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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

The following Assistant United States Attorneys have been commended:

HARRIET LEVA BEEGUN and JON CHRISTIAN CEDERBERG (California, Central) by Mr. Richard T. Bretzing, Special Agent-in-Charge, Federal Bureau of Investigation, for their successful prosecution of a Mann Act and Dyer Act case.

CHARLES E. BROWN (Georgia, Northern) by Mr. Thomas W. Stokes, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, for his successful prosecution of firearms violations.

RICHARD A. DENNIS (Kentucky, Western) by Ms. Bettye W. Williams, District Manager, Social Security Administration, Department of Health and Human Services, for his fine job in a discrimination case.

ANITA H. DYMANT and JANET L. GOLDSTEIN (California, Central) by Mr. John N. Lewis, Supervisory Special Agent, Federal Bureau of Investigation, for their successful prosecution of an advance fee scheme case.

MYLES E. EASTWOOD (Georgia, Northern) by Mr. Richard V. Fitzgerald, Chief Counsel, Comptroller of the Currency, Administrator of National Banks, Washington, D.C., for his defense of the OCC's interests in litigation with T. Bertram Lance and the Calhoun First National Bank.

EDMOND FALGOWSKI (Delaware) by Mr. Gerald G. Doane, Manager, Corporate Security, Crown Zellerbach, for his successful prosecution of employees of Crown Zellerbach for kickbacks and bribes.

RHONDA C. FIELDS and STEPHEN R. SPIVACK (District of Columbia) by Assistant Attorney General Stephen S. Trott, Criminal Division, for their effective prosecution of a national security violations case.

BRUCE A. GREEN (New York, Southern) by Assistant Attorney General Stephen S. Trott, Criminal Division, and by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his successful conclusion of an espionage case.

BARBARA M. HARRIS (Kentucky, Western) by Mr. Fred W. Harris, Jr., Regional Attorney, Office of the General Counsel, Department of Agriculture, for her successful efforts in a Chapter 7 bankruptcy case.

DONALD C. HILL (Nevada) by Mr. Ted W. Hunter, Special Agent-in-Charge, Drug Enforcement Administration, for his successful RICO prosecution of a major chemical supplier.

EDITH S. MARSHALL and ROYCE C. LAMBERTH (District of Columbia) by Mr. Ronald E. Robertson, General Counsel, Department of Health and Human Services, for their successful efforts in homeless shelter litigation.

GALE MCKENZIE (Georgia, Northern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for her successful prosecution of a series of

complex fraud by wire, mail fraud, and interstate transportation of stolen property cases involving the pharmaceutical industry.

JERE MOREHEAD (Georgia, Northern) by Assistant Attorney General Stephen S. Trott, Criminal Division, for his successful prosecution of violations of the Export Administration Act.

ALBERT R. MURRAY, JR. (Pennsylvania, Middle) by Congressman E. Clay Shaw, Jr., Florida, for his prosecution of a white collar crime case.

GEORGE L. O'CONNELL (California, Eastern) by Mr. Nolan E. Douglas, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, San Francisco, California, for his contribution to the investigation and successful prosecution of a complex arson case.

LINDA L. PARKER (Missouri, Western) by Assistant Attorney General Richard K. Willard, Civil Division, for her fine legal work in recovering approximately $7.75 million fradulently obtained from the Bureau of Indian Affairs.

CURTIS B. RAPPE (California, Central) by Mr. Richard T. Bretzing, Special Agent-in-Charge, Federal Bureau of Investigation, for his successful prosecution of a case involving wire fraud, conspiracy, Travel Act, and interstate transportation of property obtained by fraud violations.

SHARI K. SILVER (California, Central) by District Counsel L. H. Benrubi, Veterans Administration, for her outstanding victory in a murder case, and by Mr. John R. Shaw, Regional Counsel, Federal Bureau of Prisons, for her favorable settlement of a medical malpractice/wrongful death action.

F. WILLIAM SOISSON (Michigan, Eastern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding efforts in the investigation and trial of fradulent activities of Hamilton Medical Clinic associates.

DON J. SVET and DAVID N. WILLIAMS (New Mexico) by Mr. Richard L. Garner, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, for outstanding prosecutorial assistance in support of the Bureau's Arson Enforcement Program.

CLEARINGHOUSE

Criminal Division Interprets 18 U.S.C. §3565(h) Twenty-Year Statute of Limitation on Criminal Fines to Apply Retroactively.

The Criminal Division has issued an opinion interpreting the twenty-year Statute of Limitations provision contained in 18 U.S.C. §3565(h) to apply retroactively to fines imposed prior to the enactment of the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-5986 (October 30, 1984). Review of the legislative history makes it evident that the purpose of enacting the Statute was to permit the Department of Justice to remove old, uncollected fines from its books so that it could more effectively allocate its fine collection resources. The retroactive application of 18 U.S.C. §3565(h) would be in keeping with the

underlying purpose of the Fine Enforcement Act of 1984, which was to improve the collection of criminal fines. Accordingly, it is the opinion of the Criminal Division that Section 3565(h) of the Act authorizes the Department of Justice to close-out uncollected criminal fines that are over twenty years old.

Copies of the opinion are available upon request to the Office of Legal Services, at FTS 633-4024. Please request item number CH-31.

(Executive Office)

Personal Liability of Federal Officials - The Bivens Problem.

By memorandum of March 28, 1986, Assistant Attorney General Richard K. Willard, Civil Division, acquainted Department officials with the increase in litigation filed personally against federal officials, described in general terms the application of various immunity defenses, and provided an informational copy of a brochure on Professional Liability Insurance for Federal Employees.

If you are interested in receiving a copy of Mr. Willard's memorandum and a copy of the brochure, please contact the Office of Legal Services, at FTS 633-4024. Please request item number CH-32.

(Executive Office)

Seizure For Forfeiture--Amendments to 28 C.F.R. Parts 3, 8, and 9a, 51 Fed. Reg. 8817 (1986).

On February 27, 1986, the Attorney General reassigned the delegated responsibilities contained in Parts 3, 8, and 9a to Title 28 of the Code of Federal Regulations from the United States Marshals Service to the Federal Bureau of Investigation and revised Part 8 to include delegated authorities to the FBI under the following statutes: Copyright Act, Motor Vehicle Theft Law Enforcement Act of 1984, Child Protection Act of 1984, and statutes governing Transportation of Gambling Devices, Racketeering (Prohibition of Illegal Gambling Businesses), Prison-Made Goods, Wire Interception and Interception of Oral Communications and Foreign Wars, War Materials, and Neutrality (Illegal Exportation of War Materials). A copy of the amendments, as reported in the Federal Register, can be obtained from the Office of Legal Services, at FTS 633-4024. Please request item number CH-33.

(Executive Office)

AFFIRMATIVE CIVIL LITIGATION

Affirmative Civil Litigation; A New Section of the Bulletin.

Affirmative Civil Litigation, the aggressive attack on fraud, waste, and abuse in government expenditures, is a significant priority of the President and the Attorney General. The Attorney General's Advisory Committee of United States Attorneys appointed a subcommittee to develop strategies to respond to this problem. The Subcommittee has undertaken a thorough review of existing affirmative civil enforcement cases, provided training, developed resource

materials, and has begun to develop a program to emphasize and support affirmative civil enforcement (ACE) programs in United States Attorneys' offices.

At the request of the Subcommittee, the Executive Office has added a new section to the Bulletin, which will share developments in affirmative civil litigation--that is, model complaints, the development of advocacy skills and techniques, and Department policy affecting affirmative civil litigation. Complaints will be given an identifying number which will allow them to be requested through the clearinghouse function of the Office of Legal Services.

Items submitted for publication in this section should be submitted through United States Attorney Edward S.G. Dennis, Jr., Chairman, Attorney General's Advisory Subcommittee on Affirmative Civil Litigation, Attention: James G. Sheehan, 3310 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania 19106.

(Executive Office)

Affirmative Civil Litigation Developments

The United States Attorney's office for the Southern District of New York recently filed ten civil complaints for damages and civil monetary penalties and forfeitures in the United States District Court. Five of the ten cases were filed under the False Claims Act, a statute which permits the United States to recover double damages and a $2,000 penalty for every false claim submitted to the government. For example, in two Medicare fraud cases the amounts the government overpaid because of fraud was approximately $50,000, the complaints seek total recoveries, including double damages and penalties, of approximately $338,000. Eight cases are related to pending or completed criminal proceedings. The ten cases are briefly described below:

United States v. $5,809,653 U.S. Currency is a civil forfeiture action regarding the seizure in a heroin case of $5,809,653.

United States v. Pimentel and Duroyd Manufacturing Co., Inc. is a False Claims Act case regarding alleged false and fraudulent cost estimates on a contract for the manufacture of artillery parts.

United States v. Sternberg and Spritzer is a False Claims Act case regarding a scheme to embezzle Medicaid funds by issuing, forging, and laundering false and fraudulent checks.

United States v. Eng Kock Tan and Livingston is a False Claims Act case brought against two doctors convicted of Medicare fraud for services not rendered and converting funds.

United States v. Diamond is a False Claims Act case brought against a doctor convicted of Medicare fraud for services not performed, double billing, and falsely describing services to inflate fees.

United States v. Young is a False Claims Act case brought against a couple for underreporting their incomes and making other false statements to qualify for rent subsidized housing.

United States v. Perlmutter is a suit brought against a former Assistant United States Attorney to recover cash and the value of drugs stolen from the United States Attorney's office.

United States v. Rivas and A/Del Lithographics, Inc. is a suit to recover overpayments on Government Printing Office contracts awarded by a former government employee who accepted illegal gratuities from the contractor.

United States v. Krieger is a commercial case to recover the unpaid amounts of two government loans which defendants guaranteed.

United States v. Stanley Russo and Sons is a suit against a fruit and vegetable wholesaler, its owners and employees for civil penalties for violations of federal law prohibiting the "lumping" practice of falsely charging "unloading" fees.

Assistant United States Attorneys can obtain copies of all or any one of the above complaints by contacting the Office of Legal Services at FTS 633-4024. Please request CH-ACE/1 plus the name of the complaint(s) you desire.

(Executive Office)

POINTS TO REMEMBER

Cooperation With Immigration and Naturalization Service.

The Immigration and Naturalization Service (INS) recently encountered difficulty in deporting aliens paroled into the United States for prosecution or to act as witnesses for the government, because the aliens' passports were lost or misfiled during related judicial proceedings and/or terms of imprisonment. The INS requests the assistance of United States Attorneys' offices and the Drug Enforcement Administration in securing alien passports, identity cards, or other documentation as come into their possession, and requests such documents be sent immediately to the District Director of the nearest INS Office.

Offices heavily engaged in drug-related prosecutions, involving aliens paroled into the United States, may need to establish internal procedures for sending passports and other evidence of nationality to the INS which will facilitate speedy deportation or exclusion proceedings.

(Executive Office)

Personnel.

On March 28, 1986, Robert Q. Whitwell was sworn in as the Presidentially-appointed United States Attorney for the Northern District of Mississippi.

On April 4, 1986, Henry K. Oncken was sworn in as the Presidentially-appointed United States Attorney for the Southern District of Texas.

(Executive Office)

Revision of the Procedures Available to obtain subpoenas.

Appended to this Bulletin is a March 11, 1986, letter from Assistant Attorney General Stephen S. Trott, Criminal Division, to Mr. Howard Safir, Assistant Director for Operations, United States Marshals Service, on the above subject. The letter advises the Marshals Service that "in cases where the United States Parole Commission has issued a warrant for the apprehension of a parole absconder and the Marshals Service decides that its search for the absconder would be aided by the issuance of a subpoena for records, the official in charge of the investigation should (1) ascertain from the face of the Parole Commission's warrant which United States District Court imposed the sentence; and (2) request an Assistant United States Attorney in that district to file a motion (under the caption of the original criminal proceeding in which the sentence was imposed) which requests the issuance of a subpoena to aid the Marshals Service in locating the defendant to enforce the parole violator administrative warrant."

(Parole Commission)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Cerbone v. Conway, 758 F.2d 46 (2d Cir. 1985). The question is whether a two year delay in dismissing criminal charges for issuing a bad check constitutes a deprivation of liberty under the due process clause.

A brief amicus curiae in North Carolina Department of Transportation v. Crest Street Community Council, 769 F.2d 1025 (4th Cir. 1985). The issue is whether local community organizations are entitled to attorney fees under 42 U.S.C. §1988 as prevailing parties in a Title VI action.

A brief amicus curiae in Colorado v. Connelly, 702 P.2d 722 (Colo. 1985). The questions are (1) whether the due process clause requires suppression of a confession by a suspect who believed that God told him to confess; and (2) whether the suspect's mental condition rendered his waiver of his Miranda rights ineffective.

A petition for certiorari in Block v. Iowa, 771 F.2d 347 (8th Cir. 1985). The question presented is whether the Secretary of Agriculture has implementation discretion under the Special Disaster Payment Program, 7 U.S.C. §1444d(b)(2)(D).

A petition for certiorari in NLRB v. International Brotherhood of Electrical Workers, 780 F.2d 1489 (9th Cir. 1986). The issue is whether a union

violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members for working for an employer that does not have a collective bargaining agreement with that union.

A petition for certiorari in United States v. Merchant, 760 F.2d 963 (9th Cir. 1985). The questions presented are (1) whether failure to provide the defendant with personal notice of a state court "probation reinstatement" hearing constituted a denial of due process; and (2) whether law enforcement officers reasonably relied on a state court order imposing a probation condition that gave them the right to search defendant's home without a warrant.

A petition for certiorari in United States v. Cherokee Nation of Oklahoma, 782 F.2d 871 (10th Cir. 1986). The question presented is whether the United States' navigational servitude bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in a compensable taking of tribal interests in the underlying riverbed.

A petition for certiorari in Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986). The issue is whether a claim may be brought against the United States based on the alleged negligence of FAA air traffic controllers that resulted in the death of a serviceman incident to his military service.

A jurisdictional statement in Roadway Express v. Brock, 624 F. Supp. 197 (N.D. Ga. 1985). The question presented is whether Section 405(c) of the Surface Transportation Act of 1982, 49 U.S.C. App. §2305(c), is invalid under the Due Process Clause of the Fifth Amendment.

CIVIL DIVISION

SUPREME COURT HOLDS THAT FIRST AMENDMENT DOES NOT REQUIRE MILITARY TO MAKE EXCEPTIONS TO UNIFORM DRESS REQUIREMENTS FOR MILITARY PERSONNEL WHO WISH TO WEAR RELIGIOUS APPAREL WHILE ON DUTY.

Air Force regulations prescribe exactly all of the various clothing articles that are to be worn by military personnel during their various duty assignments. The plaintiff, an Orthodox Jew and a psychologist, had joined the Air Force as an officer, and was assigned duties primarily in a base hospital. In accordance with his religious upbringing, the plaintiff had worn a skull cap or yarmulke as a civilian, and sought to continue this practice while on military duty. The wearing of a yarmulke is not permitted by the Air Force dress regulations, and plaintiff was directed to conform his dress to military standards. The plaintiff brought suit claiming that the Air Force's uniform regulations infringed upon his right to freely practice his religion, and he was constitutionally entitled to be exempt from the uniform regulations.

The Supreme Court has upheld the validity of the uniform regulation. The Court reiterated and enlarged upon the relaxed standard of judicial review appropriate in challenges to military regulations; the majority noted that review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Slip op. 4. And in determining "whether military needs justify a particular restriction on

religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." The Court acknowledged that "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" And it deferred to the professional judgment of the Air Force that the traditional outfitting of personnel in standardized uniforms serves this goal. The Court held that although the wearing of a yarmulke may well be "a form of silent devotion akin to prayer[,] . . . the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."

Goldman v. Weinberger, ___U.S.___, No. 84-1097 (Mar. 25, 1986). D. J. #35-16-1788. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) Alfred R. Mollin (FTS 633-4116), Civil Division.

FEDERAL CIRCUIT HOLDS SAILOR MUST EXHAUST MILITARY REMEDIES BEFORE PRESENTING DUE PROCESS CHALLENGE TO HIS MARIJUANA COURT MARTIAL CONVICTION BASED UPON URINALYSIS TEST.

As part of its program to combat drug abuse, the military services have authorized "unit sweep" urinalysis testing of entire units. Williams tested positive for marijuana when his unit was tested. As a result, he was convicted at a special court martial, and he was given a general discharge. Instead of pursuing his right to appeal the conviction, Williams brought a class action in the Eastern District of Virginia broadly challenging the constitutionality of the urinalysis program. The district court denied the government's motion to dismiss and held a trial. Williams, however, presented no evidence, and the district court entered judgment on the merits for the government. Williams then appealed to the Fourth Circuit. On the government's motion, the Fourth Circuit transferred the appeal to the Federal Circuit.

The Federal Circuit held that the district court should have dismissed the case for failure to exhaust. The court held that the district court erred by entertaining the broad constitutional challenges to the military's urinalysis testing program before Williams had presented all his claims--constitutional, statutory, evidentiary, and factual--to the military system for reviewing court martials. Declining to follow a Ninth Circuit precedent to the contrary, the Federal Circuit stated, "If the rush to the federal courthouse, bypassing the congressionally created system attempted here by Williams, were permissible, Congress would be well advised to dismantle the military justice system as no longer required."

Williams v. Secretary of the Navy, ___F.2d___, No. 85-2690 (Fed. Cir. Mar. 18, 1986). D. J. #145-6-2562. Attorneys: Anthony J. Steinmeyer (FTS 633-3388), Civil Division, and Jay S. Bybee (633-3274), Office of Legal Policy).

SECOND CIRCUIT AFFIRMS DISTRICT COURT'S ORDER GRANTING NEW YORK CITY A STAY FOR ONE YEAR OF ITS JUDGMENT, ISSUED ON REMAND FROM THE SUPREME COURT'S DECISION IN AGUILAR v. FELTON, WHICH DECLARED UNCONSTITUTIONAL THE DELIVERY OF CHAPTER ONE SERVICES IN SECTARIAN SCHOOLS.

Plaintiffs had challenged as unconstitutional the provision of Chapter 1 (of the Education Consolidation and Improvement Act of 1981) services in sectarian schools. Plaintiffs lost in the district court, but won a reversal in the Second Circuit which was later upheld by the Supreme Court. In its original decision, the Second Circuit, in finding the program unconstitutional to the extent that services were provided in sectarian schools, had stated that "[t]he district court should afford sufficient time for the City to propose and the Secretary [of Education] to approve an alternative plan." The Supreme Court did not disturb this aspect of the Second Circuit's decision. When the case was eventually remanded to the district court, the City and the Secretary sought a stay of the injunction for one school year. The district court granted the stay over the plaintiffs' objection. Plaintiffs then appealed.

The Second Circuit affirmed the district court's stay of judgment. The court of appeals determined that granting the stay was not an abuse of discretion, citing its own statement (in its original opinion), and the record which shows that New York's Chapter 1 program is the largest in the country. The court, however, indicated very clearly that it expected a new proposal to be in position to implement at the start of the 1986 school year.

Felton v. Secretary of Education, ____ F.2d ____, No. 85-6399 (2d Cir. Mar. 26, 1986). D. J. #145-16-1482. Attorneys: Michael Singer (FTS 633-3518) and Howard Scher (FTS 633-4820), Civil Division.

SECOND CIRCUIT AFFIRMS AMENDED CLASS CERTIFICATION ORDER UNDER THE 1984 REFORM ACT, REQUIRES THE SECRETARY TO DISTRIBUTE TO ALL ADMINISTRATIVE ADJUDICATORS INSTRUCTIONS REGARDING THE "TREATING PHYSICIAN RULE," AND ADOPTS ALL THE PLAINTIFFS' CLAIMS REGARDING THE APPROPRIATE NOTICE SENT TO CLASS MEMBERS PURSUANT TO THE 1984 REFORM ACT.

In this social security class action, the court of appeals first held that the class members whose benefits were terminated between June 1, 1976, and October 8, 1984, were entitled to the 1984 Reform Act's statutory remand and readjudication. The court of appeals rejected the Secretary's contention that the district court's amended class certification violated section 2(d)(3)(B) of the Reform Act. Secondly, while the court believed the Secretary's contention that his "treating physician" rule and the Second Circuit's were the same, it nonetheless ordered the Secretary to distribute instructions in all relevant publications to all administrative adjudicators regarding the weight to be accorded to the treating physician's opinion. Such instructions were necessary, the court ruled, because of the extraordinary number of court decisions, reversing the Secretary's decisions on the basis of the "treating physician rule." Finally, the Second Circuit agreed with all the plaintiffs' claims on the appropriate notice to be sent to class members pursuant to the Reform Act and on the appropriate mailing procedures for these notices.

Schisler v. Heckler, ___ F.2d ___, Nos. 85-6092 & 6096 (2d. Cir. Apr. 2, 1986). D. J. #181-53-III. Attorneys: William Kanter (FTS 633-1597) and Frank Rosenfeld (FTS 633-4052), Civil Division.

THIRD CIRCUIT HOLDS THAT THE COMPTROLLER GENERAL'S EXERCISE OF EXECUTIVE AUTHORITY UNDER THE COMPETITION IN CONTRACTING ACT IS CONSISTENT WITH SEPARATION OF POWERS DOCTRINE.

The Competition in Contracting Act of 1984 (CICA) provides, inter alia, that once an unsuccessful bidder files a timely protest with the Comptroller General, the contracting agency may not award the challenged contract, and must suspend performance on a contract already awarded pending a nonbinding decision on the protest by the Comptroller General. In signing the Act into law, the President stated that these provisions violate separation of powers principles by giving the Comptroller General, an arm of Congress, power that cannot be exercised by Legislative Branch officers. Based upon the Attorney General's determination that the constitutionally offensive features could not be severed from the remainder of the stay provisions, Executive Branch agencies were directed to proceed as if the stay provisions were not included in the Act.

Ameron, Inc., an unsuccessful bidder on an Army Corps of Engineers contract, brought suit seeking to compel the agency to cease contract performance pending a decision by the Comptroller General on its protest. The district court rejected the government's constitutional challenge, and held that Ameron was statutorily entitled to a stay of further performance on the contract until the Comptroller General ruled on the protest.

The court of appeals affirmed. In the court's view, the Comptroller General is a part of the headless "fourth branch" of government "consisting of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either." The Comptroller General may therefore discharge the stay lifting functions prescribed in the Act. In concurrence, Judge Becker disagreed that there is a fourth branch of government. His reading of the legislative history convinced him that the Comptroller General was part of the legislative branch. Nonetheless, he concluded that the Comptroller General could exercise the functions assigned to him in the Act because his involvement would not pose a threat to the proper balance of powers among the branches.

Ameron, Inc. v. United States Army Corps of Engineers, ___ F.2d ___, Nos. 85-5226 & 5377 (3d. Cir. Mar. 27, 1986). D. J. #145-4-4508. Attorneys: William Kanter (FTS 633-1597) and Harold J. Krent (FTS 633-3159), Civil Division.

THIRD CIRCUIT AFFIRMS DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' ACTION SEEKING TO DECLARE UNCONSTITUTIONAL UNITED STATES DIPLOMATIC RECOGNITION OF THE VATICAN.

Plaintiffs sued the President, Secretary of State, and the United States Ambassador to the Vatican, claiming that congressional action consenting to the appointment of and funding for a diplomatic mission to the Vatican violates the

First Amendment, and that the President's action in extending diplomatic recognition to the Vatican exceeds the President's Article II powers and violates the First and Fifth Amendments. The district court dismissed the suit for lack of standing and non-justiciable controversy.

The Third Circuit unanimously affirmed on both grounds. The court of appeals held taxpayer standing inapplicable under Flast v. Cohen; that citizen standing did not support the suit; and that plaintiffs had failed to allege particularized harm as nonCatholic victims of stigmatization under Valley Forge. Alternatively, the court of appeals held that the Constitution commits to the President alone all decisions on the establishment of diplomatic relations; therefore, the suit is nonjusticiable under Baker v. Carr. The court of appeals noted that because the Vatican is in the unique position of a Church controlling a sovereign territory, the case did not present any issue of establishing diplomatic relations with a church qua church.

Americans United for Separation of Church and State v. Reagan, ___F.2d __, (3d Cir. Mar. 21, 1986). D. J. #145-1-1090. Attorneys: James M. Spears (FTS 633-3301), Nicholas S. Zeppos (FTS 633-5431), and Paul Blankenstein (former Appellate Staff employee), Civil Division).

FOURTH CIRCUIT REVERSES PRELIMINARY INJUNCTION THAT RESTRAINED NAVY FROM SUSPENDING A CONTRACTOR WHO IS UNDER INDICTMENT FOR FRAUD.

Merritt, a heating and air conditioning contractor, was indicted on two counts of fraud relating to its government contracts. Pursuant to the Federal Acquisition Regulations, the Navy suspended Merritt from future contracting with any executive branch agency. The suspension did not affect Merritt's existing government contracts. The district court acknowledged Merritt's argument that due process requires a hearing before suspension, and it enjoined the pending suspension against Merritt.

The government appealed, and moved for summary reversal because the imminence of Merritt's criminal trial created a serious threat that the action would become moot before the court of appeals could review the case. The Fourth Circuit promptly set our motion for oral argument, and reversed the preliminary injunction.

Merritt and Sons v. Marsh, ____F.2d____, No. 86-3830, (4th Cir. Apr. 8, 1986). D. J. #78-67-43. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Freddi Lipstein (FTS 633-3542), Civil Division.

FOURTH CIRCUIT HOLDS THAT PLAINTIFFS' ALLEGATION OF NEGLIGENT MISGRADING OF COTTON BY DEPARTMENT OF AGRICULTURE IS BARRED AS FALLING WITHIN THE MISREPRESENTATION EXCEPTION OF THE FTCA.

Under the Federal Tort Claims Act, a claim is barred if it arises out of "misrepresentation." In 1961, the Supreme Court interpreted this exception, holding that if the gist of the tort sounds in misrepresentation, the claim is barred even if plaintiff alleges negligence in the ascertainment of the information underlying the communication to plaintiff. United States v. Neustadt, 366

U.S. 696 (1961). In 1983, the Supreme Court again interpreted the misrepresentation exception in Block v. Neal, 460 U.S. 289 (1983). In Neal, the Court held that under the facts of that case, the plaintiff had successfully alleged a separate tort of negligence which would not be barred by the misrepresentation exception, despite its partial overlap with a negligent misrepresentation claim. Since Neal, courts increasingly have been willing to find the "separate" negligence claim, in some cases intimating that Neustadt is now confined to its facts.

Plaintiffs alleged the Department of Agriculture negligently overgraded certain cotton, which they bought at the erroneous price. Plaintiffs alleged they lost $3 million when the cotton could not be sold at the graded price. The district court dismissed the case based on the government's argument that plaintiffs' claim is a classic case of negligent misrepresentation under Neustadt. Plaintiffs, on appeal, argued that they stated a separate tort within the Neal doctrine. The Fourth Circuit, however, held that plaintiffs did not state a "separate" tort. Accordingly, the Fourth Circuit is the first appellate court since Neal to squarely hold that Neustadt controls the facts before it.

Carolinas Cotton Growers Ass'n v. United States, ___F.2d___, No. 85-1382 (4th Cir. Feb. 27, 1986). D. J. #157-54-410. Attorneys: Robert S. Greenspan (FTS 633-5429) and Barbara C. Biddle (FTS 633-4214), Civil Division.

SIXTH CIRCUIT HOLDS THAT JUDGMENT AGAINST UNITED STATES UNDER THE FTCA BARS BIVENS ACTION AGAINST INDIVIDUAL GOVERNMENT EMPLOYEE BY REASON OF THE SAME SUBJECT MATTER.

Plaintiff, a prisoner incarcerated in a federal prison, brought actions against the United States, a prison warden, and a prison doctor based upon allegations of negligence and deliberate indifference to plaintiff's medical needs that resulted in premature loss of his right leg due to atherosclerosis. The United States stipulated liability on plaintiff's FTCA claim. Although plaintiff's action against the warden was dismissed, plaintiff obtained a judgment against the prison doctor for $15,000 in punitive damages based on a Bivens action for violation of his Eighth Amendment right against cruel and unusual punishment. In the district court, the United States Attorney, who represented both the government and the individuals, contended that entry of judgment against the United States on plaintiff's FTCA claim barred plaintiff's actions against the individual defendants. The district court rejected that position and entered judgment against the United States on the FTCA claim and against the prison doctor on the Bivens claim.

The Sixth Circuit reversed and remanded for entry of judgment in favor of the prison doctor. The court held that the FTCA's language "that a judgment shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the government employee whose conduct gave rise to the claim" bars claims based on different legal theories but arising from the same actions that formed the grounds for judgment against the United States.

Serra v. Pichardo, ___F.2d___, Nos. 84-6103 & 6122 (6th Cir. Mar. 24, 1986). D. J. #157-30-314. Attorneys: Barbara L. Herwig (FTS 633-5425) and Peter R. Maier (FTS 633-4052), Civil Division.

SEVENTH CIRCUIT UPHOLDS HHS MEDICAID REGULATION REGARDING MAINTENANCE ALLOWANCES FOR SPOUSES.

This suit was brought by two Indiana couples. In both cases, the family's income consisted of the husband's retirement pension, and the husband was confined in a nursing home while the wife remained at home. For the husband to be eligible for Medicaid assistance, an HHS regulation required that all of the husband's pension be paid to the nursing home except for monthly allowances of $28.50 for the husband and an allowance for the wife that could not exceed the amount that a single person could receive and still be eligible for Medicaid. Indiana set that level at $238 per month. Plaintiffs contrasted their situations with those of couples where the dependent spouse was institutionalized and the spouse with independent income remained at home. In those cases, while part of the non-instutionalized spouse's income is "deemed" available to pay the institutionalized spouse's medical costs, the family unit retains substantially more of its income to meet the needs of the non-institutionalized spouse--$577 per month rather than $238. Moreover, if the non-institutionalized spouse can show actual needs in excess of $577 per month, the full actual needs amount can be retained. Noting that $238 is below the poverty level and that, unlike the "deeming" situation, there is no provision to allow the spouse to demonstrate actual needs in excess of the $238, plaintiffs argued that the $238 flat rate set by Indiana violated the federal Medicaid statute and denied due process.

The Seventh Circuit affirmed the district court's decision upholding HHS's regulation and Indiana's implementation of it. After noting its limited scope of review of HHS's legislative rule, the court of appeals held that the strict limit on the spousal maintenance allowance insured that the limited Medicaid funds went to the most needy individuals. The court also held that the plaintiffs' situation was properly distinguished from the "deeming" cases. For plaintiffs, the issue was how much of a person's income must go for his own medical care, while in the deeming cases, the issue was how much of a person's income must go to meet the medical needs of his spouse.

Mattingly v. Heckler, ___F.2d___, No. 85-1205 (7th Cir. Feb. 21, 1986). D. J. #137-26S-447. Attorneys: Anthony J. Steinmeyer (FTS 633-3388), Civil Division, and Daniel E. Bensing (633-3886), Legislative Affairs.

EIGHTH CIRCUIT REVERSES DISTRICT COURT HOLDING THAT ARMY VIOLATED PRIVACY ACT BY EXAMINING AGENCY RECORDS IN ORDER TO RESPOND TO AN EMPLOYEE'S DISCRIMINATION COMPLAINT.

Plaintiff, a civilian employee, filed a discrimination complaint against the Army. The complaint was investigated by the Army's EEO office. But when the report was received, plaintiff's commander determined that it was incomplete, and, therefore, ordered his subordinates to examine agency records in order to respond to the complaint and the report. Plaintiff then filed a Privacy Act suit, claiming that this counter-investigation into her files and the

consequent disclosure of records to her commander and his subordinates was not within any statutory exception authorizing disclosure. The district court agreed, holding that the counter-investigation violated EEOC regulations that vest investigation authority in the Army EEO office, and that the disclosures therefore violated the Privacy Act.

The court of appeals reversed, holding that it was proper for the base commander to conduct the counter-investigation. "EEOC regulations do not prevent the Army from consulting its own personnel files or other records pertaining to a claim of employment discrimination." Accordingly, the court of appeals held that the disclosures fell within Exception (b)(1), i.e., disclosure to agency employees who have a need for the record in the performance of their duties.

Howard v. Marsh, ___F.2d___, No. 84-2498 (8th Cir. Mar. 12, 1986). D. J. # 157-42-486. Attorneys: Leonard Schaitman (FTS 633-3441) and Marc Richman (FTS 633-5735), Civil Division.

EIGHTH CIRCUIT UPHOLDS HHS' IMPLEMENTATION OF THE SSI WINDFALL OFFSET STATUTE AGAINST STATUTORY AND APA CHALLENGES.

In 1980, Congress added a provision to the Social Security Act which required the Secretary of HHS to reduce retroactive Title II benefits to individuals who were paid Supplemental Security Income (SSI) benefits for the same period. The intention was to prevent windfalls or duplication in benefit payments under the Title II and SSI programs. As provided in the Social Security program operations manual, the Secretary implemented the statutory offset provisions not only in cases where the SSI had been paid in the past, but also where concurrent applications for Title II and SSI benefits were processed, with retroactive benefits eventually accruing under both programs.

Plaintiff brought this class action challenging the agency's practice of reducing Title II retroactive benefits in concurrent application cases. Plaintiff argued that such a reduction was not authorized by the offset statute, or in any event should have been promulgated under APA notice and comment rule-making procedures. Plaintiff also argued that where the Secretary paid the SSI retroactive benefits to the State welfare agency in reimbursement of interim State benefits, and then reduced the retroactive Title II award by the SSI windfall amount, the Secretary's action violated the anti-alienation provision in the Social Security Act (barring use of Title II benefits for satisfaction of creditor claims). Shortly following the effective date of a 1984 amendment to the offset statute, the district court ruled for plaintiff and her class on all counts, and enjoined the Secretary from reducing Title II benefits in the case of the class members.

The Eighth Circuit reversed. It held that the original and amended offset statutes authorized and contemplated that the Secretary would reduce retroactive Title II benefits by the excessive SSI benefits paid, in order to prevent windfalls. The court of appeals further held that reimbursement of States for interim assistance from retroactive SSI benefits, coupled with reduction of retroactive Title II benefits, did not violate the anti-alienation provision for Title II benefits. Finally, the court of appeals held that the program manual provisions were interpretations of the windfall offset statute which were exempt

from APA notice and comment procedures, and were not required to be published in the Federal Register.

McKenzie v. Bowen, Secretary of Health and Human Services, ___F.2d___, No. 85-5103 (8th Cir. Mar. 28, 1986). D. J. #137-39-951. Attorneys: William Kanter (FTS 633-1597) and Michael Kimmel (FTS 633-5714), Civil Division.

NINTH CIRCUIT HOLDS THAT CHALLENGE TO NATIONAL TRANSPORTATION BOARD'S METHOD OF INVESTIGATING AIRCRAFT ACCIDENTS IS PRECLUDED FROM JUDICIAL REVIEW.

Petitioners sought review of a decision of the National Transportation Safety Board (NTSB), declining petitioners' request to convene a special board of inquiry under 49 U.S.C. §1443. Petitioners argued that a special board of inquiry, much like the Presidential Commission now investigating the Challenger disaster, was needed to "clear the air" over a series of accidents caused by the accumulation of water in the fuel lines of single-engine aircraft. The NTSB investigated the accidents on its own, and made various safety recommendations to the Federal Aviation Administration, some of which were accepted. The Board declined to launch an additional inquiry under the provisions of 49 U.S.C. §1443, both in light of the duplication of resources that would result and of the lack of any extraordinary need for such a high level commission. The court of appeals has just accepted the government's argument that the Board's decision as to how to discharge its statutory responsbility to investigate accidents--whether on its own or by convening a special board of inquiry--is precluded from judicial review. The court concluded that because "nothing in the statute . . . compels the National Transportation Board to convene a board of inquiry at the behest of a private citizen, we believe that the method of inquiry is a matter committed to the agency's discretion."

Kuchar v. NTSB, ___F.2d___, No. 85-7184 (9th Cir. Mar. 25, 1986). D. J. #80094-99. Attorneys: Robert S. Greenspan (FTS 633-5428) and Harold J. Krent (FTS 633-3159), Civil Division.

ELEVENTH CIRCUIT HOLDS THAT FAILURE OF BORDER OFFICIALS TO INFORM FOREIGN-BORN CITIZEN OF RESIDENCY REQUIREMENTS FOR RETENTION OF CITIZENSHIP DOES NOT ESTOP THE GOVERNMENT FROM DENYING CERTIFICATE OF CITIZENSHIP.

Plaintiff Camille Paul is the Canadian-born son of an American citizen mother. Under provisions of the Immigration and Nationality Act, he was a citizen at birth. But Section 301(b) of the Act required that he reside in the United States for a continuous period of at least two years between the ages of 14 and 28 in order to retain his citizenship. Paul failed to meet this requirement and, when he subsequently sought a certificate of citizenship from the INS, it was denied.

Paul then sought a declaration of citizenship in the district court, contending that the government was estopped from denying him the certificate because on the many occasions when he crossed the border from Canada, always asserting to border officials that he was an American citizen, they had never

informed him of the residency requirement. He also contended that Section 301(b) as applied in his case violated his rights to due process and equal protection because, after his citizenship rights had already lapsed under the statute, Congress repealed the residency requirement but gave the repeal only prospective effect.

The district court held that the conduct of the border officials was sufficient to estop the government. The court declined to reach Paul's constitutional claim. The court of appeals reversed, holding that border officials had no duty to inform Paul of the residency requirement. The court remanded the case to the district court for consideration of the constitutional claim.

Paul v. Meese, ___F.2d___, No. 85-1496 (11th Cir. Feb. 27, 1986). D. J. #39-78-60. Attorneys: Barbara L. Herwig (FTS 633-5425) and Irene M. Solet (FTS 633-3355), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

FEDERAL GOVERNMENT NOT BARRED FROM PRESENTING TRIBAL WATER CLAIMS IN ARIZONA COURT.

The Tribe denied jurisdiction of the Arizona court W-1 over its water rights, and alleged that the government, or its officials, had committed fraud by grossly understating the Tribe's legitimate water claim and had mismanaged the Tribe's valuable water resources through its participation in W-1. The court of appeals affirmed the summary judgment and permanent injunction against the Tribe, preventing the Tribe--through its Tribal Court or otherwise--from interfering with officers, contractors or other representatives of the United States in the performance of their official duties, on or off the reservation, which relate in any way to the preparation and filing of water rights claims in W-1. The Tribe had forbidden our contractor's entry on the reservation to do studies necessary for development of tribal water claims, and the Tribal Court had enjoined Interior officials from transmitting any claims-related materials or documents to the Department of Justice for filing in W-1. The court of appeals held that the Tribe had "neither the jurisdiction nor the right to interfere with the official conduct of federal business by federal agents or employees . . ." The government has, as trustee, the "affirmative obligation to assert water claims" for the Tribe; and the Tribe lacks any authority to interfere with federal efforts to perform that duty, "regardless of the merits of the Tribe's charges that the officials were conducting their official business improperly." Nor was the United States required to exhaust its remedies in Tribal Court because sovereign immunity "clearly foreclosed" tribal jurisdiction.

United States v. White Mountain Apache Tribe, ___F2d___, No. 85-1719 (9th Cir. Mar. 7, 1986). D. J. #90-2-4-788. Attorneys: Martin W. Matzen (FTS 633-4426) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

CATEGORICAL EXCLUSION FROM EIS FOR WEST HOUSTON AIRPORT UPHELD.

The Fifth Circuit affirmed a decision by the Federal Aviation Administration (FAA) that the grant of an Airport Operating Certificate to West Houston Airport was categorically excluded from preparation of an environmental assessment (EA) under NEPA. Petitioner contended that the opposition of some 60 percent of a neighborhood in the direct vicinity of the airport rendered the project "highly controversial," which under FAA regulations would trigger the EA requirement for projects otherwise categorically excluded. The court held that there must be a "substantial number" of persons in opposition "in the relevant project service area." Courts should defer to an agency's interpretation of its categorical exclusion regulations, and the FAA was not "plainly erroneous" in concluding that this action was not highly controversial.

West Houston Air Committee v. Federal Aviation Administration, ___F.2d___, Nos. 85-4099, 4123 (5th Cir. Mar. 12, 1986). D. J. #90-1-4-2856. Attorneys: John T. Stahr (FTS 633-2956), Jacques B. Gelin (FTS 633-2762), and Peter R. Steenland, Jr. (FTS 633-2748), Land and Natural Resources Division.

REGULATORY FINES UNDER MAGNUSON ACT SUSTAINED.

A New Jersey dockowner, was found to have violated regulations issued pursuant to the Magnuson Act when, by physical obstruction and unbecoming language, he prevented a National Marine Fisheries Service agent from inspecting fish that were being unloaded. The court of appeals, interpreting the Magnuson Act broadly, upheld the regulatory fines. The Act itself only expressly authorizes inspections of vessels; it is the regulation that extends this authority to "areas of custody." The court, however, found that the Secretary was well within his broad regulatory authority in determining that inspection of dock areas is necessary to implement the Act. The court rejected the Fourth Amendment warrantless search objection on the ground that the commercial fishing industry is "pervasively regulated" and the measures taken are reasonable in light of the strong federal interests at stake. The court also stressed that, because of the highly perishable nature of fish, it would be difficult to obtain warrants in advance, especially since the purpose of the inspections is frequently to gather information, not seek out wrongdoers.

Lovgren v. Byrne, ___F.2d___, No. 85-5180 (3d Cir. Mar. 26, 1986). D. J. #90-8-8-97. Attorneys: Blake A. Watson (FTS 633-2772) and Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

MOTION TO DISSOLVE INJUNCTION DENIED, AND DOUBLE COSTS UNDER FEDERAL RULES OF APPELLATE PROCEDURE 38 ASSESSED.

Woodbridge Township appealed from an interlocutory order denying its motion to dissolve an injunction which had directed Woodbridge to comply with the Clean Water Act and NPDES permits in discharging its sewage into navigable waterways. Woodbridge asserted both in initially opposing the injunction and in moving to dissolve that its compliance was contingent upon receipt of EPA grant funds.

The court of appeals held that its scope of review is limited to considering whether the district court abused its discretion in denying the motion to dissolve; and the standard of the district court is whether the movant has demonstrated changed circumstances warranting discontinance of the order. The court found that Woodbridge made no showing of changed circumstances, and assessed double costs under Federal Rules of Appellate Procedure 38 for bringing a frivolous appeal. The court in dicta also found the language and legislative history of the Clean Water Act "require the inescapable conclusion that a municipality's obligation . . . is not contingent upon its receipt of federal funds."

Township of Franklin Sewerage Authority v. Middlesex County Utilities Authority, ___F.2d___, No. 85-5493 (3d Cir. Mar. 28, 1986). D. J. #90-5-1-6-345. Attorneys: John T. Stahr (FTS 633-2956) and Dirk D. Snel (FTS 633-4400), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

OHIO, NORTHERN

DISTRICT COURT HOLDS THAT INCREASED RISK OF CONTRACTING GUILLAIN-BARRE SYNDROME (GBS) LASTS FOR A MAXIMUM OF EIGHT WEEKS FOLLOWING SWINE FLU INOCULATION.

Plaintiff, who developed a severe case of Guillain-Barre syndrome (GBS) approximately nine and one-half weeks after receiving a swine flu shot, brought tort action against the United States. The United States argued that the increased risk of contracting GBS lasted for a maximum of eight weeks from the date of inoculation, and the district court agreed. Relying on an epidemiological study commissioned by the Department of Justice and published in the American Journal of Epidemiology in 1984, as well as testimony from two of the five experts who authored that study, the district court held: "The data establishes that after the expiration of that eight week period, a vaccinated individual was at no greater risk of contracting GBS than was any member of the general population; i.e., after the expiration of eight weeks there is no data with which to prove a contention that the swine flu inoculation was a likely cause of an individual's GBS." This is the first court decision to hold expressly that the increased risk of contracting GBS lasted for fewer than ten weeks from the date of the swine flu shot.

Benedict v. United States, ___F. Supp. ___, No. C78-529 (N.D. Ohio, Apr. 2, 1986). D. J. #192-57-5. Attorneys: Patrick M. McLaughlin, United States Attorney (FTS 293-3901), and Arthur I. Harris, Assistant United States Attorney (FTS 293-3950), Ohio, Northern.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8 (b). Joinder of Offenses and of Defendants.
Joinder of Defendants.

A father and son were convicted of, inter alia, mail fraud in connection with insurance claims for fire damage to a restaurant, a duplex, and a third building. The restaurant was operated by the father in partnership with others. Count 1 charged the father with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which the son was one of the partners. Counts 2 through 4 charged both defendants with mail fraud related to the duplex fire. Count 5 charged both defendants with conspiracy to commit mail fraud in connection with the third arson scheme, and count 6 charged the son with perjury before the grand jury. The district court denied defendants' pretrial motions for severance on the ground that the charged offenses were misjoined in violation of Rule 8(b). When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider the evidence against the son, and repeated this instruction in the final charge and admonished the jury to consider each count and defendants separately. The jury returned convictions on all counts. The defendants appealed and the court of appeals reversed and remanded for new trials, holding that the joinder of count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial per se. The government filed a petition for rehearing and this was denied. The Supreme Court granted certiorari.

The Supreme Court held that the misjoinder of defendants in violation of Rule 8(b) is subject to harmless error analysis and does not require reversal unless it actually prejudices the defense by having a substantial and injurious effect or influence in determining the jury's verdict. The district court did provide proper limiting jury instructions with regard to count 1. The Supreme Court ordered that the judgment of the court of appeals be reversed in part and affirmed in part, and the case be remanded for further proceedings.

(Reversed and remanded. Dissent filed.)

United States v. Lane, 106 S. Ct. 725 (1986).

Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

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
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%

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.

For cumulative list of those Federal Civil Postjudgment Interest Rates effective October 1, 1982, through December 19, 1985, see United States Attorneys' Bulletin, Vol. 34, No. 1, page 25 (January 17, 1986).

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