The Office of Legal Counsel, by memorandum of April 24, 1984, has advised that the amendments to 21 U.S.C. §881(e) provide the Attorney General with broad powers to make an equitable distribution of properties forfeited under Section 881(e) to participating state and local law enforcement agencies, irrespective of whether the forfeited assets are in the form of tangible property, cash, or proceeds from the sale of such property. (Although a copy of this memorandum was transmitted to all United States Attorneys on May 10, 1985, another copy is attached to this Bulletin for your reference in connection with the Guidelines.) Prior to enactment of the amendments, the section generally provided that forfeited property was either to be "retained" for official federal government use or sold. If the forfeited assets were sold, the proceeds were to be used to offset the expenses of the forfeiture and sale, and the remaining funds deposited in the miscellaneous receipts fund of the United States Treasury. The Office of Legal Counsel has construed the new portions of the section relating to retention for official federal government use or sale of the property (with subsequent deposit of the net proceeds into the Assets Forfeiture Fund) to apply only to that percentage of the forfeited property which the Attorney General determines should be equitably distributed to the federal government. Please refer to Section III of the Guidelines which clarifies the scope of these significant amendments. United States Attorneys should also keep in mind when considering any equitable distribution of forfeitable property that the first priority of the forfeiture fund is to maintain sufficient monies to manage other forfeiture fund properties.

During discussions of the Guidelines and the Department's implementation of them, several potential problem areas were identified which may warrant review in your District. They are briefly outlined below.

Automatic Forfeiture Statute

One area concerns whether your state has an automatic forfeiture statute which would provide that seized property is conveyed to the state effective the date of commission of the crime. Case-law in the area of forfeiture has long recognized the principle that the federal government's title to an asset vests in the United States at the moment that the asset is used, or is intended to be used, in violation of the law. This principle has now been codified by amendments to 18 U.S.C. §1963(c) and 21 U.S.C. §881(h) by the Comprehensive Crime Control Act of 1984, Public Law No. 98-473, October 12, 1984. Accordingly, any subsequently vested claims to the property by a claimant (e.g., a state agency) cannot be considered. In the past, a state lacking a similar automatic

forfeiture statute could complete a lengthy state investigation (e.g., ten years) including the forfeiture of property only to find that upon completion of the trial and judicial forfeiture of the property, a federal agency such as the Internal Revenue Service had a priority lien. Under the new federal law, if the IRS has recorded a tax lien against the property even on an unrelated matter the lien would relate back to the commission of the crime and the IRS lien would have priority over the state's interest. In order to preclude the priority position of such pre-existing IRS liens, a state would need a statute providing for similar relation-back of its forfeiture claims. United States Attorneys may wish to convey through their Law Enforcement Coordinating Committees (LECCs) the desirability of seeking such a state law.

Central Treasury Fund

United States Attorneys may want to discuss whether their state's constitution or statute requires that all monies collected be placed into the state's general treasury fund or if forfeited property goes to a central repository (e.g., similar to GSA) for distribution. If so, it is unlikely that the state may share in the forfeited property, since the legislative history of the new asset forfeiture amendments says that the forfeited property must be used for law enforcement purposes. This may be brought to the attention of the LECCs, with an eye toward their sponsoring specific legislation providing for a separate law enforcement purposes fund for forfeited property or authorizing participating law enforcement agencies to directly receive forfeited money or property.

Criminal Forfeiture

Another problem that has arisen is that some United States Attorneys' offices are disposing of forfeited property through court order, usually by plea agreement. Since the Comprehensive Crime Control Act of 1984 enlarges the scope of criminal forfeiture for drug related offenses, the opportunity for the inclusion of assets into criminal plea bargains also increases. Since criminal forfeitures only forfeit the defendant's interest in the subject property (as opposed to total forfeiture in a civil forfeiture), it is important to consider alternative methods of forfeiture in criminal cases. Coordination with the civil section of the United States Attorney's office as well as the seizing agency is critical because a civil forfeiture action may be pending at the time the criminal plea bargain is being contemplated or negotiated. It is strongly urged that all plea bargains involving assets be reviewed by the seizing agency prior to finalization so as to avoid any prosecutorial conflict.

Abandonment of Property

Another area which should be avoided is the disposal of forfeitable property through "surrender" or "abandonment" in lieu of forfeiture. Abandonment of property, whereby the prosecutor and the defense attorney agree that the property has been "abandoned," and arrange for its disposition through a court order would not only circumvent the Department's forfeiture Guidelines but may trigger the Department's abandonment procedures if the property is worth $100 or more, requiring publication or notice by mail to interested parties. There are several serious problems with this method. First, as this does not, technically, constitute a seizure or forfeiture, this procedure will not effectively clear title to the United States. Secondly, there may be a real issue of the court's jurisdiction to receive such agreements in lieu of forfeitures, either criminal or civil. Thirdly, it will not definitively address the potential issues of third party interests in the property, notice to third parties and other "due process" concerns. Finally, "surrendered" or "abandoned" property does not go into the forfeiture fund. Accordingly, such "surrender" or "abandonment" agreements should be viewed cautiously and should not be entered into without prior consultation with the Asset Forfeiture Office. In the same vein, United States Attorneys should also keep the above considerations in mind when considering deferred prosecution of a defendant (e.g., through diversion), with an attendant "abandonment" or surrender" of forfeitable property.

Timeliness of Forfeiture Proceedings

Consideration might also be given to implementing procedures in United States Attorneys' offices to ensure the timely institution of forfeiture proceedings, in light of United States v. $23,407.69, 715 F.2d 162 (5th Cir. 1983). In that case, the Fifth Circuit Court of Appeals stated that a DEA delay of six months "with no explanation and no excuse" before instituting forfeiture proceedings precluded forfeiture. As forfeiture is deemed "instituted" by notice to parties and publication in administrative forfeitures, or by referral to the United States Attorney in judicial forfeitures, United States Attorneys' offices, particularly those districts in the Fifth Circuit, should be sensitive to the six-month limitation for institution of forfeiture proceedings expressed in United States v. $23,407.69.

Agency Procedures

As implementation procedures in United States Attorneys' offices are designed, procedural changes being initiated in other federal agencies should be kept in mind. DEA, for example, on August 13, 1984, amended 28 C.F.R. §1316.78 (49 Fed. Reg. 32174) to reflect that it would no longer transmit requests to the GSA Headquarters, which would then prepare the application to place

forfeited property in official use and forward it to United States Attorneys' offices for filing with the federal district courts. Instead, DEA is making such applications directly to the United States Attorneys.

With regard to agency procedures for placing forfeited property into official use, United States Attorneys' offices should not request seizing agencies to delay placing forfeited property in official use for 60 days after receiving a final decree in order to allow time for an appeal by a claimant. Such a 60-day delay is not anticipated by the applicable Guidelines or seizing agency procedures and is contrary to the policy of the Asset Forfeiture Office. Even if an appeal is subsequently filed, this does not mean that a stay of execution on the final decree will be granted by the Court of Appeals.

The Subcommittee on Asset Forfeiture is presently in the process of preparing forms to obtain required information from state and local agencies and United States Attorneys' recommendations for use in deciding the equitable transfer of forfeited property. Generally, these forms will elicit from potential participants in an equitable distribution of forfeited assets the following information: (1) the requesting agency's name, contact person, and address; (2) a full description of the requested property and the percentage share the agency wishes to receive; (3) the intended law enforcement use of the property; (4) a full description of the requesting agency's participation in the case (to include money and workhours expended); (5) a description of any other assets seized in the case; (6) an agreement that the requesting agency will pay fees to effect the transfer of title; and (7) the approval or disapproval (or recommendation, where appropriate) of the United States Attorney or the Criminal Division section chief relating to the request. You will receive copies of these forms as soon as they have been finalized.

Compromise Authority

United States Attorneys should remind their staffs of the provisions of Criminal Division Directive No. 116 (48 Fed. Reg. 50713, Nov. 3, 1983), 28 C.F.R. Part 0, Subpart Y, Appendix, which provides that United States Attorneys have compromise authority in all civil or criminal forfeiture cases, except that the United States Attorney shall consult with the Asset Forfeiture Office of the Criminal Division before closing a forfeiture case in which the gross amount of the original forfeiture sought is $60,000 or more. (Directive 116 (a)(1)(B)). The amended regulations further provide that where an interested Department of Justice investigative agency objects in writing to a proposed closing or dismissal of a case or to the acceptance or rejection of an offer in compromise, and the matter cannot be resolved below the Assistant Attorney General level, the objection removes the delegation of

authority from the United States Attorney's office. The matter is then referred to the Assistant Attorney General of the Criminal Division for decision. (Directive 116 (d)).

Holding Account

The United States Marshals Service has requested authorization from the Department of the Treasury to establish a special Treasury account for holding monies not yet forfeited. Upon approval, all cost bonds in forfeiture actions will be transmitted by the Department of Justice investigative agency to the appropriate United States Attorney prosecuting the case for direct deposit into the Marshals new, segregated holding account. The new account will be a non-interest bearing deposit account into which the Marshals will place all monies subject to forfeiture which the United States Attorney has classified as non-evidentiary in nature. In this connection, the Marshals Service urgently requests the assistance of United States Attorneys in classifying seized funds, particularly large volumes of cash presently housed in evidence vaults, as non-evidentiary and in considering the use of substitute evidence wherever possible. This would enable the Marshals to place such funds into the Treasury instead of maintaining them in vaults as evidence. The Marshals Service further advises that, as an interim measure, they are using an existing non-interest bearing deposit account for forfeitable cash until the new segregated account is approved and that they could deposit such monies as are designated non-evidentiary by the United States Attorneys into the existing account.

United States Attorneys will be advised when the new forfeitable cash deposit account is authorized by the Department of the Treasury, as well as of changes in deposit procedures for United States Attorneys, if any, as soon as they are finalized.

Questions should be directed to Ms. Susan A. Nellor, Director, Office of Legal Services, at FTS 633-4024. Substantive questions regarding specific forfeiture procedures should be directed to the Asset Forfeiture Office of the Criminal Division, FTS 272-6420. Questions involving the Marshals account should be directed to the Seized Assets Management Branch of the United States Marshals Service, FTS 285-1032.

(Executive Office)

Items Submitted for Publication in the United States Attorneys' Bulletin.

The Executive Office for United States Attorneys, through its Office of Legal Services, Bulletin Staff, has developed a form for United States Attorneys' offices to regularly submit case

decisions, with application to other districts, for publication in the Bulletin. We encourage Assistant United States Attorneys to use this form. The form and instructions are appended to this issue of the Bulletin.

(Executive Office)

JURIS Data Base List

Appended to this issue of the Bulletin is the most recent revised JURIS Data Base Listing, dated June 1985.

(Justice Management Division)

Reimbursement to Financial Institutions for Production of Records

Reimbursement to financial institutions which furnish financial records in compliance with judicial process initiated by the United States Attorneys in the form of a grand jury subpoena, trial subpoena or search warrant, is made pursuant to the provisions of the Right to Financial Privacy Act of 1978 (RFPA) (see 12 U.S.C. §3415). The reimbursement provision of the RFPA requires the government to reimburse financial institutions for costs incurred by them in searching for and reproducing protected financial records of individuals and partnerships of five or fewer individuals in connection with law enforcement inquiries.

The United States Code provides that the Board of Governors of the Federal Reserve System shall, by regulation, establish the rates and conditions under which reimbursement shall be made. These regulations are also set forth in 12 C.F.R. Part 219 and the Federal Register and require the financial institutions to prepare an itemized bill for their services (12 C.F.R. §219.6), and limit the rates to:

Search and retrieval costs:	$10 per hour/ $2.50 per quarter hour
Reproduction costs:	$.15 per page
Computer costs:	Actual costs and necessary supplies
Transportation costs:	Necessary expenses

The Assistant United States Attorney who requested the information from the financial institution must sign the financial management form OBD-211 at line 14. Line 19 should be signed by the Administrative Officer. Completed copies of form OBD-211 should be forwarded, along with a copy of the subpoena served on the financial institution to: Accounting Operations Group, Justice Management Division, P.O. Box 7405, Ben Franklin Station, Washingotn, D.C. 20044.

If there are any questions regarding this matter, please contact the Office of Legal Services at FTS 633-4024.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A jurisdictional statement in Owens v. Heckler, C.D. Cal. Nos. 83-2436 and 84-0154 (Dec. 26, 1984). The issues are: (1) whether Social Security claimants who fail to exhaust their administrative remedies or to seek individual waivers of the exhaustion requirement, and who also have not sought judicial review within 60 days of a final administrative decision as required by statute, can be included as members of a class in a class action challenging the constitutionality of a provision of the Social Security Act; and (2) whether it was constitutional for Congress to provide survivors' benefits during the period 1979-1983 to widowed spouses who remarry but not to divorced spouses who remarry.

A petition for a writ of certiorari in City of New York v. Heckler, 742 F.2d 729 (2d Cir. 1984). The issue in this Social Security disability class action is whether class members, as in Owens, supra, can be judicially excused from exhausting their administrative remedies and from complying with the statutory 60-day period for seeking judicial review.

A petition for a writ of certiorari in Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984). The issue, as in Owens and City of New York, supra, is whether Social Security disability claimants can be judicially excused in a class action from exhausting their administrative remedies.

A jurisdictional statement in Hemme v. United States, S.D. Ill. No. 83-5069 (Jan. 23, 1985). The issue is whether an amendment to the federal estate tax enacted on October 4, 1976 was constitutional as applied retroactively to a gift made on September 28, 1976.

CIVIL DIVISION

SUPREME COURT VACATES D.C. CIRCUIT JUDGMENT IN SUIT CHALLENGING UNITED STATES MILITARY'S USE OF PROPERTY IN HONDURAS, AND REMANDS FOR CONSIDERATION OF A SUBSEQUENT STATUTE AND RECENT EVENTS.

On our petition for certiorari, the Supreme Court has vacated a D.C. Circuit judgment ordering trial in a suit to enjoin the conduct of training by the United States military at a Regional Military Training Center, allegedly located on land owned by plaintiffs in Honduras. The suit sought injunctive and declaratory relief against American military officials on the ground that military use of plaintiffs' property is unauthorized by Congress and also that it violates the Due Process Clause. The district court had dismissed the suit as a non-justiciable political question. A panel of the D.C. Circuit had affirmed on the ground that "equitable discretion" prevented judicial intervention. On rehearing en banc, however, the full court of appeals remanded the case to the district court for discovery and possibly a trial. The Supreme Court has vacated the court of appeals judgment and vacated and remanded the case to the court of appeals to consider a recent appropriations statute, and some recent developments related to the responsibility of the Honduran Government to compensate plaintiff for any loss.

Ramirez de Arellano v. Weinberger, ___U.S.___, No. A-477 (May 20, 1985). D. J. # 145-15-1474.

Attorneys: William Kanter (Civil Division) FTS 633-1597; John Rogers (Civil Division) FTS 633-1673.

SUPREME COURT UPHOLDS HHS'S REGULATIONS REGARDING REIMBURSEMENT UNDER THE MEDICAID ACT FOR "INSTITUTIONS FOR MENTAL DISEASES."

The Medicaid Act does not provide reimbursement for services performed for patients between the ages of 21 and 65 in an "institution for mental diseases" (IMD). In the absence of a statutory definition, the Secretary of Health and Human Services (HHS) promulgated a regulation defining an IMD as "an institution that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases" and providing that whether an institution is an IMD is determined by its "overall character." The Middletown Haven Rest Home in Connecticut is an "intermediate care facility" (ICF) that provided care for persons with mental illness as well as other diseases. Between January 1977 and September 1979, Connecticut paid Middletown Haven for services it

provided to Medicaid eligible patients, including those between the ages of 21 and 65 who had been transferred there from state mental hospitals. Under the Medicaid program, Connecticut received federal reimbursement for those payments.

At the completion of an audit by HHS, Connecticut was notified that the federal reimbursement was not allowable because Middletown Haven had been identified as an IMD. On administrative review, HHS's Grant Appeals Board upheld the disallowance. Connecticut then filed an action in federal district court, which set aside the disallowance. HHS appealed and the Second Circuit reversed the district court.

The Supreme Court (9-0) has just affirmed the Second Circuit's decision. The Court ruled that an ICF may be an IMD and that the terms are not mutually exclusive. The Court relied on the plain language of the statute, the Secretary's reasonable and longstanding interpretation, and on the fact that nothing in the legislative history revealed any clear expression of contrary congressional intent and that Congress "has never indicated dissatisfaction with the Secretary's undeviating construction." The Court emphasized that the interpretation by the agency charged with administering the statute is entitled to substantial deference and that the agency's construction need not be the only reasonable one in order to gain judicial approval. This win is significant not only for the amount of money at issue here ($1.6 million for two fiscal years) but also because this same issue is currently pending in several district courts and in the Seventh Circuit on our appeal (held in abeyance pending the outcome of the Connecticut case).

Connecticut Department of Income Maintenance v. Heckler, ___ U.S. ___, No. 83-2136 (May 20, 1985). D. J. # 137-14-263.

Attorneys: Robert S. Greenspan (Civil Division) FTS 633-5428; Howard Scher (Civil Division) FTS 633-4820.

SECOND CIRCUIT HOLDS THAT SUPREME COURT STAY CONSTITUTES "SUBSTANTIAL JUSTIFICATION" IN EAJA CASE, AND REVERSES $140,000 FEE AWARD.

This case arose out of the Housing and Urban Development (HUD) operating subsidy litigation of 1975-77. The operating subsidy program was enacted by Congress in 1974 to defray increased expenses of low income housing projects stemming from rises in property taxes and utility costs. The Secretary, however, refused to implement the program, contending that Congress had given the agency discretion, and that implementation would interfere with other housing programs to which Congress had assigned greater priority. Nonetheless, two courts of appeals and

approximately fifteen district courts held that the program was mandatory and ordered the Secretary to implement it. After an injunction was issued in a nationwide class action, the Secretary sought and received a stay from the Supreme Court. The Supreme Court also granted certiorari in the two cases decided by the courts of appeals.

Before the Supreme Court could resolve the issue, however, the government decided to settle the cases and implement the program. Due to a technicality in the drafting of the settlement agreement--which barred attorney's fees from the only source then available, the operating subsidy fund--the cases were still pending in October, 1981, when the EAJA went into effect. Accordingly, plaintiffs in several of the operating subsidy cases sought and received fees under the EAJA, 28 U.S.C. §2412(d). In the case at bar, the district court awarded plaintiffs $140,000 in fees, notwithstanding our arguments that the Supreme Court stay and grants of certiorari demonstrated that HUD's position on the merits had been "substantially justified"; that the settlement agreement precluded an award of fees from any source; and that the unique history of the operating subsidy litigation constituted a "special circumstance[ ] mak[ing] an award unjust."

The Second Circuit has now reversed. The court held that the Secretary's position in the operating subsidy litigation was "substantially justified," relying upon the Supreme Court stay and grants of certiorari, as well as the lack of clarity in the governing law at the time the case was litigated on the merits. The court noted that the only remotely applicable precedent in the area supported HUD, and concluded that HUD was justified in pursuing the litigation vigorously across the country. The court of appeals also refused to hold the ultimate settlement of the litigation against the Secretary, recognizing that such an approach could have a chilling effect upon settlements.

Dubose v. Pierce, ___F.2d___, No. 84-6145 (2nd Cir. May 14, 1985). D. J. # 145-17-977.

Attorneys: Robert S. Greenspan (Civil Division) FTS 633-5428; John S. Koppel (Civil Division) FTS 633- 5459.

FIFTH CIRCUIT REVERSES LOWER COURT HOLDING THAT HHS FAILED TO COMPLY WITH APA RULEMAKING PROCEDURES IN 1969 WHEN IT REPEALED A MEDICARE REGULATION WHICH HAD ALLOWED NONPROPRIETARY HEALTH CARE PROVIDERS A TWO-PERCENT ALLOWANCE FOR RETURN ON EQUITY.

Baylor University Medical Center, a nonproprietary, i.e., nonprofit, provider of services under the Medicare program, brought this action challenging HHS's denial of its claim for

reimbursement of $2.5 million for return on its equity capital. Baylor claimed that it was entitled to this sum under a regulation that had paid all providers a two-percent allowance to reimburse them for costs not specifically recognized under other regulations, including a return on equity capital. Although HHS had repealed this regulation in 1969, Baylor argued that the repeal was invalid. Baylor claimed that, because HHS had promulgated the original regulation following notice and comment procedures, it was required to follow those same procedures to repeal the regulation. The district court agreed and held that the attempted repeal was invalid and that HHS was obligated to reimburse Baylor for a return on its equity capital.

The Fifth Circuit has now reversed in a comprehensive opinion. The court first accepted the government's position that the regulation in issue was exempt from the notice-and-comment requirement because it related to benefits. The court also agreed that the district court erred in holding that we could not rely on the benefits exception because HHS had not cited it in repealing the regulation. The Fifth Circuit reasoned that the doctrine barring post hoc rationalizations was inapplicable because "the existence or absence of stated justifications for failure to follow notice and comment is irrelevant where Congress has not required such elaboration." Next, the court rejected Baylor's contention that notice and comment were nonetheless required because the repeal had a substantial impact upon Medicare providers. "The substantial impact test is not a vehicle for imposing judicial notions of procedural propriety over and above what the APA requires," the court held. Finally, the court held that the repeal of the two-percent allowance was consistent with the "reasonable cost" standard of the Medicare Act.

Baylor University Medical Center v. Heckler, ___F.2d___, No. 83-1853 (5th Cir. Apr. 26, 1985). D. J. # 137-73-689.

Attorneys: Anthony J. Steinmeyer (Civil Division) FTS 633-3388; Carlene V. McIntyre (Civil Division) FTS 633-5459.

LAND AND NATURAL RESOURCES DIVISION

INTERIOR DIRECTED TO CONSIDER PETITION FOR EQUITABLE ADJUDICATION ON TRADE AND MANUFACTURING SITE.

Ramstad's application to purchase a trade and manufacturing site in Alaska was rejected by the Bureau of Land Management on the grounds that the land on which Ramstad filed had been withdrawn from settlement and that he had no validly existing right to the land due to his failure to timely file his notice of claim and his application to purchase. It also denied his

petition for equitable adjudication on the ground that Ramstad had not substantially complied with the law, having attempted to file his notice of claim five years late and his application to purchase twelve years late. The Interior Board of Land Appeals affirmed and the district court granted the government's motion for summary judgment.

The Ninth Circuit agreed that Ramstad had no legal right to purchase the land due to his untimely filing. However, it remanded for further consideration of his petition for equitable adjudication. It found the Board's conclusion that Ramstad had not substantially complied with the law so unnecessarily strict as to be arbitrary.

Ramstad v. Hodel, ___F.2d___, No. 82-3605 (9th Cir. Apr. 2, 1985). D. J. # 90-1-4-2416.

Attorneys: J. Carol Williams (Land and Natural Resources Division) FTS 633-2757; Anne S. Almy (Land and Natural Resources Division) FTS 633-2748.

REFORMATION OF DEED MUST BE BASED ON CLEAR AND CONVINCING EVIDENCE; EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT REQUIRES AFFIRMATIVE MISCONDUCT.

In this action to quiet title to a 1.5 acre tract abutting the Arkansas River, McDermott sought to have his grantor's deed to the government in a land exchange with the Corps of Engineers set aside on grounds of (1) mutual mistake induced by the government's inequitable conduct, and (2) equitable estoppel against the government. The district court rejected plaintiff's claims on both grounds.

The Eighth Circuit affirmed. As to the first, it found that the trial court's findings that there had been neither mutual mistake nor inequitable government conduct were not clearly erroneous, noting that the grounds for reformation of a deed must be shown by "clear and convincing evidence" under Arkansas law. As to equitable estoppel, the court of appeals noted that neither the Supreme Court nor itself had yet decided whether the doctrine may be applied at all against the government, but a showing of "affirmative misconduct" would be an essential element of any such application. Again, the court of appeals found no basis to overturn the district court's fact-finding.

McDermott v. United States, ___F.2d___, No. 84-2231 (8th Cir. Apr. 29, 1985). D. J. # 90-1-5-2197.

Attorneys: Fletcher Jackson (Assistant United States Attorney, Eastern District of Arkansas) FTS 740-5330; Martin W. Matzen (Land and Natural Resources Division) FTS 633-4426; Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2762.

CHALLENGE TO AGENCY DECISION NOT TO PREPARE EIS NEED ONLY SHOW THAT THERE "MAY" BE AN ENVIRONMENTAL IMPACT.

In this case, the Corps of Engineers had renewed permits to private companies to dredge shells (which are commercially useful) in Lakes Maurepas and Pontchartrain, and in the Gulf Coast area of Louisiana. The Corps did not issue an environmental impact statement, finding that the renewals, which contained a number of conditions designed to protect the environment, would not have a significant environmental impact. Certain environmental groups, together with the State of Louisiana, brought this action arguing that the Corps should have issued an environmental impact statement.

The district court granted judgment to the Corps. The court of appeals characterized the district court as putting the burden on the plaintiffs to show that there would be an adverse environmental impact. The court of appeals stated that this was improper. The court held that the proper burden on the plaintiffs is only to show that there "may" be an environmental impact. The court therefore remanded the case for a new determination using the proper burden. The court of appeals also expressly upheld the determination of the district court that requirements in the permit may be used by the Corps to diminish the environmental effect of a project below a level of significance so that no environmental impact statement need be prepared.

Louisiana v. Lee, ___F.2d___, No. 84-3699 (5th Cir. Apr. 29, 1985). D. J. # 90-1-4-2678.

Attorneys: Edward J. Shawaker (Land and Natural Resources Division) FTS 633-4010; Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2731.

PREJUDGMENT INTEREST REGULATION UNDER SURFACE MINING CONTROL AND RECLAMATION ACT SUSTAINED.

The Fourth Circuit held that in refusing to award the government prejudgment interest on reclamation fees due under the Surface Mining Control and Reclamation Act, the district court has misconstrued the reference to "statutory interest" in 30 U.S.C. §1232(e) of the Act. The district court limited the government to

postjudgment interest under 28 U.S.C. §1961. The court held that the regulation imposing prejudgment interest was duly promulgated and has the force of law and that it was error not to enforce it.

United States v. Burford, ___F.2d___, No. 84-1828 (4th Cir. May 6, 1985). D. J. # 90-1-18-3500.

Attorneys: J. Carol Williams (Land and Natural Resources Division) FTS 633-2757; Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2731.

IN ALLOWING CONSTRUCTION OF POWERHOUSE ON MAJOR SALMON STREAM, FERC REQUIRED TO ADDRESS FISHERY PROBLEMS RAISED BY NATIONAL MARINE FISHERIES SERVICE.

National Marine Fisheries Service (NMFS) petitioned for review of a small hydropower exemption allowing construction of a new powerhouse at an existing dam on a major salmon stream. In the past, FERC had interpreted the Energy Security Act to require it to impose fishery conditions recommended by NMFS and the Fish and Wildlife Service (FWS), and its regulations so provided. In this case, FERC reversed its position and held that only FWS could impose conditions, since NMFS was not specifically mentioned in the statute. The court upheld FERC's interpretation, rejecting our argument that the Energy Security Act was intended to incorporate the procedures of the Fish and Wildlife Coordination Act, which clearly includes NMFS and FWS.

Meanwhile, the Steamboaters, an organization of fishermen, challenged several other aspects of the exemption. The court upheld their argument that FERC's decision not to prepare an EIS was unreasonable. The court ruled that FERC had improperly failed to prepare an environmental analysis, and had failed to independently assess the impacts of the project. The court implicitly overruled a recent line of FERC decisions, of great concern to NMFS, which had held that FERC had no independent responsibility to consider fishery matters, since FWS and the state fishery agencies considered these matters in the course of imposing conditions. The court stressed that FERC must address fishery problems raised by NMFS, even though NMFS has no condition-setting authority.

The Steamboaters v. FERC, ___F.2d___, No. 83-7444 (9th Cir. May 7, 1985). D. J. # 90-1-0-2078.

Attorneys: David C. Shilton (Land and Natural Resources Division) FTS 633-5580; Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400.

ATTORNEYS' FEES NOT AWARDABLE WHERE TUCKER ACT CLAIM IS BEYOND DISTRICT COURTS' JURISDICTION.

Vacating the district court's judgment against the government for attorneys' fees, the district court relied on the "citizen suit" provision in Section 505 of the Clean Water Act, 33 U.S.C. §1365, which authorizes such awards. The government contended that the district court lacked subject-matter jurisdiction to resolve Kansas City's underlying counterclaim upon which the City's request for attorneys' fees was based. First, the City's counterclaim sought judgment for over $2 million representing City demands for federal grants for constructing water and sewage treatment plants as provided in Title II of the Clean Water Act. The requested monetary relief exceeded the $10,000 jurisdictional limit imposed by the Tucker Act, 28 U.S.C. §1346(a)(2), and, if there were any other tribunal with jurisdiction, it could only be the Claims Court. Second, a Section 505 "citizen suit" can only enforce nondiscretionary agency duties imposed by the Clean Water Act, but the Environmental Protection Agency has discretion in allowing or denying Title II grants. The court of appeals addressed only the first contention, holding that the Tucker Act barred district court jurisdiction over the City's $2 million counterclaim. The court noted that the City "at some point in the [district court] proceedings, apparently realizing the Tucker Act problem, began to seek merely injunctive and declaratory relief." Nevertheless, the court held that this "shift in focus" was "unavailing" because the City's aim was the same--the obtaining of grant money." The court also held the government's appeal was timely. The City had contended that the final judgment was entered in June. The court, agreeing with the government, held that the final judgment was entered in September, because it was the first document qualifying as a judgment under Rule 58 of the Federal Rules of Civil Procedure.

United States v. City of Kansas City, Kansas, ___ F.2d ___, Nos. 82-2366, 82-2370 (10th Cir. May 14, 1985). D. J. # 90-5-1-1-275.

Attorneys: Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400; Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2731.

UNITED STATES ATTORNEYS' OFFICES

DISTRICT OF NEW MEXICO

CROSS-DESIGNATION OF STATE ATTORNEY GENERAL IN PROSECUTION OF STATE OFFICIALS FOR EXTORTION OF POLITICAL CONTRIBUTIONS UPHELD OVER DEFENSE ARGUMENTS OF EXISTENCE OF CONFLICT OF INTEREST.

The cross-designation of the Attorney General of the State of New Mexico and one of his deputies in connection with federal prosecution of state officials for the alleged extortion of political contributions in return for the award of state business was recently challenged by the defendants in United States v. Johnson and Troutman, Criminal No. 84-253 (D. N.M.). Defendants made a pretrial motion to disqualify the cross-designated prosecutors, asserting that (1) a conflict of interest exists because the State Attorney General is required by New Mexico's Statutes Annotated §§8-5-1, et seq., to defend all actions brought against a state official "in his official capacity;" and (2) that the State Attorney General and members of his staff were material witnesses, who might be called upon to testify at the trial.

The district court, in its Memorandum Opinion and Order, characterized the issue as whether a State Attorney General properly may prosecute a state official for "non-official" acts, when he also represents that person in his official capacity. In denying the motion to disqualify the cross-designated prosecutors on grounds of conflict of interest, the court stated that the State Attorney General was "not acting in a matter in which he formerly represented the defendants, nor is he using against them knowledge or information acquired by virtue of the previous relationship." The court then rejected assertions that the State Attorney General and his staff should be disqualified because they possess information vital to the defendants, stating that "[n]o need is apparent at this time for the defendants to call the Attorney General or a member of his staff as a witness at trial."

The United States Attorney's office for the District of New Mexico advises that the defendants were convicted on May 14, 1985 and that they expect defendants to appeal. For further information regarding the case, please contact either United States Attorney William L. Lutz or Assistant United States Attorney Mark Jarmie.

United States v. Johnson and Troutman, Criminal No. 84-253 (D. N.M. March 22, 1985).

Attorneys: William L. Lutz (United States Attorney) and Mark Jarmie (Assistant United States Attorney) FTS 474-3341.

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate
10-01-82	10.41%	02-17-84	10.11%
10-29-82	9.29%	03-16-84	10.60%
11-25-82	9.07%	04-13-84	10.81%
12-24-82	8.75%	05-16-84	11.74%
01-21-83	8.65%	06-08-84	12.08%
02-18-83	8.99%	07-11-84	12.17%
03-18-83	9.16%	08-03-84	11.93%
04-15-83	8.98%	08-31-84	11.98%
05-13-83	8.72%	09-28-84	11.36%
06-10-83	9.59%	10-26-84	10.33%
07-08-83	10.25%	11-28-84	9.50%
08-10-83	10.74%	12-21-84	9.08%
09-02-83	10.58%	01-18-85	9.09%
09-30-83	9.98%	02-15-85	9.17%
11-02-83	9.86%	03-15-85	10.08%
11-24-83	9.93%	04-12-85	9.15%
12-23-83	10.10%	05-15-85	8.57%
01-20-84	9.87%		

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

APR 24 1985

MEMORANDUM TO D. LOWELL JENSEN
Associate Attorney General

Re: Proposed Guidelines on Disposition of Property Forfeited Pursuant to 21 U.S.C. § 881(e)

This memorandum responds to your Office's inquiry regarding the scope of the Attorney General's authority under 21 U.S.C. § 881(e) to share forfeited property with state and local agencies that participated in the law enforcement effort leading to the seizure of the property. As set forth in detail below, we agree that § 881(e) grants the Attorney General broad powers to make an equitable division with such agencies of forfeited property. Accordingly, we conclude that the Attorney General may, as your Office has proposed, establish general guidelines for the division with the agencies of seized property, including cash, covered by § 881(e). In discussions with your Special Assistant, Rosemary Hart, however, we have recommended several technical changes in the specific rule prepared by your Office. Although we understand your Office has already undertaken to incorporate these changes into the regulation, we would be happy to discuss them with you if you so desire. 1/

I. Background

As you know, before § 881(e) was recently amended by the Comprehensive Crime Control Act, Pub. L. 98-473, 98 Stat. 2052 (1984), this section did not authorize the sharing of

---

1/ As we discussed with Ms. Hart, we do not believe the Administrative Procedure Act, 5 U.S.C. § 533, requires that the guidelines be published for notice and comment, although such publication would be the preferred practice. We caution, however, that the guidelines must be submitted to OMB at least 10 days before their publication in the Federal Register, pursuant to Executive Order No. 12291.

forfeited property, even when state or local agencies had participated in the law enforcement operation which led to the forfeiture of the property. Under the earlier language, this section generally provided that forfeited property was either to be "retained" for official federal government use, or was to be sold. If it were sold, the proceeds, as well as all forfeited cash, were to be used to pay "all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, [and] advertising." Any funds remaining after payment of these expenses were to be deposited in the miscellaneous receipts fund of the Treasury. Thus, if forfeited property were not liquidated, it could be retained for official use only by the federal government. If it were liquidated, none of the proceeds could be used by the Department of Justice, or any state law enforcement agencies participating in the seizure, but had to be deposited in the public treasury, after payment of forfeiture expenses.

In response to claims that nonfederal agencies that had assisted in drug seizures should be able to share in any forfeited property, Congress amended § 881(e) in the Comprehensive Crime Control Act, Pub. L. 98-423 (the Act). These amendments give the Attorney General authority to transfer custody or ownership of forfeited property to state and local agencies who participated in acts leading to the seizure or forfeiture. With respect to that property, the amendments provide that the Attorney General shall make an "equitable" division "so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure." In addition, the Act substitutes an "Assets Forfeiture Fund" (the Fund) for the miscellaneous receipts account of the U.S. Treasury as the depository for cash and proceeds from sales of seized property. By law, the Fund can be used to purchase evidence, and for other law enforcement purposes specified in the Act. As so amended, § 881(e) now states as follows. (The 1984 amendments are italicized.)

> (e) Whenever property is forfeited under this subchapter the Attorney General may --
>
> (1) retain the property for official use; OR TRANSFER THE CUSTODY OR OWNERSHIP OF ANY FORFEITED PROPERTY TO ANY FEDERAL, STATE OR LOCAL AGENCY PURSUANT TO SECTION 616 OF THE TARIFF ACT OF 1930 (19 U.S.C. 1616);
>
> (2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;
>
> * * *

THE ATTORNEY GENERAL SHALL ENSURE THE EQUITABLE TRANSFER PURSUANT TO PARAGRAPH (1) OF ANY FORFEITED PROPERTY TO THE APPROPRIATE STATE OR LOCAL LAW ENFORCEMENT AGENCY SO AS TO REFLECT GENERALLY THE CONTRIBUTION OF ANY SUCH AGENCY PARTICIPATING DIRECTLY IN ANY OF THE ACTS WHICH LED TO THE SEIZURE OR FORFEITURE OF SUCH PROPERTY. A DECISION BY THE ATTORNEY GENERAL PURSUANT TO PARAGRAPH (1) SHALL NOT BE SUBJECT TO REVIEW. The proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in ACCORDANCE WITH SECTION 524(c) OF TITLE 28, UNITED STATES CODE any amounts of such moneys and proceeds remaining after payment of such expenses.

II. Attorney General's Authority to Share Seized Property with the States

The clear congressional intent of the 1984 amendments was to provide for the Attorney General to share forfeited property with the states or local agencies that assisted in an operation covered by the subchapter. Although the Attorney General's decision is not subject to judicial review, the division of property must be made "so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property."

Some question has been raised, however, about the operation of the statute with regard to forfeited cash as well as forfeited property that cannot be physically divided, but is liquidated and thereby reduced to cash proceeds. The latter portion of the statute provides that forfeited cash and cash from the proceeds of sale of forfeited property are to be deposited into the Assets Forfeiture Fund after payment of costs associated with the seizure, maintenance and sale of the property. At first blush, therefore, the statute appears to be internally inconsistent. After reviewing the legislative history of the amendments and the structure of the amendments themselves, we have concluded that the statute should not be read as internally inconsistent, but rather that the latter portion of the statute merely operates on that portion of the forfeited property that is distributed to the federal government.

Initially, an examination of the amendments to the statute as reflected in italics in the quoted material set forth previously in this memorandum reveals that Congress simply inserted provisions for equitable transfer of jointly seized property into a statute that had previously applied solely to disposition of seized property entirely to the benefit of the federal government. That no change was made in the existing provisions is understandable, even though some change to fully accomodate and blend in the inserted material would have been preferable from a drafting and clarity perspective. The existing provisions understandably were carried over because they continue to be necessary to direct the disposition of that portion of the seized property transferred to the federal government. Thus, the federal government's share of any seized cash or the cash proceeds from the sale of forfeited property transferred to the federal government must be placed in the Assets Forfeiture Fund, just as it previously had to be placed in the miscellaneous receipts account of the Treasury.

This reading of the statute is consistent with traditional rules of statutory construction that give greatest weight to the most recently enacted provisions. Under these rules, the statute as amended would be construed as permitting the Attorney General to first make an equitable transfer of the forfeited property in joint seizure situations, and then look to the remainder of the statute, that is the pre-existing provisions, to guide him in disposing of the federal government's share of the property. 2/ Traditional rules of statutory construction further require an effort to avoid inconsistency by reading the statute in such a harmonious fashion.

The legislative history of the Comprehensive Crime Control Act appears to support this reading, for Congress did not appear to make any distinction among the various forms of seized property that would be subject to equitable transfer between the federal government and the state and local agencies. The amendments can be traced to a proposal by Senator Sasser to establish an Assets Forfeiture Fund, the proceeds from which would have been divided with states assisting in seizures, according to a statutorily fixed percentage. See 129 Cong. Rec. S.9504-9505

2/ Of course, disposition of that portion of the property that had been transferred to the state or local agency would not be subject to the remainder of the statute, but rather would be owned by the agency and subject to the discretionary disposition of the owner agency.

(daily ed. June 29, 1983). In response to objections by this Department to what was viewed as an inflexible division, Congress passed the law in its present form, eliminating the fixed percentage and giving the Attorney General broad powers to share forfeited property "equitably" with those states that had participated in a seizure covered by § 881(e). In expanding the Attorney General's discretion over the division of the funds, there is no clear evidence that Congress sought to draw any distinction with respect to the type of property subject to transfer, whether it be tangible property, cash, or nonpartitionable property. See, e.g., 129 Cong. Rec. S.560 (daily ed. January 31, 1984) (remarks of Sen. Sasser). If Congress had intended the division of property to depend on the fortuity of the form in which it was seized, we would expect to find better evidence of such intent in the words of the statute or its legislative history.

Two conclusions can be drawn from this history with regard to the proposed guidelines. First, there is no indication of any intent on the part of Congress to require that seized cash go directly to the Assets Forfeiture Fund and not be available for equitable transfer by the Attorney General to participating state and local agencies.

Second, there is no indication in the legislative history that Congress intended the equitable transfer provisions to operate solely upon physically divisible property and not upon other property, such as real property not capable of partition. Thus, the Attorney General should have discretion to equitably transfer an undivided interest in the property to the state or local agency and then cooperate with that agency to jointly sell the property, with the federal government and the agency receiving their respective shares of the proceeds. Of course, the remainder of the statute would require the federal government to deposit its share of the proceeds in the Assets Forfeiture Fund, after payment of the specified expenses. 3/

3/ There is no statutory provision for payment of any of these expenses from the state or local agency's share of the proceeds of sale. It would seem appropriate, however, that the agency share in such expenses. This end may be accomplished either by the Attorney General adjusting the undivided interest transferred to the agency, or reaching agreement with the agency in cooperating to effect the sale that its pro rata share of the expenses will be paid out of its pro rata share of the proceeds of sale.

This construction leads to an eminently reasonably result. If the Attorney General could not allocate interests in property in this manner, he would be precluded, whenever property is physically indivisible, from exercising his authority to divide property equitably with participating state or local agencies. It is difficult to believe Congress intended such an unlikely result.

For the foregoing reasons, we see no legal impediment to adoption of the proposed guidelines, which permit the transfer of seized cash to participating state or local agencies, and the transfer of undivided property interests in seized property to such agencies, permitting the sharing of proceeds of a subsequent sale of the property.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

ITEM FOR PUBLICATION IN THE UNITED STATES ATTORNEYS' BULLETIN

TO: Editor-in-Chief, United States Attorneys' Bulletin
1629 - Main, 10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

FROM: Name: _____ Phone No: _____

Title: _____

District: _____

A. HEADNOTE (brief description of the case):

B. CASE SUMMARY (Note: Please report only those cases which may have relevancy for other districts.):

C. TITLE OF CASE (with complete citation and DOJ number):

D. Attorney(s) to contact for further information, if different from above, include telephone number:

Dated: _____

INSTRUCTIONS FOR COMPLETING THE FORM, "ITEM FOR PUBLICATION IN THE UNITED STATES ATTORNEYS' BULLETIN"

A. Headnote. The headnote is a brief description of the holding, is in all capital letters, is underlined, and the left and right margins are 15 and 70, respectively, with the right margin justified. If the headnote is more than one line, only underline the last line.

B. Case summary. Briefly highlight the facts of the case, it's status, and it's relevance to other districts, if known. Please submit only those cases with relevancy to other districts and state that relevancy early in the case summary. Also, please limit the length of individual items to one-half page.

C. Complete case title, with citation. The Bulletin Staff follows the "Bluebook" (A Uniform System of Citation, Thirteenth Edition, The Harvard Law Review Association (1983)) recommendations for case cites, and includes the Department of Justice control number assigned to the case.

D. Attorney(s). Give the name(s), section assigned in United States Attorney's office, and telephone number(s) of the attorney(s) who can be contacted for further information about the case.

NOTE: The Bulletin Staff reserves the right to edit all copy submitted and will independently make changes to format, style, spelling, and typeface. All proposed substantive changes will be discussed in advance with the person submitting the item for publication.

JURIS DATA BASE LISTING
Revised June 1985

CASELAW

U.S. Supreme Court	178 U.S. (1900) - Slips
Federal Reporter, 2d Series	300 F.2d (1962) - Slips
Federal Supplement	332 F.Supp (1970) - Slips
** Court of Claims	134 Ct. Cl. - 229 Ct. Cl. (1956 - February 1982)
Claims Court	1 Cl. Ct. (1982) - Slips
Federal Rules Decisions	73 F.R.D. (1976) - Slips
Court of Military Review	1 C.M.R. - 50 C.M.R. (1951-1975)
Military Justice Reporter	1 M.J.R. - Slips (1974 - Present)
Atlantic 2d Reporter	370 A.2d (1977) - Present (D.C. cases only)
Bankruptcy Reporter	1 B.R. (1979) - Slips

STATLAW - STATUTORY LAW

Public Laws	93rd - 98th Congress (1-149 and 473)
United States Code	1976 Edition, Including Supp. V
Executive Orders	12/31/47 - 2/12/85
Civil Works Laws	Vols. 1-4, (8/1790 - 11/1966) and Selected Public Laws to 7/1983
Comprehensive Crime Control Act of 1984	Pub. L. No. 98-473 (CCCA), Pub. L. No. 98-573 (Tariff Act), Pub. L. No. 98-596 (Fine Enforcement Act) and Criminal Division Handbook on the Comprehensive Crime Control Act of 1984

ADMIN - ADMINISTRATIVE LAW

** Published Comptroller General Decisions	Vols. 1-63 (1921-July 1984)
Unpublished Comptroller General Decisions	(1/5/51 - 6/30/84)
Opinions of the Attorney General	Vols. 1-43 (1791-1980)
O.L.C. Memorandums	Vols. 1-3 (1977-1979)

* New JURIS File
** Major File Additions

Board of Contract Appeals	Vols. 56-2 to 83-2 (7/56-11/83)
Federal Labor Relations Authority	Vols. 1-14 (1/79-5/84)
Decisions & Reports on Rulings of the Asst. Sec. of Labor for Labor Management Relations	1 A/SLMR - 8 A/SLMR (1/73-12/78)
Federal Labor Relations Council	Vols. 1-6 (1/70-12/78)
Rulings on Requests of the Asst. Sec. of Labor for Labor Management Relations	Volume 1 (2/70-6/75)
HUD Administrative Law Decisions	Selected Decisions
Merit Systems Protection Board	Vols. 1-11 (2/79 - 9/82)
** Board of Immigration Appeals Decisions	Vols. 9 (1960)-18 (1984) and slips

REGS - FEDERAL REGULATIONS

** Code of Federal Regulations	1984 Edition, Titles 1-45, 47-50 1985 Edition, Titles 4,9, 11-13
Unified Agenda of Federal Regulations	April, 1985 Edition

DIGEST - WEST HEADNOTES

Supreme Court Reporter	1961 - advance sheets
Federal Reporter, 2d Series	1960 - advance sheets
Federal Supplement	1960 - advance sheets
Federal Rules Decisions	1960 - advance sheets
Regional Reporters (State Cases)	1967 - advance sheets

TAX

U.S. Tax Court Decisions	Vols 1-66 (11/42 - 9/76)
U.S. Board of Tax Appeals Decisions	Vols 19 - 47 (2/30-11/42)
Enforcement Decisions	Tax Division's Summons Enforcement Decisions Current to 3/1/84
Tax Protesters	Tax Division Tax Protester Decision List

FORENSIC SCIENCE - Mid-Atlantic Association of Forensic Scientists Newsletter

Scientific Sleuthing Newsletter	July, 1976 - Winter, 1985

SHEPARD'S CITATIONS

United States Reports	1944 - Present
Supreme Court Reporter	1944 - Present
Lawyer's Edition (1st & 2d Series)	1944 - Present
Federal Reporter	1970 - Present
Federal Reporter Second Series	1970 - Present
Federal Supplement	1970 - Present
Federal Rules Decisions	1970 - Present
Court of Claims	1970 - Present
Court Martial Reports	1951 - Present
Military Justice Reporter	1975 - Present

INTERNATIONAL AGREEMENTS

Bevans: Treaties and Other International Agreements of the United States	Vols. 1-12 (1776-1949)
United States Treaties and Other International Agreements	Vols. 1-32 (1/50 - 12/81)
Department of Defense Unpublished International Agreements	(6/47 - 1/84)

WRKPRDT - DEPARTMENT OF JUSTICE WORK PRODUCTS

Criminal Division Monographs	Selected Monographs

BRIEFS - DEPARTMENT OF JUSTICE BRIEFS

Office of the Solicitor General Briefs	Briefs since the 10/1982 Term
Civil Division Briefs	Selected Appellate Briefs (11/81 - Present)
Civil Division Trial Briefs	Selected Trial Briefs (1977 - Present)
Civil Rights Division Briefs	Selected Appellate Briefs (1/80 - Present)
Land and Natural Resources Division Briefs	Selected Appellate Briefs (12/83 - Present)

INDLAW - INDIAN LAW

Opinions of the Solicitor (Interior)	Vols. 1 and 2 (1917 - 1974)
Ratified Treaties	1778 - 1880
Unratified Treaties	1801 - 1868
Presidential Proclamations	1879 - 1968
Executive Orders and Other Orders Pertaining to Indians	1871 - 1971

FOIA - FREEDOM OF INFORMATION ACT

FOIA Update Newsletter	Vol. 1, No. 1 - Vol. 5, No. 4 (Fall 1979 - Fall 1984)
FOIA Short Guide	FOIA Case List Publication (September 1984 Edition)

REFERENZ - TRAINING AIDS FOR JURIS USERS

JURIS Reference Manual, Parts I - IV	November 1984 Edition

TELETYPES

05-23-85 From Laurence S. McWhorter, Deputy Director, Executive Office for United States Attorneys, re: "1985 Savings Bonds Campaign."

05-23-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Susan A. Nellor, Director, Office of Legal Services, re: "Use of HHS' Critical Mail Post Office Box."

05-28-85 From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Senior Litigation Counsel Program Nomination Solicitation."

05-30-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, Executive Office for United States Attorneys, re: "Criminal Brief Bank."

05-31-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, Executive Office for United States Attorneys, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Policies Affecting the Handling and Reporting of Affirmative Litigation (Immediate Declination of Civil Referrals)."

06-03-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Thomas G. Schrup, Acting Director, Office of Legal Education, re: "Appellate Advocacy Course, August 26-30, 1985."

06-07-85 From Richard L. DeHaan, Director, Office of Administration and Review, Executive Office for United States Attorneys, re: "Judgments and Certain Compromise Settlements, USAM 4-3.200."

06-07-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, Executive Office for United States Attorneys, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Change in Federal Civil Postjudgment Interest Rate."

UNITED STATES ATTORNEYS' LIST

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	Stephen M. McNamee
Arkansas, E	George W. Proctor
Arkansas, W	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Robert C. Bonner
California, S	Peter K. Nunez
Colorado	Robert N. Miller
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Joseph E. diGenova
Florida, N	W. Thomas Dillard
Florida, M	Robert W. Merkle
Florida, S	Stanley Marcus
Georgia, N	Larry D. Thompson
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Daniel A. Bent
Idaho	William R. Vanhole
Illinois, N	Anton R. Valukus
Illinois, S	Frederick J. Hess
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	John D. Tinder
Iowa, N	Evan L. Hultman
Iowa, S	Richard C. Turner
Kansas	Benjamin L. Burgess, Jr.
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	J. Frederick Motz
Massachusetts	William F. Weld
Michigan, E	Joel M. Shere
Michigan, W	John A. Smietanka
Minnesota	James M. Rosenbaum
Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	William A. Maddox
New Hampshire	Bruce E. Kenna
New Jersey	W. Hunt Dumont
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	Rudolph W. Giuliani
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
North Carolina, E	Samuel T. Currin
North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
North Dakota	Rodney S. Webb
Ohio, N	Patrick M. McLaughlin
Ohio, S	Christopher K. Barnes
Oklahoma, N	Layn R. Phillips
Oklahoma, E	Roger Hilfiger
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
Pennsylvania, E	Edward S. G. Dennis, Jr.
Pennsylvania, M	James J. West
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	Henry Dargan McMaster
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	James A. Rolfe
Texas, S	Henry K. Oncken
Texas, E	Robert J. Wortham
Texas, W	Helen M. Eversberg
Utah	Brent D. Ward
Vermont	George W. F. Cook
Virgin Islands	James W. Diehm
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
Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood