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Executive Office for United States Attorneys

United States Attorneys' Bulletin

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Laurence S. McWhorter, Director

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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VOLUME 36, NO. 12 THIRTY-FIFTH YEAR DECEMBER 15, 1988

COMMENDATIONS

The following **Assistant United States Attorneys** have been commended:

James R. Allison (District of Colorado), by Gregory C. Smith, Deputy Attorney General, Enforcement Section, Office of the Attorney General, Denver, for his excellent presentation on "Trial Tactics" at a conference of the National Association of Medicaid Fraud Control Units. Also, from Col. Carroll J. Tichenor, Office of The Judge Advocate, United States Army, Korea, for his participation in the Trial Counsel Assistance Program's seminar in Korea.

Peter Caplan (Michigan, Eastern District), by James DeHaan, Area Administrator, Office of Labor-Management Standards, Department of Labor, Detroit, for his advice and assistance in the supervision of a UAW regional election ordered by the U.S. District Court.

Daniel Cassidy (District of Colorado), by Gene C. Nicko, Resident Agent, U.S. Customs Service, Department of the Treasury, New Orleans, for his excellent presentation on "Innovative Techniques in Money Laundering Investigations" in Lafayette, Louisiana.

Michael A. Cauley (Florida, Middle District), by Greer C. Tidwell, Regional Administrator, U.S. Environmental Protection Agency, Atlanta, for his outstanding success in obtaining a plea agreement in an environmental crimes case.

Gary L. Cobe (Texas, Southern District), by Phillip J. Chojnacki, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Houston, for his successful prosecution of a major criminal case.

Ellen Christensen (Michigan, Eastern District), by Katherine Deoudes, Associate Director, Financial Litigation Staff, Executive Office for United States Attorneys, Department of Justice, Washington, D. C., for her excellent presentation at the Criminal Monetary Enforcement Seminar in Kansas City.

James H. DeAtley (Texas, Western District), by Roger J. Marzulla, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D.C., for his invaluable assistance in the preparation and trial of a case involving conspiracy, fraud, and illegal disposal of hazardous waste.

Richard L. Delonis (Michigan, Eastern District), was awarded a Certificate of Appreciation from Frank E. Young, M.D., Commissioner of Food and Drugs, Department of Health & Human Services, Rockville, Maryland, for his valuable contribution to the success of the National Anabolic Steroid investigation.

Kenneth C. Etheridge (Georgia, Southern District), by Rear Admiral J.E. Vorbach, Commandant, U.S. Coast Guard, Washington, D.C., for his outstanding support and assistance in a complicated case involving the entry of a People's Republic of China flag vessel into Savannah in violation of the port entry regulations of the Coast Guard.

Joseph Florio (Texas, Western District), by Hinton R. Pierce, United States Attorney, Southern District of Georgia, Savannah, Georgia, for his outstanding presentation on asset forfeiture/equitable sharing at a recent LECC conference.

Hilary W. Frooman (Illinois, Central District), by Rick R. Schramm, Regional Vice President, Farm Credit Bank of St. Louis, for obtaining a conviction in a production credit association fraud case.

Allen Gershel (Michigan, Eastern District), by Virgil D. Woolley, Jr., Supervisory Special Agent, FBI, Detroit, for his success in a complicated case involving the National Bankruptcy Act.

William T. Grimmer and **Rick L. Jancha** (Indiana, Northern District), by Richard O. Kallenbach, Prosecuting Attorney, 30th Judicial Circuit of Indiana, Rensselaer, for their outstanding efforts in prosecuting "Operation Family Affair," a case involving violations of the Continuing Criminal Enterprise statute.

Joseph H. Groff III (District of Maine), received a Criminal Investigation Division award from Richard E. Simko, District Director, Internal Revenue Service, for his exemplary contributions to the field of criminal tax prosecution.

Geneva Halliday (Michigan, Eastern District), by Arthur W. Frost, Compliance Officer-in-Charge, Food and Nutrition Service, Department of Agriculture, Chicago, for her excellent representation in a number of food stamp revocation cases.

Gary A. Husk (District of Arizona), by William S. Sessions, Director, FBI, for his expertise and legal skills in the successful prosecution of a criminal case on the Navajo Indian Reservation.

Ramsey Johnson (District of Columbia), and Department of Justice attorneys, **Jennifer Gold, Karen Morrissette,** and **Robert Erickson**, by William S. Sessions, Director, FBI, for their efforts in obtaining a favorable decision by the U.S. Court of Appeals in a sensitive criminal case.

Robyn R. Jones (Ohio, Southern District), by William C. White, Acting Assistant Secretary for Labor-Management Standards, Department of Labor, Washington, D.C., for her successful prosecution of a Union embezzlement case.

Janice Miller Karlin (District of Kansas), by David M. Smith, Chief, Civilian Personnel Branch, Office of the Judge Advocate General, Department of the Army, Washington, D.C., for her excellent representation of the U.S. Army in a sex discrimination case.

Ronald M. Kayser (Iowa, Southern District), by Nicholas V. O'Hara, Special Agent in Charge, FBI, Omaha, for his successful prosecution of the largest drug seizure case in Iowa's history. Also, by Alejandro E. Duran, Resident-Agent-in-Charge, DEA, Des Moines, for obtaining the conviction of a major drug dealer.

R. Steven Lapham (California, Eastern District), by Steven V. Adler, Senior Assistant Attorney General, and Chief, Major Fraud Unit, Department of Justice, San Diego, for his assistance in a joint prosecution effort leading to the successful conclusion of a major criminal case.

Arthur Leach (Georgia, Southern District), by Colonel Vahan Moushegian, Jr., Staff Judge Advocate, Department of the Army, Fort Stewart, Georgia, for his cooperation, support, and legal guidance extended to the Special Assistant United States Attorney.

Ross I. MacKenzie (Michigan, Eastern District), by Donald Ivers, General Counsel, Veterans Administration, Washington, D.C., for his excellent representation in a suit to recover medical costs under the Veteran's Medical Care Recovery Act.

Evelyn Matteucci (California, Eastern District), by Colonel Edwin F. Hornbrook, Chief, Claims & Tort Litigation Staff, Office of The Judge Advocate General, Department of the Air Force, Washington, D.C., for her outstanding presentation on medical malpractice cases at the Travis Air Force Base Medical Law Course.

Thomas M. O'Rourke (District of Colorado), by Robert J. Savaglia, Chief, Criminal Investigation Division, Department of the Treasury, Denver, for his outstanding representation in the prosecution of a complex tax case.

Karl Overman (Michigan, Eastern District), by Cary L. Katznelson, Senior Attorney, Office of Field Legal Services, U.S. Postal Service, Chicago, for his assistance in obtaining a favorable settlement of a land condemnation action.

John F. Paniszczyn (Texas, Western District), by James N. De Stefano, Regional Counsel, U.S. Customs Service, Houston, for his excellent representation in a Federal Tort Claims Act case.

Stephen T. Robinson (Michigan, Eastern District), received the Chief Postal Inspector's Award from C. R. Clauson, Chief Postal Inspector, Washington, D.C., for his outstanding success in prosecuting a number of complex mail fraud cases.

William D. Welch (District of Colorado), by Robert L. Pence, Special Agent in Charge, FBI, Denver, for his excellent representation as Drug Task Force Coordinator, and that of other Assistant United States Attorneys, in handling drug prosecutions.

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PERSONNEL

On December 2, 1988, **William Edwards** became Acting United States Attorney for the Northern District of Ohio.

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POINTS TO REMEMBER

Career Opportunity

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Executive Office for United States Attorneys, Legal Counsel, in Washington, D.C. The applicant will review and analyze a variety of personnel matters, including allegations of misconduct made against Assistant United States Attorneys, conflict of interest matters (Ethics in Government Act), EEO complaints, and personnel matters involving Executive Office and United States Attorney personnel; recommend appropriate action and comments on the legal sufficiency of both substantive and procedural requirements; analyze complaints received from private citizens and others to determine whether they disclose possible violations of federal statutes; and analyze proposed legislative measures and changes in Department policies or regulations. Attorneys must possess a law degree and be an active member of the bar in good standing. The position will be at the GS-12 or GM 13-14 level. Please submit a current resume or SF-171 ("Application for Federal Employment") to the Executive Office for United States Attorneys, Department of Justice, Room 6100, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530, Attn: Maureen Williams. This position is open until filled. No telephone calls, please. The U.S. Department of Justice is an equal opportunity employer.

(Executive Office for United States Attorneys)

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Civil Fraud Monograph

On November 29, 1988, Assistant Attorney General John R. Bolton of the Civil Division forwarded to all United States Attorneys a copy of the new Civil Fraud Monograph. This monograph is intended as a general purpose reference work for both criminal prosecutors and civil attorneys who must consider the civil aspects of cases involving fraud against the Government. It also represents a major effort on the part of Civil Division attorneys to provide your offices with concrete expertise in the pursuit of civil fraud and Government corruption cases.

Questions concerning issues discussed in the monograph, as well as requests for authority to close or compromise cases or to file suit, should be addressed to Michael F. Hertz, Director, Commercial Litigation Branch, Civil Division, P.O. Box 261, Ben Franklin Station, Washington, D. C. 20044 (FTS 724-7179).

(Civil Division)

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Department Policy Directive On Fugitive Apprehension

On November 9, 1988, Associate Attorney General Francis A. Keating II issued a policy directive to all United States Attorneys delineating the respective responsibilities of the Federal Bureau of Investigation, the United States Marshals Service, and the Drug Enforcement Administration in the area of fugitive apprehension. For your information, a copy of this directive is attached as Exhibit A at the Appendix of this Bulletin.

This policy, which was approved by the Attorney General on August 11, 1988, is intended to establish the framework within which these three agencies will exercise their responsibilities for the apprehension of federal fugitives, and to provide a mechanism for clarifying and resolving issues relating to the respective jurisdiction of these three agencies. Any requests from United States Attorneys involving the apprehension of fugitives should be consistent with the provisions of this policy. A working group has been established pursuant to Section H of the policy to develop procedures for implementing its provisions, and to recommend a resolution of any questions that may arise concerning its proper interpretation. The working group, which is chaired by the Associate Attorney General, is prepared to entertain general questions and suggestions from the United States Attorneys relating to the implementation of the policy. United States Attorney D. Michael Crites, Southern District of Ohio, will represent the Attorney General's Advisory Committee.

Specific questions relating to which agency should have jurisdiction in a particular fugitive matter should be resolved if possible in the field. If such local resolution proves impossible, the matter should be referred to Deputy Associate Attorney General Margaret Love, at FTS 633-3951.

(Executive Office for United States Attorneys)

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Department Policy On United States Attorney Personnel Standing For Election To Public Office

On November 29, 1988, Associate Attorney General Francis A. Keating II issued a memorandum to all United States Attorneys setting forth the Department's policy on permitting United States Attorneys and employees of United States Attorneys' Offices to stand for election to public office. Mr. Keating's memorandum reads as follows:

> It is my understanding that, in the past, employees of United States Attorneys' Offices have been allowed to participate as candidates in nonpartisan elections. The Department of Justice has permitted this activity with strong reservations. There has been concern that voters would perceive these candidates to have been endorsed by the Department, and that an employee would receive campaign contributions or other endorsements in circumstances that would give rise to a conflict of interest or appearance thereof.
>
> After receiving the advice of the Attorney General's Advisory Committee and reviewing the past history of this issue, I have determined that, as a matter of policy, no incumbent employee of a United States Attorney's Office, including the United States Attorney, will henceforth be permitted to stand for election to any public office. This prohibition extends to uncontested elections and to partisan elections that have been exempted from the Hatch Act.
>
> In addition, United States Attorneys and their Assistants shall refrain from giving public endorsements to a candidate in any election, whether or not the Hatch Act would otherwise prohibit such an endorsement. Support personnel who wish to endorse candidates in an election shall not, in so doing, identify themselves as associated with the United States Attorney's Office or the Department of Justice.

This policy will be incorporated in the United States Attorneys' Manual. If you have any questions or require further information, please contact Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, at FTS 633-4024.

(Executive Office for United States Attorneys)

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Department Policy On Firearms For United States Attorneys And Assistant United States Attorneys

On December 1, 1988, Department of Justice policy pertaining to the carrying of firearms by United States Attorneys and Assistant United States Attorneys was forwarded to you by Laurence S. McWhorter, Director, Executive Office for United States Attorneys. A copy of this Policy is attached at the Appendix of this Bulletin as Exhibit B.

Please be advised that all applications for Special Deputy United States Marshal should be forwarded to the Associate Attorney General through the Executive Office for United States Attorneys. Only those attorneys who have been appointed Special Deputy United States Marshals are authorized to carry a firearm on official duty. The carrying of firearms on official duty by attorneys that have not been deputized is strictly prohibited.

A state license to carry a firearm issued by another state does not authorize a United States Attorney or Assistant United States Attorney to carry a firearm in the District of Columbia or any other jurisdiction. Violation of state firearm requirements may be cause for disciplinary action. Employees traveling to Washington, D.C. should be particularly aware that the District of Columbia aggressively enforces these statutes.

Please refer to Volume 36, No. 11, of the United States Attorneys' Bulletin, dated November 15, 1988, which discusses the United States Marshals Service requirements as to the types of firearms to be carried by attorneys appointed as Special Deputy United States Marshals.

(Executive Office for United States Attorneys)

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Financial Litigation Attorney Network

Associate Director Katherine K. Deoudes, Financial Litigation Staff, Executive Office for United States Attorneys, has prepared a list of Assistant United States Attorneys handling financial litigation matters throughout the country, together with their telephone numbers and areas of expertise. These financial litigation experts are available to share their knowledge and expertise with you should you so desire. The list is attached as Exhibit C at the Appendix of this Bulletin.

(Executive Office for United States Attorneys)

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United States Attorneys' Manual

The revised United States Attorneys' Manual is presently being published by the Executive Office for United States Attorneys and will be issued as a four-volume set in late December. In addition, the Manual will be on JURIS for easy reference. The complete set consists of the following:

Volume I --	Title 1, General Title 2, Appeals Title 3, Executive Office for United States Attorneys
Volume II --	Title 4, Civil Division Title 5, Land and Natural Resources Division Title 6, Tax Division Title 7, Antitrust Division Title 8, Civil Rights Division
Volume III--	Title 9, Criminal Division
Volume IV --	General Index; U.S.C. Reference Table; C.F.R. Reference Table; Prior Approval Requirements Table

All requests for the Manual should be placed through your Administrative Officer. If you have any questions, please contact Judy Beeman, Editor, at FTS 673-6348.

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LEGISLATION

Anti-Drug Abuse Act of 1988

On November 18, 1988, the President signed the Anti-Drug Abuse Act of 1988. This Act gives federal law enforcement officials a new arsenal of anti-drug and anti-child pornography weapons. Specific provisions of this bill are:

- A federal death penalty for murder committed in furtherance of a drug offense, or for killing a law enforcement officer.

- Civil penalties of up to $10,000 for simple possession, to show all users that even casual use will not be tolerated.

- Enhanced penalties and new technical law enforcement provisions in the areas of money laundering, asset forfeiture, essential and precursor chemical diversion, international drug trafficking, and offenses involving juveniles. Most of these are effective immediately and will lead to significantly improved law enforcement in very short order.

- Enhanced capability to deal with public corruption, which often accompanies large-scale drug trafficking.

- Strengthened penalties against traffickers in anabolic steroids.

This bill also contains tough new provisions on child pornography and obscenity, which includes prohibitions on the buying and selling of children for use in pornographic enterprises, punishable by a minimum 20-year prison term.

Attached as Exhibit D is a Capsule Summary of Major Provisions of the Anti-Drug Abuse Act of 1988, which was prepared by the Office of Legislative Affairs of the Department of Justice. The Anti-Drug Abuse Act of 1988 is also available on JURIS in its entirety.

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Fair Housing Amendments Act Of 1988

On September 13, 1988, the President signed the Fair Housing Amendments Act of 1988 to become effective March 12, 1989. This Act provides for major changes in the Fair Housing Act of 1968 and will result in a considerable increase in the workload of the Department to meet its added responsibilities for enforcement of this new law.

Attached as Exhibit E at the Appendix of this Bulletin is a summary of the Act and the amendments. For further information, please contact Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, Department of Justice, at FTS 633-4713.

* * * * *

Judicial Branch Improvements Act Of 1988

On November 19, 1988, the President signed the Judicial Branch Improvements Act of 1988. This Act provides a means for resolving the question of Tucker Act jurisdiction in district courts at an early stage and in a manner that reaffirms the authority of the Federal Circuit to adjudicate basic Tucker Act questions. The legislation amends 28 U.S.C. §1292(d) by adding a new paragraph (4) to permit an interlocutory appeal to the Federal Circuit from district court orders granting or denying motions to transfer actions to the Claims Court. This confers exclusive appellate jurisdiction on the Federal Circuit over precisely that type of case which has been litigated so extensively, i.e., disguised "Big" Tucker Act claims for more than $10,000 wrongly maintained in district courts. Such an appeal will now be permitted before the case has been litigated on the merits in the district court.

For further information, please contact Gregory Sisk, Appellate Staff, Civil Division, FTS 633-4825.

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Legislation of interest to the Department of Justice, and a brief summary of the outcome of the legislation in the last session of the 100th Congress, is as follows:

Anti-Fraud Enforcement Act would permit Department of Justice attorneys investigating civil cases to gain access to material presented to a grand jury in related criminal prosecutions; clarify government auditors' right of access to a contractor's books and records; create an offense of obstructing a federal audit of a contractor or subcontractor; disallow legal fees incurred by a contractor in defending fraud cases resulting in a conviction or indictment; empower the court to assess costs of investigation and prosecution as part of the sentence; expand an injunction-against-fraud statute to cover procurement fraud; and lengthen a criminal statute of limitations in certain fraud cases. This legislation was submitted to the House and Senate on September 23, 1987. Related legislation that would disallow contractors' legal defense costs in certain situations was introduced in both Houses as separate bills (S. 2241 and H.R. 4360) and as amendments to the DOD authorization bill and the Major Fraud Act of 1988 (H.R. 3911). On August 10, 1988, the Senate Judiciary Committee adopted such an amendment offered by Senator Grassley to the Major Fraud Act and the Grassley provisions were included in H.R. 3911 as cleared for the President.

Antitrust Reform Package (S. 539; H.R. 1155; S.635) is a 5-part package providing for a formula for claim reduction in private antitrust cases, reform of treble damage award rules, clarification of jurisdiction of courts in hearing antitrust cases involving foreign entities, update of antitrust rules applicable to corporate interlocks, and codification of antitrust standards to be applied to mergers and acquisitions. These proposals were introduced as part of the original trade bills, S. 539 and H.R. 1155, as well as Title II of S. 635. S. 635 never got out of the Senate Judiciary Committee and some provisions of H.R. 1155 were incorporated in the trade bill, (H.R. 3) which was vetoed.

Bribes and Gratuities Act would recodify existing laws permitting the government to void contracts and grants tainted by bribery; extend the "gratuities clause" in DOD contracts to contracts awarded by civilian agencies and to actions designed to obtain favorable government action during contract performance. This legislation was submitted to the House and the Senate on September 23, 1987. No action was taken by either House.

Comparable Worth/Pay Equity (H.R. 387, S. 552) would authorize a study of the Federal pay system for wage discrimination using inherently flawed methodologies which foreordain that pay differentials which cannot be traced to measurable factors are to be labeled "discrimination." Although the House passed this measure, the Senate did not.

Contract Disputes Act and Federal Courts Improvement Act Amendments would resolve procedural and jurisdictional issues arising from the interaction of these two statutes, including eliminating the conflict in Federal court jurisdiction by providing that contract award lawsuits be heard exclusively in the United States Claims Court. This legislation was submitted to the House and Senate on September 23, 1987. No action was taken by either House.

Court Reform and Access to Justice Act (H.R. 4807, S. 1482) virtually eliminates federal diversity jurisdiction; clarifies jurisdiction in Tucker Act cases; revises federal rules; and modifies current law pertaining to arbitration, multi-party/multi-forum jurisdiction, the State Justice Institute, court interpreters and jury selection and service. A watered-down version of H.R. 4870 was cleared for the President. The Department supports the bill as enacted; however, diversity "reform" in the final version merely raised the jurisdictional amount of controversy from $10,000 to $50,000.

Federal Employees Liability and Tort Compensation Act (H.R. 4612; S. 2500) provides that suit against the United States under the Federal Tort Claims Act shall be the exclusive remedy for common law torts committed by federal government employees who are acting within the scope of their employment. This legislation does not apply to constitutional torts a la Bivens. H.R. 4612 was cleared for the President in the waning hours of the 100th Congress.

Hatch Act Repeal (H.R. 3400) would repeal substantial portions of the Hatch Act which for almost 50 years have barred certain partisan political activities by federal employees. This legislation died with the adjournment of the 100th Congress.

Indian Gaming Act (S. 555) would regulate gaming on Indian lands through a complex regulatory scheme involving tribal regulation, an independent federal commission, and compacts between states and tribes. This bill was signed on October 17, 1988.

Inspector General Act Amendments (S. 908) creates a statutory Inspector General for the Department of Justice and the Department of the Treasury. A compromise bill was signed on October 18, 1988.

National Environmental Crimes Enforcement Act (H.R. 4756, H.R. 3515) would provide clear statutory law enforcement authority to criminal investigators of the Environmental Protection Agency. H.R. 3515, a bill dealing with medical waste, was signed by the President on November 2, 1988.

Post Employment Restrictions (H.R. 5043) expands post-employment restrictions relating to the Executive Branch and applies such restrictions to the Legislative Branch for time. The President vetoed this bill based on strong policy objections.

Senior Executive Service for FBI and DEA (H.R. 4083). This Department of Justice initiative was signed by the President on May 30, 1988.

Undetectable Firearms Act (S. 2180, H.R. 4445) bans the production or importation of undetectable firearms and makes other law enforcement changes in federal firearms laws. H.R. 4445 was cleared for the President in a form which the Department supports.

Video Privacy Act (S. 2361, H.R. 4948) restricts public access to video rental records and library records, but could also seriously hamper FBI investigations. S. 2367, as cleared for the President, was a compromise acceptable to the bill's proponents and the Department.

Whistleblower Protection Act (S. 508) was intended to provide effective protection to Federal whistleblowers, but had provisions which distort the necessary balance between the need to protect whistleblowers and the Government's need to manage the work force. The President vetoed this bill.

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CASE NOTES

DISTRICT OF DELAWARE

On December 8, 1987, the United States District Court for the District of Delaware issued an opinion and order on the suppression motion of defendants, Lorgio D. Morales and Luis L. Viera, in a case arising from the traffic stop of the two defendants on Interstate 95 in Delaware.

Following the stop, the police officer asked for and received from the driver, Morales, written consent to search the rental car. Unbeknownst to the officer, the lessor of the vehicle was the passenger, Viera. Based on Morales's consent, the officer searched the car and discovered behind the rear seat, taped into spaces cut out in the foam padding of the seat back, two kilograms of cocaine. The two men were arrested and subsequently charged with conspiracy and possession with the intent to distribute cocaine in violation of 18 U.S.C. §2 (West 1969) and 21 U.S.C. §§841(a)(1), 846 (West 1981). Indictments were returned to the United States District Court for the District of Delaware.

The District Court ruled that the driver's consent was valid as to the driver and denied Morales's motion to suppress. However, the District Court ruled that the driver did not have power to waive the Fourth Amendment rights of the passenger and lessor, Viera, because the shared access and control of the vehicle, which the driver enjoyed, did not extend to the area behind the rear seat. On November 16, 1988, the United States Court of Appeals for the Third Circuit reversed the District Court's order as to defendant, Viera's, motion to suppress. Judge Hutchison, announcing the judgment of the Court, stated that a driver may consent to a search of all areas of a vehicle to which he has joint access and control, which includes any immediately apparent, readily accessible compartment, such as the enclosed and hidden area behind the rear seat where the cocaine was secreted. In a concurring opinion, Judge Seitz stated that the driver can be said to have access to or control over the entire vehicle notwithstanding superior property interest in the vehicle had by the lessor and that by allowing Morales to drive the vehicle, Viera relinquished control over all areas of the vehicle over which Morales had ready access, whether such access was exercised or not. Thus, Morales's third party consent to search was effective against Viera. Judge Sloviter dissented.

United States v. Morales, U.S. Court of Appeals for the Third Circuit, No. 87-3841.

Attorney: Kent A. Jordan, Assistant United States Attorney, District of Delaware (FTS 487-6277)

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CIVIL DIVISION

Federal Circuit Holds That A Patent Examiner May Not Be Compelled To Answer Deposition Questions Which Probe The Examiner's Technical Knowledge Of The Subject Matter Of A Patent

In this case, Piezo sought to take the deposition of a patent examiner in the course of defending against a patent infringement claim brought by Western Electric. Piezo's questions sought to ascertain whether, as a matter of "fact," the examiner had sufficient knowledge of the technology involved in Western Electric's patent to properly evaluate Western Electric's patent claims. The Commissioner of Patents and Trademarks instructed the examiner to refuse to answer the questions and was held in contempt. The Federal Circuit has now reversed. The court found that Piezo's questions invaded the examiner's decisionmaking processes in violation of the rule of United States v. Morgan, 313 U.S. §409 (1941), were an improper attempt to discredit a duly appointed patent examiner, and were irrelevant to any defense that Piezo might have had to Western Electric's patent infringement claim.

Western Electric Co. v. Piezo Technology, Inc., No. 88-1216 (Fed. Cir. Nov. 1, 1988). DJ # 27-8734

Attorneys: John F. Cordes, FTS 633-3380
Jacob M. Lewis, FTS 633-4259

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D.C. Circuit Dismisses Congressmen's Appeal In Challenge To Persian Gulf Deployment

This was a suit brought by several members of Congress challenging the Persian Gulf deployment on the ground that the President did not comply with the War Powers Resolution because U.S. Naval forces had been placed in a situation of imminent hostilities without the President filing a report with Congress as required by the Resolution.

The Court dismissed the appeal, holding: 1) that so far as the case involves current conditions in the Gulf, the case involves a nonjusticiable question, because a decision that hostilities are or are not imminent would require "an inquiry into the likely intentions of the Iranian and Iraqi governments," and "an inquiry of this sort is beyond the judicial competence," and 2) that so far as the case involves conditions in the Gulf at the time of the initial deployment, the case is moot in view of the current cease fire.

Lowrey v. Reagan, No. 87-2196 (D.C. Cir. Oct. 17, 1988). DJ # 61-51-6514

Attorneys: Douglas Letter, FTS 633-3602
Robert Zener, FTS 633-3542

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D.C. Circuit Affirms District Court Holding That HHS, Under Its New Prospective Payment System (PPS), Must Give Hospitals Additional Compensation For Services Rendered Under The New Payment System When The Payment Rate For These Services Was Initially Based Upon Regulations Subsequently Held Invalid

During the transition from the old payment system to the new Prospective Payment System (PPS), the Medicare statute tied a hospital's rate of payment to its average allowable cost of treating Medicare patients under the old, reasonable cost payment system. The PPS rate was initially calculated for hospitals on the basis of average allowable costs under regulations existing at that time. Subsequently, some of these regulations were overturned as inconsistent with the Medicare statute, and HHS was required to give hospitals additional compensation for cost years under the old payment system. This case concerned whether PPS rates must be retroactively adjusted and hospitals given additional payments for PPS years when rates were based on the allowable cost figures subsequently held to be legally incorrect. HHS regulations provided that, even though the rates may have been based upon regulations that were arbitrary and capricious, as long as the agency had acted in good faith, corrections are to apply prospectively only. The district court ruled against HHS, holding that only errors in fact, and not legal errors, are subject to "prospective only" correction. The court of appeals has now affirmed the district court on essentially the same grounds.

Georgetown University Hospital v. HHS, No. 88-5026 (D.C. Cir. Nov. 15, 1988). DJ # 137-16-1153

Attorneys: Anthony J. Steinmeyer, FTS 633-3388
Alfred R. Mollin, FTS 633-4116

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Third Circuit Upholds Federal Sentencing Guidelines As Constitutional

The Third Circuit has upheld the sentencing guidelines, reversing a district court decision which struck down the guidelines on due process grounds. The court upheld the defendant's conviction (over the dissent of one judge), rejecting the district court's conclusion that the sentencing guidelines violate substantive due process by circumscribing the discretion of the sentencing judge. The court then rejected the defendant's argument that Congress had unlawfully delegated legislative power to the Sentencing Commission and his separation of powers argument. However, the court did appear to accept the Sentencing Commission's argument that the authority to develop sentencing guidelines was properly delegated to the Judicial Branch. The separation of powers challenges to the guidelines are currently pending before the Supreme Court in United States v. Mistretta, which was argued on October 5.

United States v. Alan Frank, Nos. 88-3220, 88-3268 (3d Cir. Nov. 7, 1988). DJ # 145-12-7871.

Attorneys: Douglas Letter, FTS 633-3602
Gregory Sisk, FTS 633-4825

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Fifth Circuit Holds That Unnamed Class Members In A Civil Rights Case May Not Independently Appeal From The Entry Of A Consent Decree

In this case, two members of a class sought to appeal from the entry of a consent decree. In the underlying case, plaintiffs alleged that the Dallas Housing Authority and the Department of Housing and Urban Development and others engaged in racial discrimination in the provision and funding of low income housing in Dallas, Texas. After extensive pre-trial proceedings, a consent decree was entered by all the parties to the suit. Two class members filed an appeal from the entry of the decree, asserting that the class representative had afforded inadequate representation and that the decree was flawed in several respects. Relying on Guthrie v. Evans, 815 F.2d §626 (11th Cir. 1987), the Fifth Circuit held that unnamed class members lacked standing to pursue the appeal. The court held that such class members must move to intervene in the underlying case, holding that the denial of any such motion was independently appealable of right.

Walker v. City of Mesquite, No. 87-1123 (5th Cir. Oct. 31, 1988). DJ # 145-17-4075.

Attorneys: Michael Jay Singer, FTS 633-5432
Mark W. Pennak, FTS 633-4214

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Fifth Circuit Dismisses Physicians' Challenges to HHS's Implementation Of Medicare Part B Charge Limits On Mootness, Ripeness, And Standing Grounds

Under Part B of the Medicare program, physicians must make an annual election as to whether they wish to be "participating" or "nonparticipating" physicians. Part B subjects physicians to different charge limits depending on which of these options they choose. Because of last-minute changes by Congress in 1986 regarding the Part B charge limits, HHS was unable to provide physicians with complete information regarding their charge limits (which vary from physician to physician) by the deadline for the next annual participation election (January 1, 1987). Several medical associations and individual doctors sued HHS, asserting that HHS violated the Due Process Clause and the APA. The district court rejected the plaintiffs' claims on the merits.

The Fifth Circuit now has dismissed the plaintiffs' appeal on a variety of jurisdictional grounds. The Fifth Circuit held that: (1) the due process challenge is moot because HHS's delay in 1986 cannot be undone and HHS is not likely to repeat the delay in the future; (2) the challenge to administrative sanctions is not ripe; and (3) the plaintiffs lack standing to pursue their APA claim because they were not injured by the benchmark chosen by HHS.

AMA v. Bowen, No. 87-1755 (5th Cir. Oct. 14, 1988). DJ # 145-0-1849

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Eighth Circuit Unanimously Holds That Even When The Civil Service Reform Act Gives Them Less Than Complete Relief, Federal Employees Have No Bivens Remedy For Alleged Constitutional Violations

The Eighth Circuit originally affirmed a jury verdict against the defendant, a federal employee, who was accused in this Bivens action of denying promotions to the plaintiffs in violation of the Constitution's Due Process Clause. The defendant then sought review in the Supreme Court, and, after the decision in Schweiker v. Chilicky, 108 S.Ct. §2460 (1988), the Supreme Court vacated the appellate judgment and remanded for reconsideration. The Eighth Circuit has now ordered the judgment of the district court reversed, and has ordered the case dismissed with prejudice. Relying on Chilicky, and the D.C. Circuit's recent unanimous en banc decision in Spagnola v. Mathis, No. 84-5530 (D.C. Cir. Sept. 30, 1988), the court of appeals ruled that even where a claimant has only limited remedies under the Civil Service Reform Act, Bivens relief is, nonetheless, foreclosed.

Elise D. McIntosh, et al. v. Edward O. Turner, No. 85-2086 (8th Cir. Nov. 18, 1988). DJ # 35-42-101.

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Eighth Circuit, On Rehearing, Reverses Its Original Ruling And Reverses District Court's Dismissal Of Constitutional Challenge To Chapter 1 Education Program On Standing Grounds.

Plaintiffs challenged the Department of Education's decision to allow Missouri to use mobile classrooms to provide remedial services to students in religiously-affiliated private schools and challenged the Department's formula for allocating the cost between public and private schools. In its original decision the Eighth Circuit affirmed the district court's dismissal on the grounds that plaintiffs did not have federal taxpayer standing to assert a First Amendment challenge to the Secretary's implementation of the program. While plaintiffs' rehearing petition was pending, the Supreme Court issued its decision in Bowen v. Kendrick, 108 S.Ct. §2562 (1988), in which the Court addressed federal taxpayer standing. The original panel has now granted plaintiffs' rehearing and reversed its original decision. The court ruled that the federal taxpayer claims in Kendrick were indistinguishable from the claims asserted here.

Pulido v. Bennett, Nos. 86-1795 and 87-1228 (8th Cir. Oct. 18, 1988). DJ # 145-16-2812.

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Ninth Circuit Holds That Union-Sponsored Political, Charitable, And Educational Fund Was Entitled To First Amendment Rights, But That Secretary of Labor's Investigation Would Be Barred Only If Fund Could Make An Objective Prima Facie Showing That Disclosure Would Chill Members' Associational Rights, and Secretary Could Not Show A Sufficiently Compelling Need For The Disclosure

During a routine compliance audit, the Labor Department learned of a Political, Educational and Charitable Fund established by a local union's business manager and operated under suspicious circumstances. After further information was declined, the Department then sought enforcement of subpoenas in federal district court. The court, reasoning that the Fund was not an association under the First Amendment, held the subpoenas enforceable over the Fund's objection that disclosure of its membership would "chill" its members' freedom of association.

The Ninth Circuit has reversed and remanded. It held that the district court erroneously focused on the Fund's being "nothing but a checking account of the Union," rather than on the Fund's activities, making political donations etc., which clearly involved the exercise of First Amendment rights. It went on, however, to stress that this "does not mean that [the Fund] can escape lawful investigation." It ordered the case remanded so the Fund would have the opportunity to make the required prima facie showing that "enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on or 'chilling' of the members' associational rights."

Brock v. Local 375, No. 87-4084 (9th Cir. Oct. 28, 1988). DJ # 145-10-3476

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Ninth Circuit Holds Government Must Pay Interim Attorneys' Fees Under Freedom Of Information Act Notwithstanding Statute Limiting Payment From Judgment Fund To Final Judgments

After the district court ruled against the government on a preliminary question in a Freedom of Information Act suit, the plaintiff sought and was awarded interim attorneys' fees which the government was ordered to pay immediately. After obtaining a stay from the Ninth Circuit of the immediate payment requirement, we appealed, asserting that the Freedom of Information Act did not authorize interim fees and, in any event, federal statutes, 28 U.S.C. §2414 and 31 U.S.C. §1304, precluded payment of any award from the Judgment Fund until it was final and all appeals had been exhausted.

The Ninth Circuit has now affirmed the authority of district courts to order payment of interim attorneys' fees in FOIA cases. The court first rejected the argument that an interlocutory appeal was permitted under the collateral order doctrine because the interim award order required the government to make payment in direct violation of the Judgment Fund statutes. The court then exercised mandamus jurisdiction to review the matter as an important issue of first impression. The court found that the FOIA attorneys' fee provision, although including no language on interim fees, should be held to authorize such a remedy because it promotes the policy of the FOIA to encourage meritorious efforts by citizens to seek government documents. Next, the court dismissed the Judgment Fund statutes, which expressly provide that no award against the United States may be paid until final, by saying that the implied interim fees provision in the FOIA somehow superseded these statutes.

Seth Rosenfeld v. U.S. Department of Justice, No. 87-2975 (9th Cir. Oct. 12, 1988) DJ # 145-12-6019

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LAND AND NATURAL RESOURCES DIVISION

Fourth Circuit Rules Successful Party In Clean Water Act Suit Entitled to Attorneys' Fees Under The Equal Access To Justice Act (EAJA)

In our appeal from an award of attorneys' fees made under the Clean Water Act (CWA), we had argued that, once a wetlands determination is made by the Corps as in this case, any legal challenge to that determination must be made under the APA and

not the CWA. Therefore, if fees are recoverable, they come under EAJA and not the CWA. The court of appeals held, inter alia, that the Corps could be sued under the citizen suit provision of the CWA since "Congress cannot have intended to allow citizens to challenge erroneous wetland determinations when the EPA Administrator makes them but to prohibit such challenges when the Corps makes the determination* * *" (Slip Op. 6). This ignores that there is an avenue available to sue the Corps. Further, the court held that the Federal Rules of Civil Procedure 20 (joinder) "should be interpreted in conjunction" with 33 U.S.C. §1365(a), to allow the Corps to be joined as a party. This, of course, ignores that joinder is not available if jurisdiction over the party is lacking in the first instance.

National Wildlife Federation v. Hanson, 4th Cir. No. 87-3183 (October 14, 1988). DJ # 90-5-1-6-342

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Department of Interior Grazing Regulation Upheld Even Though Promulgation Violated APA's Notice-And-Comment Requirement

Smelser challenged a regulation which exempted from the base property requirement of the Taylor Grazing Act certain persons seeking grazing permits on acquired land. He alleged that the regulation was promulgated in violation of the APA's requirement of notice-and-comment and that the Secretary exceeded his statutory authority in promulgating the regulation. The court upheld the regulation. It found that any failure to comply with APA notice-and-comment was harmless error. The court noted that, during rulemaking, the Secretary received and considered an earlier protest filed by Smelser to certain lease issuances which fully set forth his position; that Smelser never indicated how he was prejudiced by any lack of notice; and that the regulation, in fact, merely maintained the status quo. Under such circumstances, the court found any defect in notice to be harmless. The court also rejected Smelser's contention that the Secretary had exceeded his statutory authority in promulgating this regulation. Because Congress had not spoken to the issue, the court deferred to the agency's interpretation of the statute, citing Chevron v. NRDC.

Smelser v. Hodel, 10th Cir. No. 87-1573 (October 21, 1988) DJ # 90-1-12-498

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TAX DIVISION

Government Prevails In First Appellate Test Of Commodity Loss Question

Yosha, et al. v. Commissioner (7th Cir.). On November 8, 1988, the Seventh Circuit, in an opinion written by Judge Posner, affirmed the Tax Court's decision in this case that losses purportedly incurred by the taxpayers in trading commodity option straddles and hedges on the London Metal Exchange were not deductible, because the commodity trades were wholly devoid of economic substance, i.e., they had no economic purpose or effect other than to generate tax-deductible losses. The instant cases were consolidated in the Tax Court with those of more than 1,400 other taxpayers who had claimed loss deductions aggregating in excess of $100 million as a result of their trading on the London Metal Exchange. To date, more than 150 taxpayers have taken appeals from the adverse decisions against them by the Tax Court pursuant to its opinion (reported as Glass v. Commissioner, 87 T.C. 1087 (1986), that the losses from the London trades were not deductible. The decision of the Seventh Circuit here is the first of the appeals to be decided. Appeals are pending in ten other circuits, and it is likely that additional appeals will be filed. Judge Posner's persuasive opinion in the instant case significantly enhances our prospects of prevailing in pending appeals in the other circuits.

* * * * *

Tenth Circuit Holds That Credit Unions Were Without Reasonable Cause In Their Refusal To Honor IRS Levies

United States v. Golden Plains Credit Union; United States v. Bell Credit Union, et al. (10th Cir.). In these cases the IRS levied on the credit union share accounts owned by delinquent taxpayers. The taxpayers had an unrestricted right to withdraw the funds from their share accounts at the time of the levies. Instead of complying with the levies, the credit unions applied the funds in the accounts to loan balances owed by the taxpayers. The Government then brought this action to enforce the levies under Section 6332(c) of the Internal Revenue Code. The

district court held that the Government was entitled to the funds in the share accounts, and that the credit unions were liable for a 50 percent penalty because their refusal to honor the levies was without reasonable cause. The credit unions appealed, contending that the district court misunderstood the nature of the state-created property interests in credit union share accounts. On October 21, 1988, the Tenth Circuit affirmed the district court's decision as to both the propriety of the levies and the imposition of the penalties. The decision is noteworthy because the court qualified its decision in United States v. Central Bank, 843 F.2d §§1300, 1305-1306 (1988), wherein it held that it had jurisdiction in a Section 6332(c) proceeding to consider other defenses that might be raised by a third party in a wrongful levy action (Section 7426).

* * * * *

Tenth Circuit Reverses Tax Court's Decision In Oil And Gas "Production Payment" Case

Freede v. Commissioner (10th Cir.). On November 1, 1988, the Tenth Circuit reversed the Tax Court's reviewed decision, and ruled in favor of the Commissioner in this oil and gas taxation case, which raised an issue of industry-wide importance. Taxpayers here held interests in natural gas wells, and sold the gas to a utility company under "take or pay" contracts. The Tax Court held that the utility's right to credit advance payments for gas not taken against gas taken in later years gave the utility an interest in future production that constituted a "production payment." The consequence of this holding was that amounts received by the taxpayers as advance payments were treated, under Section 636(a) of the Internal Revenue Code, as loans from the utility to them and, therefore, were not includible in their gross income. The Tenth Circuit agreed with our argument that the utility's interest was not a production payment. In order to be a production payment, the right of a purchaser to future production must be an economic interest in the mineral in place, and the appellate court held that the utility had no such economic interest here. It was merely a consumer, paying for gas at the wellhead, not an investor looking for profit from successful extraction.

* * * * *

APPENDIX

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
01-17-86	7.85%	07-03-87	6.64%
02-14-86	7.71%	08-05-87	6.98%
03-14-86	7.06%	09-02-87	7.22%
04-11-86	6.31%	10-01-87	7.88%
05-14-86	6.56%	10-23-87	6.90%
06-06-86	7.03%	11-20-87	6.93%
07-09-86	6.35%	12-18-87	7.22%
08-01-86	6.18%	01-15-88	7.14%
08-29-86	5.63%	02-12-88	6.59%
09-26-86	5.79%	03-11-88	6.71%
10-24-86	5.75%	04-08-88	7.01%
11-21-86	5.77%	05-06-88	7.20%
12-24-86	5.93%	06-03-88	7.59%
01-16-86	5.75%	07-01-88	7.54%
02-13-87	6.09%	07-29-88	7.95%
03-13-87	6.04%	08-26-88	8.32%
04-10-87	6.30%	09-23-88	8.04%
05-13-87	7.12%	10-21-88	8.15%
06-05-87	7.00%	11-18-88	8.55%

* * * * *

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* * * * *

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

Policy On Fugitive Apprehension In Federal Bureau Of Investigation and Drug Enforcement Administration Cases

This Fugitive Apprehension Policy applies to fugitives in Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) cases and to foreign fugitives. It supersedes all prior inter-agency memoranda of understanding on fugitive apprehension responsibility in FBI and DEA cases, including the July 23, 1979, agreement between the FBI and the United States Marshals Service (USMS) and the 1982 agreement between the FBI and DEA. The purpose of this policy is to ensure the timely apprehension of fugitives through inter-agency cooperation where helpful, but without unnecessary duplication of effort.

A. Arrest Warrants

1. The FBI and DEA shall have apprehension responsibility on all arrest warrants resulting from their own investigations.

2. Notwithstanding paragraph 1, the DEA may delegate apprehension and administrative responsibility (including initial NCIC entry) to the USMS whenever the subject of a DEA arrest warrant is not apprehended within seven days after issuance of the arrest warrant, or it may elect to retain this responsibility in individual cases for investigative purposes. The delegation becomes effective upon notification of USMS by DEA.

3. In cases of joint FBI-DEA investigations and multiple agency task force investigations, it shall be the decision of the lead agency whether to have the investigating agencies maintain apprehension responsibility themselves or delegate apprehension responsibility to the USMS.

B. Post-Arraignment

1. The FBI, in an FBI case, shall have apprehension responsibility whenever there is a bond default violation prior to adjudication of guilt.

2. The USMS, in a DEA case, shall have apprehension responsibility whenever there is a bond default violation prior to adjudication of guilt.

C. Post-Conviction/Other Than Escapes

1. The USMS shall have apprehension responsibility whenever after adjudication of guilt there is a Federal probation, parole, or bond default or mandatory release violation, except as set forth below.

2. The USMS will promptly notify the original investigating agency whenever there is such a violation.

D. Escapes

1. The USMS shall have apprehension responsibility whenever there is a violation of the Federal Escape and Rescue Statutes.

2. The USMS will promptly notify the original investigating agency whenever there is an escape.

E. Exceptions

1. Upon written notice to the USMS as provided in paragraph three below, the FBI will have exclusive apprehension responsibility in its own cases at any stage when a fugitive, or the organization of which he is a current member, is the subject of an existing FBI Foreign Counterintelligence, FBI Organized Crime,[1] or FBI Terrorism investigation.

2. Upon written notice to the USMS as provided in paragraph three below, the FBI or DEA may assume apprehension responsibility in any case where the FBI or DEA is seeking the fugitive on an arrest warrant based on charges filed by it for an additional offense beyond the one for which the subject is a fugitive.

3. In those situations where the FBI or DEA elect to assume apprehension responsibility, agency Headquarters shall immediately notify USMS Headquarters. The assumption of apprehension responsibility becomes effective seven-calendar days after receipt of notice by USMS Headquarters. During that seven-day period, the investigating agency and USMS shall fully coordinate their fugitive apprehension efforts. The USMS for good cause may request the investigating agency to consent to the continuation of USMS apprehension efforts for a limited or indefinite period of time. Should that consent be declined, the USMS may request the Associate Attorney General to approve a limited or indefinite continuation. Such a request will be made within the seven-day period. In making this decision, the Associate Attorney General will consider the relative interests of each agency and the need for swift apprehension of the fugitive. The Associate Attorney General shall make this decision within forty-eight hours of receiving a request. The fugitive investigation will continue to be coordinated by the agencies during the time the Associate Attorney General is considering the matter.

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[1] This term covers those organizations being investigated by the FBI as a "racketeering enterprise" pursuant to the Attorney General's Guidelines on Racketeering Enterprise Investigations and the criteria set forth in Section 92 of the FBI Manual of Investigative Operations.

4. In the event of an escape, it is particularly important that fugitive apprehension efforts be closely coordinated during the seven-day period following the giving of notice under paragraph three. The investigating agency shall assume sole apprehension responsibility at the conclusion of the prescribed period. However, the USMS and the agency shall be responsible for maintaining an orderly transition, which would include capitalizing on leads developed by the USMS during its initial investigation of escape.

5. The investigating agency shall return apprehension responsibility to the USMS if the reason for the exception is no longer applicable.[2]

F. Unlawful Flight Statute

1. The FBI shall have such jurisdiction in locating fugitives pursuant to the Unlawful Flight Statutes (Title 18, Sections 1073 and 1074), but, in exercising it, the FBI will not seek an Unlawful Flight warrant when the USMS is already seeking the fugitive as an escape, probation/parole, mandatory release, or bond default violator. Nor will the FBI seek an Unlawful Flight warrant against any fugitive already sought by the USMS pursuant to the Federal Escape and Rescue Statutes. The above provisions shall not preclude the USMS from providing available information to state and local law enforcement agencies about fugitives being sought by their jurisdictions. The initiation of formal fugitive investigations involving state and local fugitives will be done through the Unlawful Flight process set forth above, except for special apprehension programs (such as Fugitive Investigative Strike Teams and Warrant Apprehension Narcotics Teams) and other special situations approved by the Associate Attorney General.

2. The FBI will notify the USMS of any state or local requests for Unlawful Flight assistance in situations described above. The FBI will also notify local or state authorities that the USMS is already seeking that person. In these situations, the USMS will notify the appropriate local or state authorities when a fugitive has been apprehended, so that a local detainer can be placed.

3. If state or local authorities request the assistance of the USMS in locating or apprehending a fugitive and it is determined that the fugitive is the subject of an FBI or DEA warrant, the USMS shall refer the requesting agency to the FBI or DEA for assistance and notify the FBI or DEA of the request by the state or local authority.

G. Foreign Fugitives

1. The USMS shall have location and apprehension responsibility for a fugitive sought in the United States by a foreign government, except as provided below.

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[2] For example, if the FBI is seeking an escapee, because it has an arrest warrant for him, and the arrest warrant is later withdrawn because the case is dismissed, apprehension responsibility for the escape would be returned to the USMS.

2. The FBI shall have location and apprehension responsibility for such a foreign fugitive: (a) whenever the fugitive, or the organization of which he is a current member, is the subject of an existing FBI Foreign Counterintelligence, FBI Organized Crime, or FBI Terrorism investigation; (b) whenever the FBI is seeking the fugitive on an arrest warrant for a Federal offense; (c) whenever the fugitive is the subject of an FBI investigation which it is currently conducting at the request of the foreign government concerned; or (d) whenever a referral has been made exclusively to the FBI through one of its legal attaches.

3. The DEA shall have location and apprehension responsibility for such a foreign fugitive: (a) whenever the fugitive is the subject of a DEA investigation which it is currently conducting at the request of the foreign government concerned; or (b) whenever a referral has been made exclusively to the DEA through one of its country attaches.

4. INTERPOL-USNCB shall, upon receiving from a foreign government a request for the location or apprehension of such a fugitive, refer such a request to the USMS, FBI or DEA in accordance with the provisions of paragraphs one through three above. However, nothing herein precludes referral of such requests instead, where appropriate, to the U.S. Immigration and Naturalization Service for action under the immigration laws or to state and local law enforcement authorities in accordance with INTERPOL's internal procedures and practices.[3]

5. Upon receiving a request from a foreign government for the location or apprehension of a fugitive, the FBI, DEA, USMS or the Office of International Affairs, Criminal Division (OIA), shall notify INTERPOL-USNCB of this fact to determine the existence of any parallel request or investigation with respect to the fugitive.

6. Once a matter has been referred to the FBI, DEA, or USMS by INTERPOL-USNCB, the notice, coordination, and review procedures set forth in Part E shall govern if either of the other two agencies concludes it should have fugitive apprehension responsibility under the provisions of this policy.

H. Inter-Agency Coordination

1. In cases where the USMS is requested to provide apprehension assistance or to seek the apprehension of a fugitive sought by a Federal agency other than the FBI or DEA and it is determined by the USMS through an NCIC or other appropriate inquiry that the FBI or DEA have an existing warrant, the USMS will notify the requesting agency of the existing FBI or DEA warrant. If the requesting Federal agency continues to seek USMS assistance, the USMS will notify the FBI or DEA of the request for assistance by the other agency. The FBI or DEA

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[3] This policy is applicable to Department of Justice agencies only. If a Treasury Department agency received an exclusive referral, it would, of course, handle the matter pursuant to Treasury Department or agency policy.

will either defer to the USMS the fugitive apprehension responsibility in the particular case or assert the need to continue its apprehension responsibilities in regard to the fugitive. The USMS shall defer in those instances to the FBI or DEA, unless the requesting agency declines to accept the deferral. In such instances, the requesting agency, the USMS, the FBI or DEA shall confer at the headquarters level to resolve the issue. If a resolution is not reached between the involved agencies on the issue, it will be referred to the Associate Attorney General under the same provisions as set forth in Section E 3 above.

2. The Director of the FBI, the Administrator of DEA, and the Director of the USMS shall each designate a representative to a working group charged with developing procedures to develop implementing procedures for this policy. The Chief of Interpol (USNCB) may also designate a representative to attend any meetings concerned with implementation of part G of this policy.

3. Nothing in this policy prevents an individual investigating agency from delegating its designated apprehension responsibility in a particular case or category of cases to the USMS, or prevents the USMS in turn from delegating its designate apprehension responsibility to the investigating agency.

11 August 1988

Edwin Meese III
Attorney General

DEPARTMENT OF JUSTICE POLICY PERTAINING TO THE CARRYING OF FIREARMS BY UNITED STATES ATTORNEYS AND ASSISTANT UNITED STATES ATTORNEYS

BACKGROUND. United States Attorneys and Assistant United States Attorneys are not authorized by specific federal statute to carry firearms as a part of their official duties, and the carrying of a (concealed) firearm by an individual may violate the law of most states unless duly authorized by law. United States Marshals and Deputies are empowered to carry firearms. 18 U.S.C. §3053.

POLICY. The personal safety of United States Attorneys and Assistant United States Attorneys is a necessary requirement for them to efficiently perform their statutory responsibilities and for the efficient functioning of the Department of Justice. Unfortunately, in the performance of their official responsibilities, United States Attorneys and Assistant United States Attorneys have been and may be threatened or placed in danger. On occasion, the families of such officials may also be threatened and placed in danger. At the present time, when serious threats are received, the United States Marshals Service is asked to provide physical protection to the employee and his/her family. The responsibilities of the Marshals Service are many and its assets are limited. The tenor of the perceived threat may involve relocating the threatened individuals until the danger ends. Authorizing threatened individuals to carry firearms may be an alternative or supplement to the physical protective services of the United States Marshals Service.

It is the policy of the Department of Justice that no Department attorney should permit himself/herself to be in breach of any federal, state, county, local or municipal ordinance, regulation or statute that precludes the carrying of a firearm by individuals without proper authorization. Absent deputization, a United States Attorney or Assistant United States Attorney who is threatened in connection with his/her official duties is dependent upon state law as to whether or not he/she can receive a license or permit to carry a firearm. In Florida, United States Attorneys and their Assistants are designated by statute as "peace officers" and are thus empowered to carry firearms. In other states individuals who are not law enforcement officers may not be licensed. It should also be noted that state permits are not valid except in the issuing state and that Federal authority is required to lawfully carry a firearm from one state to another.

The Attorney General, Deputy Attorney General, and Associate Attorney General as delegated by the Attorney General, may in appropriate cases, direct the Director of the United States Marshals Service to deputize United States Attorneys and Assistant United States Attorneys on an individual basis as Special Deputy United States Marshals for the limited purpose of carrying firearms. Such deputization will enable them to possess and carry firearms without violating local, state and federal laws which may restrict the possession or carrying of firearms. This deputization expressly excludes law enforcement powers such as the power to arrest for violations of federal law and court-related duties of United States Marshals.

LIMITATIONS. Attorneys authorized to carry firearms as Special Deputy United States Marshals pursuant to this Order shall not carry such firearms on their persons while pursuing their official duties in courtrooms or in the United States Attorneys' offices. Each United States Attorney shall have a secure locked location within the United States Attorney's office to store his/her firearm and the firearms of any Assistant United States Attorney authorized to be carried pursuant to this Order. When not in the office, Attorneys authorized to carry firearms pursuant to this Order shall secure the firearm in a proper location, if not carried on their person.

ATTORNEY RESPONSIBILITY. Any attorney who is deputized as a Special Deputy United States Marshal and who carries a firearm pursuant to this Order shall at all times be in full compliance with the provisions and requirements set forth herein and as may be required by the Deputy Attorney General. Attorneys deputized as Special Deputy United States Marshals who carry firearms must furnish their own firearms and ammunition and shall be responsible for ensuring that their firearms are in safe working condition, and for obtaining and maintaining their firearms proficiency and safety training. When carrying a firearm, all attorneys are required to carry their Department of Justice credentials.

DEPARTMENT FIREARMS POLICY

Last Resort. Attorneys deputized as Special Deputy United States Marshals may use firearms as contemplated by this Order defensively only. Firearms may be discharged as a last resort to prevent the loss of life or serious bodily injury when there is imminent danger of such an occurrence.

Warning Shots. Warning shots are prohibited.

Shooting Incidents. Any firearm used by an attorney authorized to carry the firearm pursuant to this Order in his/her capacity as a Special Deputy United States Marshal that is involved in a shooting incident resulting in injury or death will be surrendered, upon request, to the appropriate law enforcement authority in the course of the investigation of the incident.

AUTHORIZATION

General Principles. The deputization of United States Attorneys and Assistant United States Attorneys will be determined on an individual basis. Authorization to deputize will normally not be granted unless at least one of the following conditions is determined to exist by the Deputy Attorney General or his designee:

- The attorney or members of his/her immediate family are in imminent danger, or the facts warrant a reasonable determination that the attorney or family is threatened with serious bodily harm or there is a history of danger associated with the occupancy of the attorney's position; or

- The attorney is required to perform a substantial amount of his/her official duties in geographical areas which pose physical danger to the attorney; or

- The attorney's duties require him/her to address types of criminal activity (e.g., organized crime, illegal drug distribution, etc.) that may generate a level of risk or physical danger to the attorney warranting the carrying of a firearm for self-protection; or

- A threat of physical harm has been communicated specifically or implicitly, and considering the totality of the circumstances, there is a reasonable possibility that the threat is real in the assessment of a federal law enforcement agency.

Deputization of an attorney as a Special Deputy United States Marshal may be revoked at any time by the Deputy Attorney General.

Initial Authorization Request. Before an attorney shall be authorized to be deputized as a Special Deputy United States Marshal, he/she shall make a written request to the United States Attorney, setting forth the following:

- The specific reasons for requesting deputization, including the names of any cases, investigations, persons and other factors relevant to the request;

- Whether the attorney has requested protection from the United States Marshals Service, and if so, whether the protection was provided or denied;

- The make, model, caliber, and serial number of the weapon the attorney seeks authorization to carry as a Special Deputy United States Marshal;

- The attorney's current firearms training and safety qualifications, including the date of his/her most recent firearms training, the agency providing such training, and whether such training meets or exceeds the standards established by the Marshals Service for Deputy United States Marshals; and

- Whether the attorney possesses a valid state, county or local firearms permit, the name of the entity issuing the permit, and the expiration date of the permit, if any.

The United States Attorney shall provide his/her recommendation with the attorney's request to the Deputy Attorney General through the Director of the Executive Office for United States Attorneys, together with an affidavit signed by the requesting attorney that he/she has completed firearms proficiency and safety training which meets or exceeds the standards established by the United States Marshals Service for Deputy United States Marshals within six months of the request for the type of firearm the attorney seeks to carry. The affidavit shall also contain a statement that the attorney has read and agrees to comply with all applicable Department policies, rules and regulations as determined by the Deputy Attorney General relating to the carrying of firearms.

Written authorization by the Deputy Attorney General, or his designee, which sets out any special limitations on the deputization and the carrying of firearms, and the expiration date of the authorization which shall conform to United States Marshals Service limitations and expiration dates, shall be communicated to the attorney via the United States Attorney, and a copy of the authorization shall be provided to the United States Marshals Service. Authorization to carry firearms shall be suspended during any period the attorney is provided with a Marshals Service protection detail.

Procedures for Requesting Extensions. If an attorney who has been deputized pursuant to this Order believes that circumstances warrant his/her continued deputization beyond the date, if any, deputization is to terminate as determined by the Deputy Attorney General or his designee, or if the attorney believes that additional circumstances warrant deputization, he/she may provide such information to the Deputy Attorney General, or his designee, in such manner as the Deputy Attorney General shall prescribe.

SECURING FIREARMS BROUGHT INTO DEPARTMENT OF JUSTICE OFFICES

Upon entering the official place of business of the attorney authorized to carry a firearm, said attorney shall promptly secure his/her approved firearm in a place designated by the United States Attorney. Firearms will be secured in a locked place that is not accessible to unauthorized personnel and secured firearms shall be unloaded. Firearms shall remain secured until the attorney leaves the official place of business.

REVOCATION OF AUTHORIZATION AND DISCIPLINARY SANCTIONS

The Deputy Attorney General may cause the Special Deputy United States Marshal status of an attorney who has been deputized pursuant to this order to be revoked, upon the recommendation of the United States Attorney or United States Marshals Service.

Special Deputy United States Marshal status of an attorney shall be subject to immediate review and revocation upon the happening of any of the following circumstances:

- Noncompliance with any part of this Order;

- Noncompliance with the procedures and directives the Deputy Attorney General issued to effect the provisions of this Order;

- The discharge of a firearm by a deputized attorney when the attorney is not training or practicing with the firearm in a safe and lawful manner;

- When injury or death results from the discharge of the firearm;

- When the attorney fails to adhere to recognized standards of safety for the handling of firearms.

Failure of the deputized attorney to adhere to any of the provisions of this Order or to the procedures and directives implementing this Order may result in the imposition of formal disciplinary action.

DISCHARGE OF FIREARMS. Any deputized attorney shall immediately report, in writing, to the United States Attorney, the circumstances of any discharge of a firearm carried by said attorney, whether accidental or intentional, not related to firearms training.

Any deputized attorney who loses or has his/her firearm stolen, shall notify the United States Attorney in writing.

Upon receipt of a written report regarding the discharge, loss or theft of a firearm, the United States Attorney shall forward such report to the Deputy Attorney General, or his designee, via the Director of the Executive Office for United States Attorneys. The Deputy Attorney General shall cause any alleged noncompliance with this Order, discharge of a firearm, loss or theft of a firearm, to be investigated as he deems appropriate.

The Director of the Executive Office for United States Attorneys shall provide to the Deputy Attorney General, or his designee, a quarterly report setting forth all deputized Assistant United States Attorneys and United States Attorneys, and such other information as directed by the Deputy Attorney General.

Dated this 17th day of February, 1988.

Arnold I. Burns
Deputy Attorney General

Decision Memorandum

I hereby approve the attached firearms policy for United States Attorneys and Assistant United States Attorneys and delegate authority to the Deputy Attorney General to implement the policy.

Edwin Meese III

Dated: 18 Feb 88

Edwin Meese III
Attorney General

I hereby disapprove the attached firearms policy for United States Attorneys and Assistant United States Attorneys.

Dated: _____

Edwin Meese III
Attorney General

EXHIBIT C

FINANCIAL LITIGATION ATTORNEY NETWORK

ASSISTANT U. S. ATTORNEY	DISTRICT	TELEPHONE	EXPERTISE
Sharon D. Simmons	Alabama, Northern	229-1785	Bankruptcy, Generally
Richard E. O'Neal	Alabama, Northern	229-1785	Bankruptcy, Generally Bankruptcy, Chapter 12 Small Business Administration Cases
James E. Mueller	Arizona	762-6511	Bankruptcy, Generally Criminal Fines Medical Care Recovery Act Cases Public Health Service Cases Small Business Administration Cases Other
Robert H. Plaxico	California, Southern	895-5662	Bankruptcy, Generally Student Loans
Lawrence B. Lee	Georgia, Southern	248-4422	Bankruptcy, Generally Bankruptcy, Chapter 12 Foreclosures U.S. Department of Agriculture Cases
Jane Bondurant	Kentucky, Western	352-5911	Bankruptcy, Chapter 12 Foreclosures
Ann M. D'Arpino	Massachusetts	223-9399	Criminal Fines Housing and Urban Development Cases Public Health Service Cases Veterans Administration Cases Department of Education Cases
Gary Maveal	Michigan, Eastern	(313) 237-4775	Forfeitures
Ross I. MacKenzie	Michigan, Eastern	(313) 237-4776	Bankruptcy, Chapter 12 Forfeitures
Karl Overman	Michigan, Eastern	(313) 237-4777	Bankruptcy, Generally Forfeitures Medical Care Recovery Act Cases Public Health Service Cases

FINANCIAL LITIGATION ATTORNEY NETWORK

ASSISTANT U. S. ATTORNEY	DISTRICT	TELEPHONE	EXPERTISE
William J. Kopp	Ohio, Northern	293-3937	Bankruptcy, Generally Foreclosures Housing and Urban Development Cases Medical Care Recovery Act Cases Public Health Service Cases Small Business Administration Cases Veterans Administration
Linda C. Burris	Oklahoma, Eastern	736-2543	Bankruptcy, Generally Bankruptcy, Chapter 12
Ralph F. Keen	Oklahoma, Eastern	736-2543	Foreclosures
Gordon A. D. Zubrod	Pennsylvania, Middle	590-4482	Forfeitures
Bruce Brandler	Pennsylvania, Middle	717-348-2800	Criminal Fines
Barbara L. Kosik	Pennsylvania, Middle	717-348-2800	Bankruptcy, Generally
Robert Joseph DeSousa	Pennsylvania, Middle	717-348-2800	Medical Care Recovery Act Cases
Michael P. Iannotti	Rhode Island	838-5477	Bankruptcy, Generally Criminal Fines Forfeitures Small Business Administration Cases
Henry D. Knight, Jr.	South Carolina	677-3425	Housing and Urban Development Cases Small Business Administration Cases
Richard F. Clippard	Tennessee, Middle	852-5151	Bankruptcy, Generally Bankruptcy, Chapter 12 Small Business Administration Cases
(Ms.) Jimmie Lynn Ramsaur	Tennessee, Middle	852-5151	Bankruptcy, Generally
Claude D. Brown	Texas, Northern	334-3324	Execution & Judicial Sales

FINANCIAL LITIGATION ATTORNEY NETWORK

ASSISTANT U. S. ATTORNEY	DISTRICT	TELEPHONE	EXPERTISE
Joseph B. Moore	Missouri, Eastern	262-3280	Criminal Fines Forfeitures Small Business Administration Cases
Wesley D. Wedemeyer	Missouri, Eastern	262-3280	Forfeitures Medical Care Recovery Act Cases Small Business Administration Cases
Edwin B. Brzezinski	Missouri, Eastern	262-3280	Forfeitures Housing and Urban Development Cases Public Heatlh Service Cases Small Business Administration Cases Lands
Susan C. Cassell	New Jersey	348-2945	Bankruptcy, Generally Foreclosures Forfeitures Medical Care Recovery Act Cases Public Health Service Cases
Jane B. Wolfe	New York, Western	437-4811	Bankruptcy, Generally Bankruptcy, Chapter 12
Steve West	North Carolina, Eastern	672-4530	Forfeitures
Rudolf A. Renfer, Jr.	North Carolina, Eastern	672-4530	Bankruptcy, Generally Bankruptcy, Chapter 12 Small Business Administration Cases
Marcia W. Johnson	Ohio, Northern	293-3932	Forfeitures Housing and Urban Development Cases Medical Care Recovery Act Cases Public Health Service Cases Fraud (False Claims Act and common law) Fraudulent Conveyance

EXHIBIT D

ANTI-DRUG ABUSE ACT OF 1988

Capsule Summary of Major Provisions

Title I -- Coordination of National Drug Policy

Subtitle A, the "National Narcotics Leadership Act of 1988"

-- Establishes the Office of National Drug Control Policy, headed by a director with two deputies -- one for demand reduction and the other for supply reduction. A bureau of state and local affairs, headed by an associate director for drug-control policy, would also be established.

Subtitle B, the "Justice Department Organized Crime and Drug Enforcement Enhancement Act"

-- Emphasizes the intent of Congress that DOJ make a priority of the use of civil statutes creating ancillary sanctions and remedies, such as forfeitures, civil penalties, fine collection, and injunctions.

Title II -- Treatment and Prevention Programs

Subtitle A, Programs relating to the Public Health Services Act

Chapter 1 -- Revision and Extension of the Alcohol and Drug Abuse and Mental Health Services Block Grants:

-- Authorizes $1.5 billion for Fiscal Year 1989; prohibits use of AIDs related funding for distribution of sterile needles or bleach;

Chapter 2 -- Programs of the Alcohol, Drug Abuse and Mental Health Administration:

-- Authorizes $95 million for Fiscal Year 1989;

Chapter 3 -- Reports and Studies:

-- Authorizes HHS study on relationship between mental illness and substance abuse;

Chapter 4 -- Miscellaneous:

-- Provides for use of military facilities for treatment purposes;

Subtitle B, Employee Assistance Programs (EAPs)

-- Provides for Department of Labor grant program for employers to provide EAPs;

Subtitle C, Indian Alcohol and Substance Abuse Prevention and Treatment

Subtitle D, Native Hawaiian Health Care

Subtitle E, Provisions Relating to Certain Drugs

-- Criminalize distribution or possession with intent to distribute of any anabolic steroid for use in humans, other than as directed by a physician, and provide for forfeiture related to steroid trafficking.

-- Bans butyl nitrite except in cases where its use is approved under the Federal Food, Drug and Cosmetics Act.

Subtitle F, Veterans Administration Programs

Subtitle G, Miscellaneous Health Amendments

Title III -- Drug Abuse Education and Prevention

Subtitle A, Drug and Alcohol Abuse Education Programs

Chapter 1 -- Alcohol Abuse Education Programs

Chapter 2 -- Prevention Education for Participants in the Women, Infants and Children Supplemental Food Program

Chapter 3 -- Drug Free Schools and Communities Act Amendments

Chapter 4 -- ACTION Volunteer Demonstration Project

Subtitle B, Drug Abuse Education and Prevention

Chapter 1 -- Drug Education and Prevention Relating to Youth Gangs

-- Authorizes $15 million for FY 1989, and such sums as necessary for 1990 and 1991, for HHS grants to non-profit private and public organizations to prevent and reduce the youth participation in gangs that engage in drug-related activities.

Chapter 2 -- Program for Runaway and Homeless Youth

-- Authorizes $15 million for fiscal 1989, and such sums as are necessary for 1990 and 1991, for HHS grants to public and non-profit private agencies to provide individual counseling to runaway youths and their families, and to develop community-education activities and support research on drug use by runaway and homeless youths.

Chapter 3 -- Community Programs for Youth

-- Authorizes $40 million in fiscal 1989 to create HHS block grants for state community-youth-activity programs. The bill authorizes $55 million for the programs in 1990 and $60 million in 1991.

Title IV -- International Narcotics Control Act of 1988

Subtitles A through J

-- Authorizes $101 million in fiscal 1989 for international narcotics-control programs and makes numerous changes in other drug-related laws administered by the Department of State.

-- Seeks to facilitate U.S. law enforcement access to foreign bank records by directing the Department of the Treasury to enter into international negotiation for access to cashflow information.

-- Authorizes international sharing of forfeited property pursuant to agreement rather than requiring international treaty.

Title V -- User Accountability

Subtitle A, States Congressional Opposition to Legalization of Drugs

Subtitle B, National Commission on Drug Free Schools

Subtitle C, Preventing Drug Abuse in Public Housing

-- Terminates the tenancy of any public-housing tenant who, while a resident of public housing, engages in criminal activity, including drug-related activity, on or near public-housing premises. Tenants would also lose their public housing if any member of their household, guest or

other person under their control also engaged in criminal activity, on or near public-housing premises.

Subtitle D, the "Drug Free Workplace Act of 1988"

-- Requires that any individual or contractor procuring property or services valued at $25,000 or more from any federal agency certify that he will provide a drug-free workplace by publishing a statement and giving it to all employees notifying them that the unlawful manufacture, distribution, possession or use of a controlled substance is prohibited in the workplace and specifying what actions will be taken against violators.

-- Establishes a similar drug-free workplace requirement for federal grant recipients.

-- Requires that, within 30 days of receiving notice from an employee of the violation of drug-free workplace requirements, a federal grantee or contractor take appropriate personnel action, up to and including termination, or require that the employee satisfactorily participate in a drug-abuse assistance or rehabilitation program.

Subtitle E, President's Media Commission on Alcohol and Drug Abuse Prevention

Subtitle F, Drug Free America Policy

-- Declares that it is the policy of the United States Government to create a drug-free America by 1995.

Subtitle G, Denial of Federal Benefits to Drug Traffickers and Possessors

-- Denies certain federal benefits to anyone convicted of distributing illegal drugs, similar provision for possession.

-- Allows the period of ineligibility to be suspended if the person completes a supervised drug-rehabilitation program, has otherwise been rehabilitated, or has made a good-faith effort to gain admission to a supervised rehabilitation program.

-- Defines "federal benefit" to mean any grant, contract, loan or professional or commercial license provided by a U.S. Government agency or by appropriated government funds. The term does not include any retirement, welfare, Social

Security, health disability, veteran's benefit, public housing, or other similar benefit for which payment or services are required for eligibility.

Title VI -- Anti-Drug Abuse Amendments Act of 1988

Subtitle A, Chemical Diversion and Trafficking Act of 1988

-- Requires those who manufacture, distribute, import or export certain chemicals, and who engage in regulated transactions involving specific chemicals that can be used in manufacturing a controlled substance, to keep a record for four years of any transaction involving a precursor chemical and for two years involving any essential chemical.

-- Authorizes the Attorney General to order the suspension of any importation or exportation of a listed chemical or to disqualify any regular customer or supplier on the ground that the chemical may be diverted to the clandestine manufacturer of a controlled substance.

-- Provides that any person who knowingly or intentionally imports or exports a listed chemical with intent to manufacture a controlled substance, or has reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance, will be fined or imprisoned not more than 10 years.

Subtitle B, The Asset Forfeiture Amendments Act of 1988

-- Requires creation of "Innocent Owner" federal regulations for expedited administrative pre-cost and claim bond procedures for seizures of conveyances for violations involving personal-use quantities of a controlled substance. The regulations shall provide for final administrative determination of the case within 21 days of seizure and require return of the property if the owner had no knowledge and did not consent to the property being used in violation of law; or if the owner had knowledge or reason to believe the property would be used in violation of the law, he did what reasonably could be expected to prevent the violation and acted in a normal and customary manner to ascertain how the property would be used.

-- Requires notice to persons whose property is seized at time of seizure.

-- Provides a post-cost and claim bond innocent owner defense if the owner of a conveyance establishes that use of the

conveyance to transport a controlled substance was committed without his knowledge, consent, or willful blindness.

-- Provides for joint regulations by the Attorney General, and the Secretaries of Treasury and Transportation, to permit "constructive seizure" of a commercial fishing vessel for violations involving the possession of personal-use quantities of drugs.

-- Specifies that traces or sweepings or other evidence of greater than personal use amounts shall not be considered personal use amounts for purposes of this section.

-- Authorizes equitable sharing of forfeited assets with state and local law enforcement agencies, and requires, effective October 1, 1989, that adoptive seizures not circumvent any requirement of state law that prohibits forfeiture or limits disposition or use of property forfeited.

Subtitle C, State and Local Narcotics Control and Assistance Improvements

-- Reauthorizes the Bureau of Justice Assistance and encourages the targeting of state and local resources on efforts to reduce drug abuse, through a program of state and local law enforcement grants.

-- Authorizes $350 million and $400 million for drug grants in FY 1989, 1990, and 1991, respectively.

-- Continues RISS rules, authorities, proceedings, including grant and contract programs.

-- Raises the PSOB benefit level from $50,000 to $100,000 and extends benefits to surviving family members.

Subtitle D, Authorizations of Appropriations for Department of Justice, Prisons and Related Law Enforcement Purposes

-- Authorizes (but does not appropriate funds for) the following additional spending over levels already approved for fiscal 1989:

  -- $12.3 million for salaries and expenses for the Immigration and Naturalization Service (INS), including $44 million to increase the number of INS inspectors by no fewer than 70.

  -- $10.7 million for salaries and expenses of the Bureau of Alcohol, Tobacco and Firearms (ATF) to be used to increase the number of Armed Career Criminal

Apprehension enforcement personnel by no fewer than 244 full-time equivalent positions.

-- $60 million for salaries and expenses of the Drug Enforcement Administration (DEA), including $4.9 million to increase DEA operations against criminals involved in youth gang-related organized crime. Also authorizes $10.8 million for the DEA Airwing Facility.

-- $30 million for salaries and expenses of FBI drug-enforcement personnel.

-- $21.5 million for salaries and expenses for the U.S. Marshals Service to be used for asset seizure and forfeiture activities and for protection of the federal judiciary and court facilities needed as a result of increased numbers of drug-related trials.

-- $21.5 million for support of U.S. prisoners.

-- $36 million for salaries and expenses for U.S. Attorneys of the Justice Department, and $16.4 million for salaries and expenses of the Border Patrol.

-- $200 million for the building and facilities account of the Federal Prison System.

-- Appropriations not to exceed $440 million for the salaries and expenses of the U.S. Customs Service incurred in non-commercial operations. At least $26 million is to be used to increase the number of Customs inspectors.

-- $200 million in fiscal year 1989 for acquisition, construction and improvement of the Coast Guard.

-- $820,000 authorized for INTERPOL-United States National Central Bureau.

Subtitle E, the Money Laundering Prosecution Improvements Act of 1988

-- Clarifies that 18 U.S.C. 1957 forfeiture reaches to attorneys fees insofar as 6th Amendment right to counsel is not infringed.

-- Requires that financial institutions may not issue or sell a bank check, cashier's check, traveler's check or money order in amounts of $3,000 or more to any individual unless that person has an account with the financial institution, verifies that fact through a signature card or furnishes

such forms of identification as the Treasury Department may require.

-- Authorizes the Treasury Secretary to require any domestic institution or institutions in a geographic area to maintain additional records.

-- Provides for a $10,000 civil penalty against any insured institution and director or employee who willfully or through gross negligence violates any regulation established by the Secretary.

-- Amends the Right to Financial Privacy Act (RFPA) to authorize transfer of bank records without notice to the Attorney General for criminal investigative purposes and provides an exception to the requirement of actual presentation of voluminous financial records to a Grand Jury.

Subtitle F, Declares the Sense of Congress Opposing Drug Legalization

Subtitle G, Interdiction of Supply of Firearms to Traffickers

-- Makes transfer of a firearm, knowing that it will be used to commit a crime of violence or drug trafficking, a 10-year felony.

-- Expands definition of drug trafficking crimes in which use of or carrying of firearms and armor-piercing ammunition trigger a mandatory-minimum penalty.

-- Automatically revokes probation for possessing a firearm.

-- Makes possession of a firearm or other dangerous weapon (or causing it to be present) in a federal facility, or an attempt to do so, a federal misdemeanor and provides felony sanctions where accompanied by an intent to commit an offense.

Subtitle H, Investigative Powers of the Postal Service Personnel and National Forest System Drug Control

-- Extends Postal Inspection Service law enforcement authorities with concurrence of the Attorney General.

-- Gives Postal Inspection Service administrative forfeiture authority.

-- Directs cooperation and authorizes cross-designation of Forest Service Personnel and limited Title 21 authority for offenses committed within the National Forest System.

Creates new authority for Forest Service drug investigations outside System Boundaries for offenses committed within System.

-- Establishes new Title 18 offense and criminal penalties for placing hazardous or injurious devices on federal lands with intent of violating the Controlled Substances Act. Provides criminal penalties for anyone who, with the intent to violate the controlled-substances act, uses a hazardous or injurious device, on federal lands or an Indian reservation.

-- Establishes a new Title 21 offense and penalties for pollution of federal land related to drug offenses.

Subtitle I, Authorization of Appropriations for Expenses of Department of Justice Personnel Serving Abroad

Subtitle J, Authorization of Drug Aftercare Program of the Administrative Office of the U.S. Courts and National Training Center for Prison Drug Rehabilitation Program Personnel for the National Institute of Corrections

-- Requires study of alternative judicial system for prosecuting federal narcotics offenses.

Subtitle K, Manufacturing Offenses

-- Establishes criminal penalties for endangering human life while illegally manufacturing a controlled substance.

Subtitle L, Serious Crack Possession Offenses

-- Provides increased penalties for serious offenses involving the possession of "crack."

Subtitle M, Miscellaneous Drug Enforcement

-- Authorizes payment of bonus of up to 25% of base pay for foreign language capabilities for DEA and FBI personnel.

Subtitle N, Sundry Criminal Provisions

-- Provides for life terms without parole for three-time drug felony offenders.

-- Establishes enhanced penalties for drug importation by aircraft and vessels.

-- Provides enhanced penalties for drug offenses involving children.

-- Eliminates exceptions to minimum mandatory penalties for second offenses involving five grams or less of marihuana.

-- Provides enhanced penalties for "possession with intent to distribute" within 1,000 feet of school yard, or within 100 feet of playgrounds, youth centers, swimming pools, or video arcades.

-- Provides mandatory minimum penalties for the purchase of controlled substances from minors.

-- Provides a 20-year maximum penalty for drug offenses committed within federal prisons.

-- Provides enhanced penalties for the use of certain weapons in connection with a crime of violence or a drug trafficking crime, and for certain other firearms offenses.

-- Makes federal firearms violations a wiretap predicate.

-- Provides for money laundering-related seizure and forfeitures, including forfeiture of substitute assets, subject to certain restrictions.

-- Authorizes undercover sting operations in money laundering cases and provides 20 year sentence for attempting to launder money represented by a law enforcement officer to be drug proceeds.

-- Authorizes Postal Service investigations of money laundering.

-- Provides new civil penalties of up to $10,000 for single possession of personal-use amounts of illegal drugs.

-- Provides 10 year mandatory minimum term for trafficking in certain quantities of methamphetamine, expands mandatory minimum prison terms to encompass drug attempts and conspiracies and makes other changes in laws related to controlled substances.

-- Increases to 15 years the maximum term for operating a locomotive while under the influence of drugs or alcohol.

-- Strengthens federal laws related to explosives.

-- Restarts Speedy Trial Act Time Period for defendants who abscond on the eve of trial.

-- Amends Federal Rules of Criminal Procedure to require notice of defense based upon public authority.

-- Provides for measuring marihuana based on number of plants, as well as weight.

-- Enhances penalties for CCE offenses.

-- Provides for protection of former federal officials and their families.

Title VII -- Death Penalty and Other Criminal and Law Enforcement Matters

Subtitle A, Death Penalty

-- Authorizes imposition of the death penalty;

  -- (a) for the killing of a law enforcement officer in connection with a drug felony or;

  -- (b) for the killing of any person in connection with a Continuing Criminal Enterprise.

Subtitle B, Minor and Technical Criminal Law Amendments

-- Provides for emergency pen register or trap and trace authority in cases of "immediate danger of death or serious bodily injury to any person; or conspiratorial activities characteristic of organized crime" for a 48 hour period.

-- Adds new RICO predicates for use of interstate commerce facilities in the commission of murder for hire and sexual exploitation of children.

-- Creates a new offense for the obstruction of a federal audit.

-- Permits the aggregation for prosecution purposes of certain schemes to defraud multiple victims.

-- Authorizes arrest warrants for foreign fugitives whose specific whereabouts are not known.

-- Authorizes federal prison industries (UNICOR) to borrow and invest funds.

Subtitle C, Sentencing Amendments

-- Provides for resentencing of prisoners convicted abroad.

-- Establishes a clear Standard of Review for sentences under the Sentencing Reform Act of 1984.

Subtitle D, Victim Compensation and Assistance

-- Reauthorizes and amends Victims of Crime Act (VOCA) to make the Director of the Department of Justice's Office for Victims of Crime a Presidential appointee.

Subtitle E, FAA Enforcement Assistance

-- Seeks to deter aircraft-related narcotics offenses.

Subtitle F, Juvenile Justice and Delinquency Prevention

-- Reauthorizes all titles of the Juvenile Justice and Delinquency Act for four additional years.

Subtitle G, Provisions Relating to Prisons, Probation, Parole, and Supervised Release

-- Requires the revocation of probation, parole and supervised release of anyone found in possession of a controlled substance.

-- Makes it a mandatory condition of probation for offenses occurring on or After January 1, 1989, in certain pilot districts, that a probationer refrain from any illegal use of drugs and submit to periodic drug tests at least once every 60 days.

-- Provides for congressional action on the report of the Special Committee on Habeas Corpus Review of Capital Sentences.

Subtitle H, Provisions Relating to the Courts

Subtitle I, Provisions Relating to the FBI

-- Authorizes FBI to investigate, upon request, felonious killings of state or local law enforcement officers.

Subtitle J, Deportation of Aliens who Commit Aggravated Felonies

-- Seeks to facilitate deportation of aliens who commit drug offenses.

Subtitle N, Child Pornography and Obscenity Enforcement Act of 1988

-- Criminalizes "buying and selling" of children.

-- Expands reach of federal obscenity laws.

-- Provides for limited forfeiture in obscenity cases.

-- Strengthens federal child pornography laws.

-- Seeks to curb "cable pornography," and "dial-a-porn" through criminal penalties for specified conduct.

Subtitle O, Miscellaneous

Section 7603, The Definition for Mail Fraud Chapter of Title 18, United States Code (McNally Fix)

-- Restores coverage under the mail and wire fraud statutes for schemes to defraud that deprive the pubic of the "intangible right to honest services."

Section 7604, National Commission on Measured Responses to Achieve a Drug Free America by 1995 Authorization Act.

Section 7608, United States Marshals Service Act would Make USMS Director and U.S. Marshals Presidential appointees.

Title VIII -- Federal Alcohol Administration

Title IX -- Miscellaneous

Subtitle A, Alcohol and Drug Traffic Safety

Subtitle B, Truck and Bus Safety and Regulatory Reform

Subtitle C, Comptroller General Study

Subtitle D, Insular Area Drug Abuse Amendments of 1988

Title X -- Supplemental Appropriations

FY 1989 Supplemental outlays for Justice components are:

DEA	$22,500,000
FBI	$12,000,000
Prisons	
S&E	.....
Buildings	$ 9,560,000
INS	$20,960,000
U.S. Attorneys	$34,320,000*
U.S. Marshals	$14,760,000

Prisoner Support	$ 9,840,000
OJP	$33,300,000
Criminal Division	$ 870,000
INTERPOL-USNCB	$ 696,000

* Plus a $30,000,000 transfer from the Assets Forfeiture Fund.

Fair Housing Act of 1968
and
Fair Housing Amendments Act of 1988

On September 13, 1988 the President signed the Fair Housing Amendments Act of 1988. This Act, which becomes effective on March 12, 1989, provides for major changes in the Fair Housing Act of 1968 and will result in a considerable increase in the workload of the Department to meet its added responsibilities for enforcement of this new law. Below is a more detailed discussion of the provisions and impact of this new law. Primary responsibility for enforcement of the Fair Housing Act of 1968 and the new Fair Housing Amendments Act of 1988 is with the Housing and Civil Enforcement Section of the Civil Rights Division. Any questions or need for further information should be directed to Mr. Paul F. Hancock, who is Chief of the Housing and Civil Enforcement Section, at FTS 633-4713. In the past U.S. Attorneys have assisted that Section in enforcement of the Fair Housing Act. It is evident that in view of the major increase in the caseload resulting from the Amendments that there will be an increased need for such assistance in the future.

I. Limitations of the Fair Housing Act of 1968

Under the Fair Housing Act of 1968, 42 U.S.C. 3601, et seq., the federal government's ability to enforce the provisions of the law has always had serious limitations. The Department of Justice's authority to initiate cases in federal court has been limited to instances in which it is determined that defendants are engaged in a "pattern and practice" of discrimination on the basis of race, color, religion, national origin or sex, or are denying rights protected by the Act to a group of persons where such denial raises "an issue of general public importance." 42 U.S.C. §3613.[1] This limitation means that the Department has not been able to initiate cases where there is only evidence of a single incident of discrimination or discrimination involving one person. Moreover, while under the Fair Housing Act of 1968 an individual has been able to complain to the Department of Housing and Urban Development (HUD) and HUD is authorized to investigate and attempt to conciliate such disputes, neither HUD nor Justice has had any authority to take enforcement action in such cases.

A second serious limitation under this law has been the inability of this Department to seek money damages in our

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[1] To prove a "pattern or practice" of discrimination, the courts have held that while we need not show that a defendant discriminates 100% of the time, we do have to prove that the discrimination is not an "isolated, accidental, or peculiar departure from an otherwise nondiscriminatory norm."

"pattern and practice" cases. Not long after enforcement of the 1968 Act began, several courts interpreted the Act as not authorizing such a remedy in cases brought by the Attorney General. Consequently, the Department has been limited to seeking only injunctive relief in these cases. The practical effect of this limitation has been that a very high proportion of our cases settle by consent decree, many filed simultaneously with the complaint in the case, primarily because it has made very little sense for defendants to subject themselves to the adverse publicity and expense of litigation when the severity and burden of the relief we seek is relatively moderate.

Despite the limited enforcement authority provided by the 1968 Act, vigorous enforcement of the government's responsibilities under the Act has been a consistent goal of the Civil Rights Division. From 1969-79 enforcement of the Act was the responsibility of a Housing Section especially created within the Division for such enforcement. In 1979 the Housing Section was consolidated with the Education Section of the Division into what was known as the General Litigation Section. As part of this reorganization responsibility for bringing "routine" Title VIII suits was delegated to the U.S. Attorneys' offices. In November, 1983, another reorganization was implemented which resulted in the creation of the Housing and Civil Enforcement Section. Enforcement of the Fair Housing Act was and is the chief responsibility of this Section.[2] The Section presently has an authorized strength of eighteen attorneys and five paralegal specialists.

II. Impact of the Fair Housing Amendments Act of 1988

The passage of the Fair Housing Amendments Act of 1988 (hereinafter referred to as Amendments) provides major increased enforcement authority for the federal government in its continuing efforts to combat housing discrimination. Indeed, it addresses the two major limitations of the 1968 Fair Housing Act discussed above. The following summarizes the major provisions of the Amendments:

1. For the first time HUD will have enforcement authority over instances of individual complaints of discrimination. An Administrative Law Judge apparatus at HUD is created by the Amendments which gives the ALJs authority to impose

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[2] In this respect the Section's responsibilities are very similar to those of the old Housing Section. The Section also has enforcement responsibilities for enforcement of the Equal Credit Opportunity Act and Title II of the Civil Rights Act of 1964 (public accommodations). Responsibility for education cases was placed in another section as part of this reorganization.

damages and civil penalties against defendants found to have discriminated against individuals.

2. The new enforcement authority over individual complaints of discrimination extends to this Department in a major way. After investigation of a complaint and a determination of "reasonable cause" is made by HUD in such cases, either the complaining party (an aggrieved party or HUD) or the defendant may elect to have the case heard in federal court rather than before an ALJ. When such an election is made, this Department must initiate the case within thirty days of the election; there appears to be little, if any, discretion on our part in such circumstances.

3. The Amendments authorize this Department to recover monetary damages for aggrieved persons and civil penalties in both our pattern or practice suits, as well as any suits on behalf of individuals which come to us as a result of the election process discussed above. This addresses one of the major shortcomings in the 1968 Act, as noted above. It will also most certainly result in a major increase in the litigation activity in our suits. With potentially large sums of money involved, fewer defendants will settle and the number of cases that go to trial or require major discovery before settlement will increase substantially. Moreover, defendants will have a right to trials by jury in such suits and for the first time this Division will be litigating before juries in cases of this kind.

4. The Amendments add to the existing categories of discrimination prohibited by the Act those of handicap and familial status. Consequently, both HUD and this Department can be expected to receive a major increase in complaints alleging discrimination on these new bases.[3] Moreover, both agencies can also be expected to experience a significant increase in housing discrimination complaints in categories already covered by the law (i.e. race, color, national origin, religion and sex) because for the first time the federal government will have the ability to obtain damages for individuals through enforcement of the law. Publicity surrounding this new Act is also likely to cause an increase

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[3] Recent newspaper articles in more than one publication have indicated the major impact that a ban on discrimination on the basis of familial status will have on the rental apartment market; there are estimates that as many as a third of existing apartment complexes in some major metropolitan areas have limitations on renters with children. In addition, organizations designed to assist the handicapped are particularly well-organized and are likely to do a thorough job of disseminating information concerning the new law.

in the number of complaints submitted to the federal government.

5. Other provisions of the Amendments pertaining to actions that will be initiated at HUD will also result in an increase in this Division's workload. First, if HUD desires to seek preliminary relief during the administrative process in order to preserve the status quo, such actions shall be sought in federal court and will be assigned to our Department for prosecution upon HUD's request (again, apparently, without any discration on our part). Second, the Amendments require HUD to transmit information to this Department whenever there is reason to believe that an administrative complaint reveals a potential pattern and practice violation, and upon referral from HUD authorize this Department to initiate civil actions to enforce conciliation agreements. While this is not a departure from previous procedures and responsibilities, explicit requirement and authorization of such activities in the amended law is likely to result in increased referrals of this kind from HUD. Third, the Amendments require HUD to refer any matter involving the legality of any state or local zoning or other land use law or ordinance to the Department of Justice for appropriate action. Such matters are among the most complex that we face and require a significant resource allocation.

The new Act will substantially increase the workload of the Housing and Civil Enforcement Section. First, with respect to the pattern and practice cases that the Department already has authority to initiate, we expect (1) a substantial increase in the number of active trials and active litigation as a result of our ability to obtain actual damages and civil penalties, and (2) a very substantial increase in the number of complaints we will receive both in the newly covered areas of handicap and familial status as well as in categories already covered by the law as a result of the potential of complaining parties being able to obtain damages through the federal government's enforcement of the law.[4] Second, there will be a major increase in the number

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[4] As noted above HUD has substantial new enforcement responsibilities under the Act. They have made a number of estimates and projections based on their past experience and the experience of state and local agencies which presently enforce laws prohibiting discrimination on the basis of handicap and familial status. They believe, if anything, that these projections are conservative. In the second half of FY 1989 they are expecting an 85% increase in the number of complaints received as a result of the Act, 65% as a result of complaints in the area of familial status and handicap and 20% as a result of an increase in complaints in already-covered categories.

of cases that we will be required to file pursuant to elections made for federal court in cases involving instances of individual discrimination. HUD estimates that in the second half of FY 1989 alone, 25% of the 502 cases which they project not to be settled will elect the litigation route,[5] which would mean 125 new cases for this Department in only half a year. When you compare that with the annual number of cases presently brought by our Housing and Civil Enforcement Section (approximately 20 pattern and practice suits), the tremendous impact of the Amendments on Department's enforcement responsibility becomes particularly stark.[6]

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[5] This would not appear to be an inflated figure inasmuch as there is considerable potential for more than 25% of the HUD cases to go the federal court litigation route, especially from the perspective of election by defendants.

[6] Even if we assume that the individual cases that come to us from HUD are likely take less time to develop than the pattern and practice cases because HUD presumably will have already completed most of the investigation necessary, this is a daunting figure.