



U.S. Department of Justice
 Executive Office for United States Attorneys

United States Attorneys' Bulletin



**EXECUTIVE
 OFFICE FOR
 UNITED
 STATES
 ATTORNEYS**

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THIRTY-FIFTH YEAR

MARCH 15, 1988

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136, Universal Building North, 1875 Connecticut Avenue, N.W., Washington, D. C. 20009.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

John Braud and Marcia Harris, (Ohio, Southern District), by Thomas M. Hillin, Counsel, Defense Logistics Agency, Department of Defense, Columbus, Ohio, for their assistance in recovering over \$70,000 worth of government property.

Daniel E. Bensing, (District of Columbia) by Vincent L. Crivella, Regional Counsel, General Services Administration, National Capital Region, for his skillful drafting of a complaint to remove a hold-over tenant.

Eddie Booth, (Georgia, Southern District), by William M. Thigpen, District Counsel, Veterans Administration, Atlanta, Georgia, for obtaining a favorable verdict in two civil cases.

Joseph S. Cage, Jr., United States Attorney, (Louisiana, Western District), by Col. Robert B. Mayhew, Base Dental Surgeon, 2nd Strategic Hospital (SAC), Barksdale Air Force Base, Louisiana, for his presentation to the dental staff at the Barksdale Air Force Base concerning a number of dental cases.

Patricia D. Carter, (District of Columbia), by Calvin Ninomiya, Chief Counsel, Bureau of the Public Debt, Department of the Treasury, for her excellent representation and satisfactory settlement of a civil case.

Richard A. Cook, (Indiana, Northern District), by Clويد L. Shuler, Deputy Commissioner/Operations, Indiana Department of Correction, Indianapolis, Indiana, for the successful prosecution of money order fraud cases at the Indiana State Prison.

Marlene Dayne, (Michigan, Eastern District), by A. James LaJoye, Sheriff, Shiawassee County, Corunna, Michigan, for her successful prosecution of a drug distribution case.

Mark Dubester, (District of Columbia), by Joseph E. DiGenova, United States Attorney, District of Columbia, for his outstanding performance as prosecuting attorney in a tax fraud case.

Mikal Frey, (Texas, Southern District), by Lee P. Brown, Chief of Police, Houston Police Department, Houston, Texas, for her strong leadership on behalf of the U.S. Drug Task Force in seizing fortified crack houses in the City of Houston.

Cleveland Gambill, (Kentucky, Western District), by William S. Sessions, Director, Federal Bureau of Investigation, for the resolution of allegations against a special agent which resulted in dismissal of a case and a favorable judicial opinion beneficial to all federal officials.

Ralph Gants, (Massachusetts), by Richard V. Wiebusch, United States Attorney, District of New Hampshire, for outstanding performance in prosecuting a criminal case of major importance to the law enforcement community.

Barry Goldman, (Florida, Southern District) by William S. Sessions, Director, Federal Bureau of Investigation, for his successful prosecution of three principals in a white collar crime case.

Linda A. Halpern, (District of Columbia), by John J. Kelleher, Chief Counsel, U.S. Secret Service, Department of the Treasury, for her expert representation of the Secret Service in a civil action.

Guy W. Harrison, (Florida, Southern District) by John L. Bedrick, Jr., Southeast Regional Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, for his excellent representation in a civil case in St. Petersburg.

Charles F. Hyder, (Arizona), by E. Derle Rudd, Regional Inspector, Internal Revenue Service, Dallas, Texas, for assisting in the prosecution of an individual who represented a threat to IRS employees.

Cedric Joubert, (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, Federal Bureau of Investigation, Houston, Texas, for his success in prosecuting several defendants in a criminal case involving shipment of stolen motor vehicles to the country of Kuwait.

Michael Johns, (Arizona) by Jim Burnett, Chairman, National Transportation Safety Board, Washington, D.C., for providing legal support and assistance to the Board in obtaining a hearing in a railroad case.

Karen L. Kothe, (Arizona), by Herbert H. Hawkins, Jr., Special Agent in Charge, Federal Bureau of Investigation, Phoenix, Arizona, for her expert handling of a difficult bank fraud and embezzlement case.

Marian McGuire and Carol Lam, (California, Southern District), by Drew C. Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, for their victory in an extradition case.

John J. McKenna, (Texas, Southern District), by Phillip J. Chopinski, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Houston, Texas, for his success in the conviction of a felon for possession of a firearm.

Patrick M. McLaughlin, United States Attorney, and Gary Arbezniak, (Ohio, Northern District), by Arnold J. Schneider, Regional Inspector General for Investigations, Department of Education, Chicago, Illinois, for conducting an informative seminar on Sentencing Guidelines.

Roslyn Moore-Silver and Thomas Connelly, by J. Brian Hylan, Inspector General, Department of Labor, for their valuable assistance in various fraud investigations resulting in numerous indictments, successful prosecutions, and monetary recoveries in 1987.

Jeanne Mullenhoff, (Florida, Southern District), by Susan Kantor Bank, Associate General Counsel, Federal Emergency Management Agency, Washington, D. C. for her defense of a flood insurance case.

Janet Parker and Michael Hlucklanouk, (Michigan, Eastern District), by Christine M. Dowhan, District Counsel, U.S. Army Corps of Engineers, Detroit, Michigan, for their expert handling of a case involving violation of the River and Harbor Act and the Clean Water Act.

George J. Terwilliger, III, United States Attorney, (Vermont), by Stanley E. McKinley, Regional Commissioner, Immigration and Naturalization Service, Burlington, Vermont, for the successful prosecution of a case involving illegal transportation of explosive materials.

Nicholas Theodorou, (Massachusetts), by Sharla Cerra, Attorney, Claims Division, U.S. Postal Service, for excellent representation in a civil case.

Richard E. Welch and Peter E. Gelhaar, (Massachusetts), by Robert P. Pontzer, Acting Regional Administrator, National Highway Traffic Safety Administration, Cambridge, Massachusetts, for their valuable assistance in the defense of a complicated personnel case involving allegations of whistleblowing, civil rights, and discrimination.

James D. Whitney, (Arizona), by Paul E. Wilson, Regional Counsel, U.S. Customs Service, Department of the Treasury, for his representation on behalf of the Customs Service in a drug interdiction case.

PERSONNEL

Effective February 16, 1988, Robert H. Edmunds, Jr. was Presidentially appointed United States Attorney for the Middle District of North Carolina.

Effective February 22, 1988, Tony Michael Graham was Presidentially appointed United States Attorney for the Northern District of Oklahoma.

Effective February 22, 1988, Daniel F. Lopez-Romo was Presidentially reappointed United States Attorney for the District of Puerto Rico.

Effective February 22, 1988, James Eldon Wilson was Presidentially appointed United States Attorney for the Middle District of Alabama.

Effective February 26, 1988, Charles A. Banks was Presidentially appointed United States Attorney for the Eastern District of Arkansas.

Effective February 26, 1988, Edgar Wm. Ennis, Jr. was Presidentially appointed United States Attorney for the Middle District of Georgia.

Effective February 26, 1988, Patrick J. Fiedler was Presidentially appointed United States Attorney for the Western District of Wisconsin.

Effective February 26, 1988, John E. Fryatt was Presidentially appointed United States Attorney for the Eastern District of Wisconsin.

Effective March 11, 1988, Margaret P. Currin is the interim United States Attorney for the Eastern District of North Carolina.

Effective March 14, 1988, Jay B. Stephens is the interim United States Attorney for the District of Columbia.

Effective March 14, 1988, Michael J. Norton is the interim United States Attorney for the District of Colorado.

(Executive Office)

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POINTS TO REMEMBERPRESIDENT REAGAN COMMENDS UNITED STATES ATTORNEYS

During the recent United States Attorneys Conference held in San Diego, California, Attorney General Edwin Meese III read the following letter from President Reagan commending the United States Attorneys for their law enforcement efforts and specifically for their success in "Operation Deadbeat."

THE WHITE HOUSE
Washington

February 23, 1988

I am pleased to greet everyone attending the annual conference of United States Attorneys, and to congratulate and thank you for the work you perform in behalf of the American people. Your efforts are in the finest tradition of law enforcement, and you can take pride in your achievements.

Those efforts are many and wide-ranging. You serve the public trust by taking action against every form of violation of Federal law, from illegal drugs to pornography to white-collar crime, and your actions have a palpable impact on daily life in our communities. Just one example is "Operation Deadbeat," in which you've prosecuted, and seized the assets of, debtors who refuse to meet their financial obligations to the Federal government. Your effective courses of legal action, after all other attempts failed, have demonstrated the United States Government's determination, have recovered large sums, and have undoubtedly motivated other debtors to pay up. And, as you know, legislation incorporating your recommendations in this area has been introduced in Congress.

Again, congratulations on your progress on so many matters of surpassing importance to the American people. You have my best wishes for a productive conference and for the future. God bless you.

/s/ Ronald Reagan

(Executive Office)

SENTENCING GUIDELINES SUBCOMMITTEE

On February 22, 1988 Robert G. Ulrich, Chairman of the Attorney General's Advisory Committee of United States Attorneys announced the formation of a new Sentencing Guidelines Subcommittee to be chaired by Joe B. Brown, Middle District of Tennessee. Other members of the Committee are as follows:

Robert L. Barr, Jr., Northern District of Georgia

Benjamin L. Burgess, Jr., District of Kansas

Deborah J. Daniels, Southern District of Indiana

Robert H. Edmunds, Jr., Middle District of North Carolina

Henry E. Hudson, Eastern District of Virginia

William A. Maddox, District of Nevada

J. William Roberts, Central District of Illinois

Charles H. Turner, District of Oregon

Breckinridge L. Willcox, District of Maryland

(Executive Office)

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UNITED STATES ATTORNEYS HONORED

Attorney General Edwin Meese III and Deputy Attorney General Arnold I. Burns honored the following United States Attorneys during the recent United States Attorneys Conference, presenting each with a plaque and newly designed United States Attorney flag.

Robert G. Ulrich, Western District of Missouri, for exemplary leadership and dedicated service to the Department of Justice and the United States Attorneys.

J. Alan Johnson, Western District of Pennsylvania, for dedicated service to the Department of Justice in support and defense of the budget for United States Attorneys.

Rudolph W. Giuliani, Southern District of New York, for outstanding accomplishments against organized crime.

Stephen M. McNamee, District of Arizona, for dedicated leadership toward improving the management capabilities of the Offices of the United States Attorneys.

Daniel A. Bent, District of Hawaii, for innovative leadership and support for the debt collection initiatives of the United States.

George L. Phillips, Southern District of Mississippi, for dedicated leadership in the law enforcement cooperation program of the Department of Justice.

Peter K. Nunez, Southern District of California, for dedicated efforts on behalf of the Department of Justice and United States Attorneys against organized drug trafficking.

A clock was presented to the staff of the United States Attorney's Office, Southern District of California, in recognition of their hospitality, resourcefulness, and initiative in hosting the 1988 National Conference of United States Attorneys.

(Executive Office)

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ASSET FORFEITURE MANUALS ON JURIS

The following asset forfeiture manuals are now available on JURIS:

1. "Asset Forfeiture: Law, Practice, and Policy," published by the Asset Forfeiture Office, Criminal Division.
2. "Drug Agents' Guide to Forfeiture of Assets," published by the Drug Enforcement Administration.
3. "The Forfeiture and Property Management Program," published by the U.S. Postal Service.

The manuals are contained in a new file called "FORFEIT" which has been created within the JURIS' Workproduct ("WRKPRDT") files. This file can be searched like all other JURIS files using any words or combinations of words as your search terms. You will find case and statutory citations and analysis, forms, procedures, and policy. The FBI's manual entitled "Forfeiture and Abandoned Property" will be added in the near future. Questions regarding this JURIS file should be referred to Candace Olds, FTS 633-5661. More general questions about JURIS or to arrange for training should be directed to the User Assistance Office, FTS 633-4537.

(Justice Management Division)

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CAREER OPPORTUNITY

The Organized Crime and Racketeering Section of the Criminal Division, Department of Justice, Washington, D. C. is seeking a Deputy Chief at the ES-1 through ES-6 level to supervise the conduct of investigations and litigation carried on by the lawyers and support staff of the Organized Crime Strike Forces in Boston, Philadelphia, and Washington, D.C. The Deputy Chief directly supervises prosecutions conducted by Strike Force attorneys and coordinates the prosecution of criminal cases involving joint U.S. Attorney and Strike Force cases. Inquiries should be directed to Paul Mathwin, Executive Personnel Unit, Room 1103, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, FTS 633-4006, re: Job Announcement # 88-SES-6.

(Criminal Division)

Federal Civil Penalties

On February 29, 1988, the Senate Governmental Affairs Subcommittee on Oversight of Government Management held a hearing on S. 1014, the Federal Civil Penalties Inflation Adjustment Act. Deputy Assistant Attorney General Stuart E. Schiffer of the Civil Division testified to explain our significant reservations about the need for the legislation and the burdens and confusion that could result from its enactment. The Subcommittee expects to obtain additional information about existing penalties from the President's Counsel on Integrity and Efficiency (PCIE) before taking action on the bill.

Federal Charters

On March 3, 1988, the House Judiciary Subcommittee on Administrative Law and Governmental Relations held a hearing on H.R. 3897, the Federal Charter Act. Deputy Assistant Attorney General James Mann of the Tax Division testified that we oppose the bill, which would transfer responsibility for granting, oversight and termination of federal charters from Congress to the Attorney General. The bill suffers from substantial vagueness and fails to provide the Attorney General with guidance essential to the task. Moreover, it begs the fundamental question of the purpose of federal charters. Subcommittee Chairman Frank readily agreed with our concerns, noting that we would have been informed of the purpose if Congress knew. The sense of the hearing was that Congress should explore the possibility of abolishing federal charters or at least conclude that federal charters will not be issued in the future.

International Child Abduction Act

On February 25, 1988, Representative Barney Frank's House Judiciary Subcommittee marked up H.R. 2673, the International Child Abduction Act, which would implement the Hague Convention on the civil aspects of international child abduction. The Justice Department's principal interest is in ensuring that state courts rather than federal courts are given jurisdiction to hear these matters. At the markup, the bill was amended to delete the jurisdiction provision altogether. This will not solve the problem, as the courts would then be required to decide the jurisdiction question. Work is in progress to resolve this matter before the full Committee markup.

Juvenile Delinquency Prevention

On February 18, the Human Resources Subcommittee of the House Education and Labor Committee, chaired by Rep. Dale Kildee, (D-Mich.), held a hearing on H.R. 1801, a bill which would reauthorize the Juvenile Justice and Delinquency Prevention Act of 1984 for four additional years. H.R. 1801 would also reauthorize the Missing and Exploited Children's Act of 1984 as well as the Runaway and Homeless Youth Act of 1984.

While the Department did not testify, the Department's report on the legislation was introduced into the record. The report opposes the reauthorization of the Office of Juvenile Justice and the companion grant program. The Department, however, supports continuation of the Missing and Exploited Children's Act.

Rep. Kildee and Subcommittee members strongly favor re-enactment of the Juvenile Justice and Delinquency Prevention Act in its present form and vowed to seek additional funds to expand the missing children hotline to 24 hours a day, seven days a week. The Subcommittee also favors additional funding for the Homeless Youth component of the Act due to an increase in the number of homeless youth.

Military Medical Malpractice

On February 17, 1988, the House passed H.R. 1054, which will permit service members to sue the United States under the Federal Tort Claims Act for military medical malpractice. These suits have historically been barred by the Feres doctrine that generally prohibits suits by service members for injuries resulting from activities that are incident to military service. The Department of Justice and the Department of Defense vigorously opposed this bill in testimony before Subcommittees of both the House Judiciary and the Armed Services Committees. The legislation would substantially disrupt military operations and precipitate a flood of tort litigation against the United States.

Despite our unalterable opposition, the bill passed by a vote of 312 to 61. An amendment was adopted that reportedly would limit damages for non-economic loss to \$300,000. The Senate companion, S. 347, has been pending in the Armed Services Subcommittee on Manpower and Personnel, where no hearings have yet been scheduled. In the past, similar bills have been adopted in the House only to languish in the Senate.

CIVIL DIVISION APPEALS

On February 19, 1988, Assistant Attorney General Richard K. Willard of the Civil Division issued a memorandum to all United States Attorneys summarizing the responsibilities of United States Attorneys' Offices regarding Civil Division appeals. A copy of this memorandum is attached for your review at the Appendix of this Bulletin.

Questions concerning this matter should be directed to Anthony J. Steinmeyer, Assistant Director, Appellate Staff, Civil Division, FTS 633-3388.

(Civil Division)

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DIPLOMATIC AGREEMENTS WITH BRITISH WEST INDIAN COLONIES

The Executive Working Group of the Department of Justice has published Issue 1, Vol. 6, of Law Enforcement Alert, entitled "Diplomatic Agreements with British West Indian Colonies on Documentary Information in Narcotics-Related Cases," dated February, 1988. This issue discusses the background and operation of a series of executive agreements entered into by the Governments of the United States and Great Britain which prescribe the procedure by which federal prosecutors investigating narcotics trafficking can obtain copies of documentary evidence located in the British Colonies in the West Indies. Copies are available from Judith H. Friedman, Criminal Division, FTS 633-5746.

(Criminal Division)

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LEGISLATION

Anti-Pornography Legislation

The President's Child Protection and Obscenity Enforcement Act has been introduced in the House and Senate with bi-partisan support. The House bill is H.R. 3889, introduced by Chairman Hughes and Ranking Minority Member McCollum of the Subcommittee on Crime, which will have jurisdiction over the bill; there are presently about 95 House co-sponsors. In the Senate, the bill has been introduced by Senator Thurmond and Senator DeConcini as S. 2033, and has about 20 co-sponsors. "Dear Colleague" letters are planned in both the House and Senate to solicit additional co-sponsors. Both the House and Senate Judiciary Committees indicate that they contemplate early hearings on this issue. Moreover, we understand that private anti-porn groups plan a major grassroots mail campaign in support of the President's bill. We are optimistic, therefore, that some parts of this legislation can be enacted this year.

Fair Housing

On March 3, 1988, the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee reported to the full Committee the Edwards substitute for H.R. 1158 (Fair Housing), without amendments having been offered, under an agreement between the Chairman and the Ranking Member that no amendments would be offered at Subcommittee in exchange for a commitment by the Chairman that the bill would go to the House floor under an "open" rule. The substitute differs in many respects from the HUD/DOJ proposal being prepared for transmittal to the Hill. The Edwards substitute resorts to a costly and lengthy administrative enforcement procedure, employing Administrative Law Judges without affording respondents a right to trial by jury; creates overbroad handicap provisions, including a federal "building code" for new construction; and creates a new category as a basis for discrimination -- "familial status."

The HUD/DOJ initiative will provide a basis for many of the amendments which will be offered to the Edwards substitute at the full Committee markup.

Polygraph Protection Act

On March 3, 1988, the Senate voted 69 to 17 in favor of S. 1904, the Polygraph Protection Act. S. 1904 provides for a ban on polygraph testing in the private sector as employment screening devices, with very limited exceptions for national security industries.

The Department of Justice strongly opposed enactment of S. 1904. It is the Department's view that federal legislation to regulate polygraphs on a national level is an unnecessary intrusion in the private marketplace, and an unnecessary interference in a traditional area of state regulation. Prior to the vote on S. 1904, an Administration Position Statement was sent to the Senate indicating Administration opposition to the bill, unless certain amendments were made. The position statement did not include veto threat language.

Prior to final passage, the following amendments were adopted: Senator Quayle's amendment to provide an exemption for pre-employment tests for use of controlled substances; Senator Thurmond's amendment to provide a restricted exemption for security services; Senator Cochran's amendment to remove the provisions establishing qualifications for polygraph examiners; Senator Gramm's amendment to provide for national security exemptions and to provide a nuclear power plant exemption; a perfecting amendment offered by Senator Nickles; and Senator Metzenbaum's non-germaine amendment to express the opposition of the Senate to the proposed World Bank loan to restructure Mexico's steel industry.

(Office of Legislative Affairs)

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CASENOTESOFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in Abbott v. Meese, 824 F.2d 1166 (D.C. Cir. 1987). The issue is whether the Bureau of Prison's regulations governing the receipt of publications by federal prisoners are constitutional.

A petition for certiorari in Reporters Committee for Freedom of the Press v. Department of Justice, 831 F.2d 1124 and 816 F.2d 730 (D.C. Cir. 1987). The question presented is whether 30-year old or older arrest and conviction records that are "on the public record" somewhere in the country are subject to mandatory disclosure by the federal government under FOIA, notwithstanding Exemption 7(C) for unwarranted invasion of personal privacy, because any privacy in them has faded as a result of their public availability somewhere and because the courts are incapable of assessing the public interest in favor of disclosure in any particular case.

An amicus curiae brief in Patterson v. Illinois, 116 Ill.2d 290, 107 Ill. Dec. 690, 507 N.E.2d 843 (1987). The question presented is whether petitioner's voluntary statements should be suppressed on the ground that petitioner did not effectively waive his Sixth Amendment right to the assistance of counsel at the post-indictment interrogations.

A petition for certiorari in Staples v. Commissioner, 821 F.2d 1324 (8th Cir. 1987). The issue is whether certain payments made by individuals to the Church of Scientology for "auditing" sessions are tax-deductible charitable contributions under Section 170 of the Internal Revenue Code.

A petition for certiorari in Railway Labor Executive Ass'n v. Burnley, No. 85-2891 (9th Cir. 1988). The issue is whether Federal Railway Administration regulations that provide for certain drug and alcohol testing of railway employees are invalid under the Fourth Amendment because they do not require individualized suspicion of drug and alcohol impairment as a precondition to testing.

* * * *

APPENDIXCUMULATIVE 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)

<u>Effective Date</u>	<u>Annual Rate</u>	<u>Effective Date</u>	<u>Annual Rate</u>
12-20-85	7.57%	04-10-87	6.30%
01-17-86	7.85%	05-13-87	7.02%
02-14-86	7.71%	06-05-87	7.00%
03-14-86	7.06%	07-03-87	6.64%
04-11-86	6.31%	08-05-87	6.98%
05-14-86	6.56%	09-02-87	7.22%
06-06-86	7.03%	10-01-87	7.88%
07-09-86	6.35%	10-23-87	6.90%
08-01-86	6.18%	11-20-87	6.93%
08-29-86	5.63%	12-18-87	7.22%
09-26-86	5.79%	01-15-88	7.14%
10-24-86	5.75%	02-12-88	6.59%
11-21-86	5.77%		
12-24-86	5.93%		
01-16-87	5.75%		
02-13-87	6.09%		
03-13-87	6.04%		

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

For cumulative list of those Federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see United States Attorney's Bulletin, Vol. 34, No. 1, Page 25, January 17, 1986.

TELETYPES TO ALL UNITED STATES ATTORNEYS
FROM THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

- 3/4/88 From Fred J. Scullin, Jr., United States Attorney, Northern District of New York, to all United States Attorneys, re: Raising Monetary Limit on U.S. Attorney Decision-Making Authority in Asset Forfeiture Sharing Decisions.
- 3/9/88 From Teresa Russell, Chief, Special Authorizations Unit, Justice Management Division, Washington, D.C. to all United States Attorneys, re: Requests for Pretrial Conference in Advance of Trial and Unusual Witness Expenses -- Fact Witnesses.
- 3/9/88 From Laurence S. McWhorter, Director, Executive Office for United States Attorneys, Washington, D. C. to all United States Attorneys, re: Procedures Governing the Destruction of Contraband Drug Evidence in the Custody of Federal Law Enforcement Authorities.
- 3/11/88 From William F. Weld, Assistant Attorney General, Criminal Division, Department of Justice, to all United States Attorneys, re: New Extradition Treaty With Jamaica.

* * * *

UNITED STATES ATTORNEYS

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	Stephen M. McNamee
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	Joseph P. Russoniello
California, E	David F. Levi
California, C	Robert C. Bonner
California, S	Peter K. Nunez
Colorado	Michael J. Norton
Connecticut	Stanley A. Twardy, Jr.
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	K. Michael Moore
Florida, M	Robert W. Merkle
Florida, S	Leon B. Kellner
Georgia, N	Robert L. Barr, Jr.
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	K. William O'Connor
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Anton R. Valukas
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	James G. Richmond
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Christopher D. Hagen
Kansas	Benjamin L. Burgess, Jr.
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Joseph M. Whittle
Louisiana, E	John Volz
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Breckinridge L. Willcox
Massachusetts	Frank L. McNamara, Jr.
Michigan, E	Roy C. Hayes
Michigan, W	John A. Smietanka
Minnesota	Jerome G. Arnold
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	William A. Maddox
New Hampshire	Richard V. Wiebusch
New Jersey	Samuel A. Alito, Jr.
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	Rudolph W. Giuliani
New York, E	Andrew J. Maloney
New York, W	Roger P. Williams
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	H. Gary Annear
Ohio, N	Patrick M. McLaughlin
Ohio, S	D. Michael Crites
Oklahoma, N	Tony Michael Graham
Oklahoma, E	Roger Hilfiger
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
Pennsylvania, E	Edward S. G. Dennis, Jr.
Pennsylvania, M	James J. West
Pennsylvania, W	J. Alan Johnson
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	Vinton DeVane Lide
South Dakota	Philip N. Hogen
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Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	Marvin Collins
Texas, S	Henry K. Oncken
Texas, E	Robert J. Wortham
Texas, W	Helen M. Eversberg
Utah	Brent D. Ward
Vermont	George J. Terwilliger III
Virgin Islands	Terry M. Halpern
Virginia, E	Henry E. Hudson
Virginia, W	John P. Alderman
Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Patrick J. Fiedler
Wyoming	Richard A. Stacy
North Mariana Islands	K. William O'Connor



Washington, D.C. 20530

MEMORANDUM

FEB 19 1988

TO: United States Attorneys

FROM: Richard K. Willard
RKW Assistant Attorney General
Civil Division

Re: Responsibilities of United States Attorneys' Offices
Regarding Civil Division Appeals

The responsibilities of the United States Attorneys' Offices and the Appellate Staff of the Civil Division regarding the consideration and handling of appeals are set forth in Title 2 of the United States Attorneys' Manual. In addition, various memoranda have been issued from time to time that supplement the Manual. The purpose of the present memorandum is to provide a convenient summary of these responsibilities. At the outset we note that this memorandum is applicable only to cases within the jurisdiction of the Civil Division and is not applicable to cases supervised by the other divisions of the Department.

1. Adverse Final District Court Judgments. All adverse final district court decisions should be sent promptly to the Director of the Appellate Staff. With the one exception discussed below for Social Security and Medicare Part A benefits cases, it is the receipt of these decisions that causes the Appellate Staff to begin the formal process of preparing memoranda to the Solicitor General recommending for or against appeal. The Appellate Staff assigns the case to one of its attorneys, who then requests appeal recommendations from the United States Attorney's Office, the agency involved, other interested agencies, and the concerned Civil Division trial branch. The Appellate Staff then prepares its own appeal recommendation which, together with the other recommendations, is transmitted to the Solicitor General. There, an Assistant to the Solicitor General and a Deputy Solicitor General generally prepare their own recommendations, and the Solicitor General then decides whether or not to authorize an appeal.

The Solicitor General and the Appellate Staff have established time deadlines so that this formal process normally can be completed within the 60-day period for filing a notice of appeal.

The key to this scheduling, however, is that the AUSA must promptly send the adverse decision to the Appellate Staff. Almost always, delays in this first step mean that the process cannot be completed without the filing of protective notices of appeal and the burdensome process of protecting the government's right to appeal. Problems in this area have been encountered in the past in cases where the United States Attorney's Office has delegated some or all of the responsibility for handling the case to an agency, such as Health and Human Services. Even in these cases, it is the responsibility of the AUSA to notify the Appellate Staff of the adverse decision. The only cases where the AUSA does not have this responsibility are those cases which have been primarily handled by the Civil Division trial branch. Even in those cases, the AUSA should ensure that the trial branch attorneys have received the adverse judgment.

A. What to Send. The printed form in the United States Attorneys' Manual (§ 2-3.221) to be used for transmitting adverse decisions includes a check list of documents to enclose. While this form indicates that the complete case file should be sent if not previously forwarded, the most important document is the adverse decision, i.e., the district court's memorandum opinion, findings and conclusions, and judgment. Do not delay forwarding this information in order to copy a lengthy file. In addition, do not delay this information to prepare your office's recommendation for or against appeal. Additional documents, if requested, and the appeal recommendation can be sent later.

The form also recites that the AUSA has notified the concerned agency of the adverse decision and requested its recommendation regarding an appeal. A copy of the adverse decision should also be sent to the Civil Division trial branch which had jurisdiction over the case. Compliance with these steps will also expedite the completion of the appeal memorandum process.

B. Protecting the Right to Appeal. Until the AUSA has been notified that the Solicitor General has decided against an appeal, it is the responsibility of the AUSA to protect the government's right to pursue the appeal. There are only two exceptions to this rule: (1) cases where the Civil Division trial branch, not the AUSA, had primary responsibility for handling the case in the district court, and (2) cases involving claims by individuals for Social Security and Medicare Part A benefits as discussed below.

The most important procedural step in this regard is the filing of a timely notice of appeal. Usually, this notice must be filed within 60 days after entry of final judgment. F.R.A.P. 4(a). Seven situations, however, require special alertness.

First, if the case was decided by a state court, the notice of appeal deadline may well be different than in federal court.

Second, in Bivens or common-law tort actions, where we represent a present or former government official who is sued for damages in his individual, not official, capacity, the notice of appeal should be filed within the 30-day period applicable to non-governmental cases.

Third, a similar situation arises where we represent veterans, reservists, or national guardsmen under the Veterans' Reemployment Rights Act, 38 U.S.C. 2021, et seq. In these cases, too, our notice of appeal is due 30, not 60, days after entry of judgment.

Fourth, if the district court has held a federal statute (not merely a regulation) unconstitutional in either a final or an interlocutory order, the appeal must be taken directly to the Supreme Court under 28 U.S.C. 1252, not to the court of appeals. The notice of appeal is due in 30, not 60, days. 28 U.S.C. 2101(a). In these cases the AUSA should consult with the Appellate Staff to ensure that the contents of the notice of appeal comply with the Supreme Court's requirements. See Sup. Ct. Rule 10.

Fifth, if the district court's jurisdiction "was based, in whole or in part, on" 28 U.S.C. 1346 (the Little Tucker Act), then the appeal lies in the Federal Circuit under 28 U.S.C. 1295(a)(2), not the regional court of appeals. This provision has proved especially troublesome as a trap for the unwary and creates many complexities that have not been resolved by the courts. The AUSA and the Appellate Staff attorney should discuss by telephone any uncertainty as to which court has appellate jurisdiction before the notice of appeal is due. Such doubts can never excuse the failure to file a timely notice of appeal. If the appeal is filed in the wrong court, that court can transfer the appeal to the correct court pursuant to 28 U.S.C. 1631, upon finding it in the interest of justice to do so.

Sixth, the majority rule for most types of cases is that the judgment on the merits is final and appealable even though the issue of attorneys' fees has not been resolved. The usual rule, therefore, is that the AUSA must file a notice of appeal within 60 days after the merits judgment to protect our right to appeal the merits and file a second notice within 60 days after the attorneys' fee award to protect our right to appeal that order. If both orders are entered within 60 days, one notice of appeal can be filed that expressly appeals both orders.

Finally, the filing of a timely motion under Fed. R. Civ. P. 50(b), 52(b) or 59 -- but not under Rule 60(b) -- tolls the time of all parties for filing a notice of appeal until that motion is decided. F.R.A.P. 4(a)(4). A notice of appeal filed before the disposition of such a motion is a nullity, and a new notice must

be filed within the prescribed time following disposition of the motion.

After the filing of a protective notice of appeal, the AUSA should consult with the Appellate Staff attorney assigned to the case to ensure completion of the other procedural steps necessary to perfect the government's appeal. These steps include ordering a transcript within 10 days after filing the notice of appeal, if a transcript is desired (F.R.A.P. 10(b)), and complying with local rules regarding the designation and preparation of the record on appeal (F.R.A.P. 11). A growing number of courts of appeals have imposed additional requirements by local rule regarding forms or docketing statements to be submitted. In the absence of explicit directions to the contrary, the AUSA is responsible for ensuring that these documents are properly prepared and filed if they are necessary to protect the right to appeal.

C. Social Security and Medicare Part A Individual Benefits Cases. Because of the large volume of such cases, an exception to the above requirements was established in 1982 for Social Security benefits cases. This exception includes all cases claiming individual benefits under Title II of the Social Security Act (e.g., disability, old-age, child's, or parent's benefits), SSI benefits, and Black Lung benefits payable under the Social Security Act. In addition, the exception also applies to claims by individuals under the Medicare Part A program. 42 U.S.C. 1395ff(b). Suits by Medicare providers, i.e., hospitals and nursing homes, are not covered and are subject to the usual procedure. For both Social Security and Medicare Part A cases, the exception does not apply if a statute or regulation has been held unconstitutional or if broad class-action relief has been awarded. Any doubts regarding whether a case fits within this exception should be resolved by following the usual procedure for adverse district court decisions.

Where the exception applies, the AUSA should send the adverse district court decision promptly to three offices:

1. Appellate Staff Civil Division Department of Justice P. O. Box 978 Washington, D. C. 20044	[This address is to be used only for these cases.]
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2. Chief Counsel for Social Security Department of Health and Human Services P. O. Box 17054 Baltimore, Maryland 21235	[For Social Security cases -- note new box number and zip code]
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Chief Counsel for the Health Care
 Financing Administration
 Office of General Counsel
 Department of Health and
 Human Services
 Washington, D.C. 20201

[For Medicare
 Part A cases
 involving claims
 by individuals]

and

3. The HHS Regional Attorney.

In these cases, the AUSA is not to file a protective notice of appeal unless specifically requested to do so by the Appellate Staff. Such a request will be made only where the AUSA or HHS recommends for an appeal. This new procedure has greatly reduced the number of such notices that were filed but later withdrawn under the past practice.

2. Appellate Consideration of Interlocutory Orders. Prior to the district court's entry of a final judgment, the AUSA ordinarily has no duty to communicate with the Appellate Staff, although the pertinent Civil Division trial court branch (e.g., Federal Programs, Commercial, or Torts) may well have requested that copies of the district court papers be transmitted to it. The one exception to this general rule is an interlocutory order holding an Act of Congress unconstitutional. As discussed above, such orders can be appealed directly to the Supreme Court. The AUSA should consult with the Appellate Staff by telephone if such an interlocutory order is entered.

For nonconstitutional cases, however, only if an interested party, i.e., the United States Attorney's Office, the agency involved, or the Civil Division trial branch, recommends that an interlocutory order of the district court be appealed should the AUSA promptly notify the Appellate Staff. When the time deadlines are pressing, the AUSA should call the Director or one of the Assistant Directors of the Appellate Staff at FTS 633-3311 to explain the nature of the proposed appeal.

Two types of orders issued before final judgment often lead to appeals. Preliminary injunctions can be appealed as a matter of right pursuant to 28 U.S.C. 1292(a)(1). If such an injunction causes an immediate injury to the government and presents a clear legal issue, then serious consideration should be given to recommending an appeal. The other commonly appealed interlocutory order is the denial of our motion for either absolute or qualified immunity in a Bivens or common-law tort action seeking damages against a present or former government official in his individual capacity. The Supreme Court has held that such denials are also immediately appealable as a matter of right as collateral orders. All such orders should also be given serious

consideration by the AUSA and the individual defendant as to possible appeal.

Interlocutory appeals pursuant to 28 U.S.C. 1292(b) are less common. The district court may certify that an order not otherwise appealable (1) involves a controlling question of law as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. If such a §1292(b) certification is entered, however, the appellant has only 10 days to apply to the court of appeals to permit the appeal. Some courts have held that this statutory deadline cannot be extended. Interlocutory appeals, like all other appeals, require the authorization of the Solicitor General. Therefore, to allow time to secure this approval, the AUSA should attempt to persuade the district court not to enter a §1292(b) certification until after the Solicitor General's authorization has been obtained. There is no requirement that the §1292(b) certification be contained in the same order as the order certified for appeal. Indeed, there is no time limitation for entering a §1292(b) certification of a previous order. Note also that either the district court or the court of appeals can veto an appeal under §1292(b).

The important point to remember is that the Appellate Staff usually becomes involved in the consideration of a possible appeal of any order other than a final judgment only if the AUSA, the agency, or the trial branch takes the initiative and recommends in favor of such an appeal. Otherwise, the Appellate Staff considers the case only after entry of an adverse final judgment or the filing of a notice of appeal by the opposing party.

3. Favorable District Court Decisions Appealed By Opposing Party. Where the district court's decision is entirely favorable to the government, the AUSA should not forward it to the Appellate Staff unless a notice of appeal is filed by another party. In that event, the Appellate Staff will assign the responsibility for defending the appeal. The AUSA should promptly send only the notice of appeal and the district court's decision to the Director of the Appellate Staff. If the decision does not reveal what the case is about, the AUSA should also send some conveniently available document, such as the government's brief in the district court, that does describe the case.

At one time, the Appellate Staff wrote letters in all such cases specifically assigning responsibility for each appeal. In 1983, however, the procedure was streamlined. If the AUSA is not notified to the contrary within 10 workdays from the date of sending the decision and notice of appeal to the Appellate Staff, then the AUSA can presume that he retains responsibility for defending the appeal. The extent to which the AUSA wishes to rely upon the assistance of agency counsel in conducting the

appeal is a matter within the discretion of the AUSA. Note this procedure applies only where the appeal is taken by the other side. When the Solicitor General authorizes the appeal, the Appellate Staff will notify the AUSA by letter in every case regarding the responsibility for handling the appeal.

When the AUSA is responsible for the appeal, there is no need to send copies of the briefs, motions, or other documents to the Appellate Staff. Settlement of any case while on appeal, however, must be approved by the Appellate Staff. 28 C.F.R. 0.172 App. to Subpart Y §4(c)(6). Appeals authorized by the Solicitor General can be settled only with his consent. 28 C.F.R. 0.163.

The AUSA should promptly send the court of appeals' decision to the Appellate Staff. If that decision is adverse, the AUSA should also notify the Appellate Staff by telephone so that the option of seeking rehearing can be discussed. Panel rehearing generally rests within the discretion of the Appellate Staff and the AUSA handling the appeal, although in important cases, the Appellate Staff coordinates informally with the Solicitor General's office. En banc rehearing petitions, however, require the authorization of the Solicitor General. 28 C.F.R. 0.20(b).

For each adverse court of appeals' decision, the Appellate Staff follows a procedure similar to the procedure for adverse district court decisions. Recommendations as to whether to seek certiorari are requested from the United States Attorney, the agency involved, other interested agencies, and the concerned Civil Division trial branch. These recommendations, together with the one prepared by the Appellate Staff, are then submitted to the Solicitor General for decision. Unlike the exception for adverse district court decisions, adverse court of appeals' decisions in Social Security and Medicare Part A benefits cases are treated the same as other cases.

I trust that this discussion of the responsibilities of the United States Attorneys' Offices regarding appeals will be helpful to you. These procedures have enabled the Civil Division to manage its vast appellate caseload efficiently while at the same time concentrating decision-making efforts in a formal and deliberative manner at key points in a case's history. The process works thanks to the sustained dedication of Assistant United States Attorneys throughout the Nation.