



United States Attorneys' Bulletin



**EXECUTIVE
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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:

James R. Allison (District of Colorado), by Senator William Armstrong, Washington, D. C., for his successful prosecution of a hostage case in Grand Junction.

Leslie D. Banks (Texas, Southern District), from Ronald G. Parra, District Director, Immigration and Naturalization Service, Houston, for obtaining a conviction in a major criminal case.

Michael P. Carey (District of Colorado), by Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Denver, for obtaining guilty pleas from four defendants charged with assault on DEA agents in Coal Creek Canyon last February.

John M. Compton and Jane E. Graham (Kentucky, Eastern District), by Joel A. Carlson, Special Agent in Charge, FBI, Louisville, for their professional efforts and dedication in bringing a complex bank fraud case to a successful conclusion in Lexington.

John Dominguez (District of Columbia), by Joseph S. Bracewell, Chairman of the Board, Century National Bank, Washington, D.C., for his efficiency in handling the prosecution of an embezzlement case.

Patrick J. Foley (Ohio, Northern District), by John A. Gibson, Regional Inspector, Internal Revenue Service, Cincinnati, for his assistance in the apprehension and trial of a dangerous criminal in an IRS case.

David F. Geneson (District of Columbia), by James D. Meyers, Chief, Computer/Economic Crime, Federal Law Enforcement Training Center, Glynco, Georgia, for his valuable presentation on "Prosecution Considerations in Data Processing Cases" as part of the Computer Fraud and Data Processing Investigations Training Program.

Cynthia Giles (Pennsylvania, Eastern District), by Roger J. Marzulla, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C., for obtaining an excellent settlement in a case under the Clean Water Act.

Linda Halpern (District of Columbia), by Jim Burnett, Chairman, National Transportation Safety Board, Washington, D.C., for her outstanding representation in a case involving cruise ship operations. Also, from Lt. Col. William A. Aileo, Office of the Judge Advocate General, Department of the Army, Washington, D.C. for reaching a favorable settlement in an administrative dispute.

Linda Turner Hamilton (District of Columbia), by Clarence E. Dickerson, Director of Training, Metropolitan Police Department, Washington, D.C., for her excellent presentation on Search and Seizure for First Line Supervisors at the Metropolitan Police Academy.

Grant C. Johnson and Jeffrey M. Anderson (Wisconsin, Western District), by Joseph R. Davis, Assistant Director, Legal Counsel, FBI, Washington, D.C., for their outstanding participation as defense counsel in the New Agents' Moot Court held at the FBI Academy in late June.

Jeffrey Kinder and Mickey Trujillo, Supervisory Legal Technician (District of Colorado), by David G. Barger, Trial Attorney, Tax Division, Department of Justice, Washington, D.C., for their valuable assistance and advice in two criminal tax cases.

Frederick W. Kramer, III (Georgia, Southern District), by William J. Clancy, Jr. Assistant Special Agent in Charge, FBI, Savannah, for his successful prosecution of a White Collar Crime conspiracy.

Wilma Lewis (District of Columbia), by William Barton, Inspector General, General Services Administration, Washington, D. C., for her excellent defense of a civil case brought under the Freedom of Information Act.

Lillian Lockary (Georgia, Middle District), by Paul Herndon, State Director, Farmers Home Administration, Athens, for her skill and expertise in handling a complex bankruptcy case under Chapter 11.

Ellen Lockwood (District of Guam), by Kendall Warren, District Counsel, Immigration and Naturalization Service, Honolulu, Hawaii, for her tireless efforts which resulted in the denial of three petitions for naturalization.

Jan Elizabeth Mitchell (District of New Mexico), by Major General Thomas J.P. Jones, U.S. Army White Sands Missile Range, New Mexico, for her excellent representation on behalf of the U.S. Army in a criminal case.

Roslyn O. Moore-Silver (District of Arizona), by William Sessions, Director, FBI, Washington, D.C., for her outstanding efforts in a fraud against the government case involving Motorola, Inc.

Kimberly Pignuolo (Texas, Southern District), by Rodney Martin, District Director, Small Business Administration, Houston, for her effectiveness in reaching a successful compromise in a complicated bankruptcy matter.

PERSONNEL

Effective June 28, 1988, Joseph D. Magri assumed the position of Acting United States Attorney for the Middle District of Florida.

* * * * *

POINTS TO REMEMBER

Notification Of Litigation Involving Executive Order No. 12291, Executive Order No. 12498, Regulatory Flexibility Act, Paperwork Reduction Act Or Certain Rulemaking Challenges

By memorandum dated July 25, 1988, Assistant Attorney General John R. Bolton, Civil Division, reminded all Civil Division attorneys of their reporting obligations when they handle a case concerning Executive Order 12291, Executive Order 12498, the Regulatory Flexibility Act, the Paperwork Reduction Act or certain rulemaking challenges. United States Attorneys and Assistant United States Attorneys were advised in 1985 through the United States Attorneys' Bulletin of their similar reporting obligations. The following is to reiterate the notification procedures for handling such rulemaking challenges.

As set forth in the memorandum issued by Deputy Attorney General Jensen on April 18, 1985, a "clearinghouse" has been established for certain rulemaking litigation involving the above-referenced executive orders and statutes. The clearinghouse should be notified of all such cases and all significant developments in those cases as well as in cases which challenge the timing of agency rulemaking, seek to compel an agency to engage in rulemaking or in which a commitment to engage in rulemaking may be part of a settlement agreement.

It is most important that timely notification be given to allow coordination of this important area of litigation. All United States Attorneys and Assistant United States Attorneys are reminded that where they have cases involving Executive Order No. 12291, Executive Order No. 12498, the Paperwork Reduction Act (44 U.S.C. §3501, et seq.), the Regulatory Flexibility Act (5 U.S.C. §601, et seq.) or the rulemaking challenges described above, they

are responsible for reporting significant litigation developments to the clearinghouse as soon as they occur and providing the clearinghouse with relevant pleadings, decisions or other papers concerning the litigation. They are also responsible for informing the clearinghouse of Office of Management and Budget input in the case, and sending relevant copies of correspondence with the Office of Management and Budget to the clearinghouse.

United States Attorneys and Assistant United States Attorneys are also reminded that the clearinghouse assembles these litigation materials and makes them available to Department attorneys as needed or requested. Communications to the clearinghouse should be directed to Sandra M. Schraibman, Civil Division, Room 3744, Main Justice Building, Washington, D. C. 20530, FTS 633-3315. Communications to the Office of Management and Budget should be directed to Robert Damus, Acting Deputy General Counsel, Office of Management and Budget, Room 464, Old Executive Office Building, 17th and Pennsylvania Avenue, N.W., Washington, D. C. 20503, FTS 395-5600.

(Civil Division)

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Request For Telephone Notification Of Court Opinions

Assistant Attorney General John R. Bolton, Civil Division, has requested the assistance of the United States Attorneys' Offices in expediting the receipt of court opinions by the Civil Division attorneys. A recent internal survey indicated that court opinions transmitted by regular mail are frequently delayed as much as seven to ten days. Mr. Bolton suggests that as soon as a court opinion is received in a United States Attorney's Office, the Civil Division attorney of record be notified so that special arrangements can be made to expedite the opinion via express mail or by facsimile transmission. Several United States Attorneys' Offices routinely call the Civil Division attorney immediately when a court opinion is received, and it is requested that a similar practice be adopted in all United States Attorneys' Offices.

(Civil Division)

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LEGISLATIONDOJ Appropriations, FY 1988

On July 26, 1988, the House Appropriations Committee reported out two supplemental appropriations bills for FY 1988: H.R. 5026 and H.R. 5027.

H.R. 5026, which was billed as the "dire emergency" supplemental, contains \$15 million for the support of U.S. prisoners, \$6 million for the Community Relations Service, \$42.6 million for Federal Prison System salaries and expenses, and \$46 million for Federal Prison System buildings and facilities. The measure was subsequently passed by the full House on July 27, 1988. H.R. 5027, a somewhat less urgent "emergency supplemental," was also approved by the House Committee. This bill includes \$455.5 million for the Department for carrying out drug law enforcement activities. The Committee also adopted an amendment making \$2.6 billion available for the war on drugs. The funds would be made available to the President to distribute over several years. It is anticipated that H.R. 5026 and H.R. 5027 will be cleared for the President before the recess scheduled for August 11, 1988.

* * * * *

DOJ Appropriations, FY 1989

On June 15, 1988, the House passed its version of H.R. 4782, the Department's FY 1989 appropriations bill. On July 27, 1988, the Senate passed its version of the bill. The Senate adopted a Pryor amendment that would reduce to 85% of the amount spent in FY 1987, the amount made available for consulting services for all agencies covered by the bill. This reduction in funding was included in six other appropriations bills because many agencies are perceived as having previously circumvented consultant restrictions. The impact of the amendment on the Department is thought to be relatively minor.

The Senate also adopted a Hollings amendment postponing a rulemaking proceeding commenced by the Immigration and Naturalization Service concerning the conditions under which aliens should be admitted who are proficient in the arts and professions, or are professional athletes. In addition, the Senate agreed to a Chiles amendment allowing U.S. families to adopt foreign illegitimate children who have had a bona fide relationship with their U.S. citizen father. This bill should be cleared for the President prior to the August recess.

* * * * *

Inspector General Legislation

The House of Representatives passed H.R. 4054, Inspector General legislation, on July 26, 1988, by voice vote (better than a two-thirds majority) by stripping out the provisions of the Senate version, S. 908, and inserting the language in H.R. 4054. The Senate version of the bill, S. 908, passed by a vote of 85-0 on February 2, 1988. The bill creates a statutory Inspector General for the Department of Justice (excluding the Office of Professional Responsibility), and also creates statutory Inspectors General for the Department of the Treasury, the Postal Service, the Government Printing Office, and the Federal Emergency Management Agency. The Department opposes this legislation.

H.R. 4054 brings all statutorily created Inspectors General in the Executive Branch under one Act, pursuant to which they are required to make detailed semi-annual reports to the Congress concerning the details of their work and success in securing implementation of their recommendations. The Inspectors General at the Department of Justice and Treasury, along with the Federal Emergency Management Agency, are to be appointed by the President, but the agency heads will handle this responsibility in all other departments.

S. 908 will form the basis for the Senate bargaining position when the bill goes to conference. The Senate version did not contain an Inspector General for the Department of Justice (the House view is expected to prevail in conference on this issue). Unlike its House companion, it did include the Office of Personnel Management, the Nuclear Regulatory Commission, the Federal Election Commission, and the Corporation for Public Broadcasting. Its specification of the form in which Inspectors General are to report information to Congress is significantly different, as is its more highly detailed treatment of the Department of the Treasury.

The Department of Justice objects to this legislation for the following reasons:

- The public disclosure aspect of the reporting requirements interferes with the President's control over the deliberative processes of the Executive Branch.
- The requirement that Inspectors General submit to Congress "a summary of matters referred to prosecutive authorities and the prosecutions which have resulted" could, when publicly disclosed, adversely affect prosecutorial decision-making and interfere with the Department's ability to investigate and prosecute criminal offenses.

- Extending the Inspector General Act to the Department of Justice would diffuse the Attorney General's broad powers of investigation, indictment and prosecution, and lessen accountability.
- Inspector General power to review prosecutorial decisions without statutory standards or guidance creates the possibility of unjustified intrusion into prosecutorial and litigation decision-making.
- Many components of the Department use their existing inspection units as a means of developing management talent by requiring interested employees to serve a tour of duty on the inspection staff.
- The Department operates mechanisms established to carry out audits and investigate allegations of impropriety.

The House and Senate staffs are expected to give the bill priority consideration and have already begun to meet informally. Senate conferees were appointed and the House members will be named later. Committee staff are urging the Department to submit compromise language designed to protect its interests while preserving the policy objectives sought in the bill (a suggestion that the Department has steadfastly maintained to be unrealistic) or face an Inspector General created wholly without Department of Justice input.

* * * * *

U.S.-Canada Free Trade Agreement

The Senate Finance Committee and the House Ways and Means Committee completed action on the U.S.-Canada Free Trade Agreement. The complete package, including the Statement of Administrative Action, was sent to the White House on July 21, 1988, after final review by participating agencies. The Department actively participated in the drafting and negotiations process and was concerned over language in the implementing legislation requiring the President to implement binational panel decisions. The Department believed that the original language violated the Constitution on separation of powers principles by involving binational panel members in executive branch activity in the Federal Government. The final product contains "fallback" language, which will take effect if a legal challenge on separation of powers principles is successful and grants the President authority to implement the binational panel decisions. The Free Trade Agreement is on the list of priority items to be completed in the coming weeks.

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CASE NOTESCIVIL DIVISIONSupreme Court Upholds The Facial Validity Of The Adolescent Family Life Act And Remands To District Court For Findings Whether Grants To Individual Grantees Violate The Establishment Clause

The district court in this case struck down the Adolescent Family Life Act -- under which the Department of Health and Human Services may make grant awards for programs that discourage adolescent premarital pregnancy or that offer care services for pregnant, unmarried adolescents -- on its face and as applied. The district court held that because the Act referred to addressing the problem of adolescent pregnancies through "a variety of integrated * * * services provided * * * by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector," it had a primary effect of advancing religion and was, therefore, unconstitutional on its face. The court also held that the Act was unconstitutional as applied because grants had been awarded to some religious organizations, such as hospitals, maternity homes, and YWCAs.

The Supreme Court has now reversed by a 5-4 vote, holding that the Act was not unconstitutional on its face. While the Act did refer to religious organizations, there was no requirement that the Secretary award grants to religious organizations and the services provided are not inevitably religious in nature. After finding that the appellees (federal taxpayers) had standing to sue, the Court held that the Act was not necessarily unconstitutional as applied, and that the district court would have to review the grantees on a case-by-case basis for possible violations of the Establishment Clause. Where the Secretary was funding the religious activities of specific grantees, the district court could order the Secretary to withdraw funding from that grantee.

Otis R. Bowen v. Chan Kendrick, Nos. 87-253, 87-431, 87-775 (June 29, 1988). DJ # 145-16-2391.

Attorneys: Michael Jay Singer, FTS 633-5431
Jay S. Bybee, FTS 633-4096

* * * * *

Supreme Court Holds That State's Claim For Medicaid Reimbursement Is Not A Claim For "Money Damages" And Can Be Asserted Under The APA In The District Court

In this case, the Secretary disallowed Medicaid reimbursement, totaling approximately \$11.3 million for four fiscal years, to Massachusetts for certain "special educational" services provided by Massachusetts in state-run intermediary care facilities for mentally retarded persons. Massachusetts challenged the disallowance, and the district court reversed. On appeal, the court of appeals affirmed in part and reversed in part. The court first ruled that the Tucker Act precluded the district court from issuing a judgment requiring reimbursement because that was a judgment for monetary relief. Nevertheless, it then ruled that the district court could exercise jurisdiction over the statutory interpretation issue because that issue had significant prospective importance which could form the predicate for an APA cause of action for which there was jurisdiction pursuant to 28 U.S.C. §1331. The court therefore reversed the district court's award of retrospective monetary relief but affirmed its decision on the statutory interpretation issue.

The Supreme Court has just issued its decision, holding that the district court had jurisdiction over the whole case, and that no part of the case had to be transferred to the Claims Court. The Court accepted the reasoning advanced by Judge Bork in Maryland Dept. of Human Resources v. DHHS, 763 F.2d §1441 (D.C. Cir. 1985), that claims for reimbursement under federal grant programs are not claims for money damages cognizable exclusively in the Claims Court; rather such claims are for specific relief cognizable in the district court under the APA. The only kind of suit that will qualify as one for money damages (and would thus be outside of the APA's waiver of immunity) will be one which seeks "compensation for damage sustained by the failure of the Federal Government to pay as mandated," but a suit that seeks to enforce "the statutory mandate itself" is cognizable under the APA even if it "happens to be one for the payment of money." Slip. op. 20.

Bowen v. Massachusetts, No. 87-712, and Massachusetts v. Bowen, No. 87-929 (June 29, 1988). DJ # 137-36-697

Attorneys: William Kanter, FTS 633-1597
Howard Scher, FTS 633-3180

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D.C. Circuit Upholds Military Regulations That Govern The Characterization Of Administrative Discharges Issued To Homosexual Servicemembers

Four former servicemembers who had received less than honorable discharges for homosexual conduct and two non-profit organizations that represent the interests of gays brought this action challenging military regulations that govern discharge characterizations issued to homosexual servicemembers. Plaintiffs alleged that the regulations unlawfully allowed the military to issue less than honorable discharges to servicemembers separated for homosexual conduct even though such conduct had not been shown to have adversely affected the military. The district court rejected plaintiffs' challenge.

The court of appeals has now affirmed. The court stated that the military may, after Dronenburg v. Zeck, 741 F.2d 1388 (D.C. Cir. 1984), presume that homosexual conduct "adversely affects the military." The court concluded, however, that the regulations establish no presumption regarding the issuance of less than honorable discharges based on homosexual conduct alone. Rather, the regulations require the military to determine that the adverse effect from the homosexual conduct (together with any other alleged misconduct) constitutes a "significant" negative aspect of the servicemember's record. Then, the military must conduct a balancing test and conclude that the negative aspect outweighs the positive aspect of the servicemember's record. The court held that this procedure was lawful on its face. The court also held that the regulations were lawful as applied to the named plaintiffs and that the military had not acted arbitrarily in refusing to upgrade plaintiffs' discharges to honorable.

Gay Veterans Association, Inc. v. Secretary of Defense, No. 87-5349 (D.C. Cir. June 28, 1988)
DJ # 145-15-1658.

Attorneys: Anthony J. Steinmeyer, FTS 633-3388
E. Roy Hawken, FTS 633-4331

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First Circuit Reverses District Court's Ruling
Ordering Disclosure Of All Information Supplied
By Confidential Sources Who Testified

In this Freedom of Information suit, the court ordered the release of information supplied by confidential informants who testified at the Smith Act trials. This information was contained in over 136,000 pages. The FBI had withheld the information on the basis of Exemption 7(D) of the FOIA. The First Circuit has reversed the district court's disclosure order, declaring it significantly overbroad. In so doing, the court of appeals specifically rejected the district court's holding that by testifying a confidential informant waives the protection of Exemption 7(D) for all information he supplied to the law enforcement agency. Nonetheless, the court held that an informant who testifies does waive the protection of Exemption 7(D) for the subject matter of the testimony and all related information as measured by the hypothetical scope of cross-examination.

Irons v. FBI, No. 87-1516 (1st Cir. July 15, 1988).
D.J. # 145-12-5158.

Attorneys: Leonard Schaitman, FTS 633-3441
Deborah R. Kant, FTS 633-4825

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Second Circuit Holds That In Determining Food
Stamp Eligibility, Foster Children May Be Excluded
From Household As "Boarders" And Consequently
Foster Care Payments Need Not Be Included In
Calculation Of Household Income

Plaintiffs were a class of foster parents who objected to their food stamp benefits having been reduced or eliminated because their foster care payments were included in the calculation of household income for purposes of determining food stamp eligibility. The district court granted plaintiffs summary judgment and the Second Circuit, in a per curiam opinion, affirmed for "substantially the reasons stated in the district court's opinion."

The district court had reasoned that under applicable regulations, foster children must be considered "boarders" who may be excluded from the food stamp household and whose payments therefore may be excluded from household income. The court stated that this result was supported by both the language of the statute and its legislative history. But, striking a middle ground, it further held that since a boarder's payments to a household "for room and meals" were to be treated as "self-employment income" to the household, that portion of foster care payments attributable to room and board (approximately 70%) should be identically treated.

Foster v. Celani, No. 87-6276 (2d Cir. June 24, 1988). DJ # 145-8-1906.

Attorneys: Robert S. Greenspan, FTS 633-5428
Robert D. Kamenshine, FTS 633-4820

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Eighth Circuit Reverses District Court
Refusal To Grant Summary Judgment In Favor
Of U.S. Marshal In Inmate Bivens Suit

Marion inmate Randy Gometz sued Deputy U.S. Marshal Culwell. The two had an altercation in a St. Louis holding cell when Gometz attended the trial of a fellow inmate. Upon his return to Marion, Gometz was allegedly beaten by several prison guards. The district court dismissed Gometz' assault and battery claims concerning the holding cell incident. However, the district court refused to grant summary judgment on Gometz' claim under 42 U.S.C. §1985 alleging that Culwell conspired with prison officials to have him beaten, despite the fact that extensive discovery had uncovered no evidence of any communication between Culwell and Marion officials. The Eighth Circuit has now reversed and remanded with instructions to dismiss. The Court agreed with our position that a conspiracy claim must be supported by specific factual allegations, and that summary judgment is mandated where, as here, the plaintiff has adduced no evidence on an essential element of his conspiracy claim.

Gometz v. Culwell, No. 87-2036 (8th Cir. July 5, 1988).
DJ # 157-8-652.

Attorneys: Barbara Herwig, FTS 633-5425
Dwight Rabuse, FTS 633-3159

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Ninth Circuit Holds That Government Was Not Substantially Justified In Relying On Final Audit Date As Date For Commencement Of Statute Of Limitations On Claim For Recoupment Where Agency Became Aware That It Was Entitled To Recover Overpayment Before Final Audit; But Recovery Of EAJA Fees Forecloses Any Rule 11 Sanction

The United States brought suit against Gavilan College to recover overpayments received by the school under a Veterans Administration educational program. The district court granted summary judgment to Gavilan, finding the United States' action time-barred by the six-year statute of limitations. The Ninth Circuit, rejecting the government's contention that the statute of limitations did not begin to run until the completion of its own audit, held that the United States was not substantially justified within the meaning of the Equal Access to Justice Act in challenging the school's statute of limitations defense. The court specifically found that the government is not entitled to delay instituting a claim until it knows the exact dollar amount; and it rejected our argument that the government's position should be found reasonable because it relied on cases holding that the final audit date triggered the statute of limitations on virtually identical facts.

The court also rejected the government's argument that the United States was not subject to Rule 11 sanctions due to its sovereign immunity. Nevertheless, the court determined that the fees it awarded under the EAJA encompassed what was fair and reasonable in this case. Because Rule 11 authorized the same result through the sanction mechanism, imposition of Rule 11 sanctions was unnecessary.

United States v. Gavilan Joint Community College
District, No. 87-2126 (9th Cir. June 23, 1988).
DJ #151-11-1528.

Attorneys: Michael Jay Singer, FTS 633-5431
Michael Robinson, FTS 633-5460

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Eleventh Circuit Reverses Award Of Over \$300,000
In Attorneys' Fees And Expenses Awarded By The
District Court Under The Equal Access To Justice Act

The merits of this case involved the City of Brunswick's challenge to the Federal Emergency Management Agency's determination of flood level figures used in calculating Brunswick's eligibility for federally subsidized flood insurance. After the merits were settled pursuant to agreed-upon arbitration, Brunswick was awarded \$324,492.16 in attorneys' fees, costs, and other expenses under EAJA. A panel of the Eleventh Circuit has reversed the district court's fee decision. The panel ruled that Brunswick was not eligible for fees and expenses under EAJA because its net worth exceeded the \$7 million statutory cap. It also ruled that, in calculating the city's net worth, all assets owned by the city had to be considered and that the district court erred in excluding from its calculation those assets that were restricted, *i.e.*, assets that were not generally available to meet the payment of debts. As an alternative holding, the panel also concluded that the district court abused its discretion in finding that the Government's position was not substantially justified. The panel held that the district court erred in focusing strictly on whether FEMA's flood insurance study was wholly accurate. Rather, the panel found that the positions taken by the Government before the arbitration panel were substantially justified, even if they were not accepted in their entirety by the arbitrators.

City of Brunswick, Georgia v. United States, No. 87-8543
(11th Cir. July 11, 1988). DJ # 145-193-810.

Attorneys: Michael Jay Singer, FTS 633-5431
John Hoyle, FTS 633-3547

* * * * *

Fifth Circuit Reverses District Court Denial Of
Government Claim And Awards The United States
About \$2.4 Million Under Financing Contract

The United States Marine Fisheries Service guaranteed loans to the defendants under two federal financing programs which seek to aid the fishing industry. The defendants defaulted on the loans. The Government, as guarantor, paid the loan amounts to the lender and sued for reimbursement from the defendants. The defendants claimed they had no duty to pay the Government because they were wrongfully induced to enter the financing contracts by government misstatements.

After trial, the district court agreed with the defendants. The court denied the Government enforcement of the financing contracts because the Government had wrongfully induced them. The court also awarded the defendants reliance damages for losses caused by entering the loan contracts. The Fifth Circuit reversed, ruling that the misrepresentation exemption of the Federal Tort Claims Act barred any award of reliance damages to the defendants for wrongful inducement of the contracts. The court of appeals also ruled that the defendants could not prevent enforcement of the financing contracts, even for fraudulent inducement, after the other party, the Government, had performed. The Fifth Circuit's reversal means that the Government will not collect about \$2.4 million under the financing contracts.

United States v. Texarkana Trawlers, No. 87-2508
(June 6, 1988). DJ # 61-17M-235.

Attorneys: Leonard Schaitman, FTS 633-3441
Susan Sleater, FTS 633-3305

* * * * *

TAX DIVISIONNinth Circuit Affirms Tax Court's Decision Holding That Restitution Payments To Victims Of Crimes Are Nondeductible.

Waldman v. Commissioner (9th Cir.). On July 5, 1988, the Ninth Circuit issued an unpublished order affirming the decision of the Tax Court in this case, which was reported at 88 T.C. 1384 (1987). The taxpayer pleaded guilty to conspiracy and grand theft, but his prison sentence was stayed on the condition that he repay his victims. The Tax Court rejected the taxpayer's argument that the payments were deductible as business expenses because they were restitutionary in nature. Since the taxpayer was required to make the payments as part of his punishment for a crime, the court concluded that the payments constituted a non-deductible fine or penalty within the meaning of Section 162(f) of the Internal Revenue Code, notwithstanding the fact that they were not paid to a government. This is, to our knowledge, the first appellate decision holding that Section 162(f) extends to such court-ordered restitution payments.

* * * * *

State Tax On Sales Of Items To Federal Credit Unions Held Unconstitutional By Sixth Circuit.

United States v. State of Michigan (6th Cir.). On July 8, 1988, the Sixth Circuit, affirming the decision of the district court, held that the imposition of the Michigan sales tax on sales of items to federal credit unions was unconstitutional because federal credit unions were instrumentalities of the Federal Government and because the incidence of the sales tax was upon those instrumentalities. The Sixth Circuit further determined that the Tax Injunction Act, 28 U.S.C. §1341, did not bar this action brought by the United States under 28 U.S.C. §1345, and that the six-year federal statute of limitations set forth in 28 U.S.C. §2415(a) was applicable in this action, rather than the four-year Michigan statute of limitations.

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Sixth Circuit Permits Charitable Contribution
Deduction For Payments To Church Of Scientology
For Auditing And Training

Neher v. Commissioner (6th Cir.). On July 19, 1988, the Sixth Circuit reversed the Tax Court's holding in favor of the Commissioner, and held that Neher was entitled to a charitable contribution deduction for \$9,000 in payments to the Church of Scientology for auditing and training. In so ruling, the court joined the Second and Eighth Circuits, and rejected the contrary holdings of the First, Fourth, Ninth and Tenth Circuits. The Supreme Court has granted two taxpayer petitions for certiorari (that we did not oppose), and the cases have been consolidated. The taxpayers' opening Supreme Court brief has been filed; our answering brief is being drafted. There are appeals raising the issue still pending in the Third, Fifth, Seventh and Eleventh Circuits; they will be held up pending the Supreme Court's resolution of the conflict.

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Sixth Circuit Holds That Constructive Notice
Provision Of Section 6335(b) Of The Internal
Revenue Code Is Unconstitutional

Verba v. Ohio Casualty Company (6th Cir.). On July 11, 1988, the Sixth Circuit declared as unconstitutional and violative of the Due Process Clause that part of Section 6335(b) of the Internal Revenue Code which permits constructive notice, by publication or posting, of the sale of seized property to all except the owner of the property. In reaching its decision that a judgment lienor was entitled to actual notice, the court of appeals relied on Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), applying that decision retroactively to this case, on the ground that Mennonite was an extension of prior law rather than a case establishing a new legal principle. The court concluded here that because the notice given to the judgment lienor was constitutionally inadequate, its lien was not extinguished pursuant to Section 6339(c). The court added, however, that this conclusion does not entitle the lienor to have its lien elevated in priority over that of the United States.

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LISTING OF ALL BLUESHEETS IN EFFECT
AUGUST 15, 1988

<u>AFFECTS USAM</u>	<u>TITLE NO.</u>	<u>DATE</u>	<u>SUBJECT</u>
1-1.550*	TITLE 1	6/25/87	Communications from the Department
1-8.000**	TITLE 1	7/13/87	Relations with Congress
1-11.350*	TITLE 1	5/06/86	Policy With Regard to Defense Requests for Jury Instruction on Immunized Witnesses
5-1.310	TITLE 5	8/3/88	Authority to Defend Cases
5-7.323	TITLE 5	8/3/88	Biotechnology Litigation
9-1.177**	TITLE 9	12/31/85	Authorization for Negotiated Concessions in Organized Crime Cases
9-2.132*	TITLE 9	12/31/85	Policy Limitations on Institution of Proceedings - Internal Security Matters
9-2.133*	TITLE 9	5/08/87	Consultation Prior to Initiation of Criminal Charges (One-Year Sunset Provision Added)
9-2.136*	TITLE 9	6/04/86	Investigative and Prosecutive Policy for Acts of International Terrorism
9-2.136*	TITLE 9	10/24/86	Investigative and Prosecutive Policy for Acts of International Terrorism

* Bluesheet has been approved by the Advisory Committee and will be incorporated into revised Manual.

** Tabled by Attorney General's Advisory Committee.

<u>AFFECTS USAM</u>	<u>TITLE NO.</u>	<u>DATE</u>	<u>SUBJECT</u>
9-2.151*	TITLE 9	12/31/85	Policy Limitations - Prosecutorial and Other Matters, International Matters
9-2.160*	TITLE 9	7/18/85	Policy With Regard to Issuance of Subpoenas to Attorneys for Information Relating to the Representa- tion of Clients
9-6.400	TITLE 9	3/17/88	Cancelling Pre-trial Detention Reporting Requirements
9-7.2000*	TITLE 9	4/06/87	The Electronic Communications Act of 1986
9-7.5000*	TITLE 9	4/06/87	Forms - The Electronic Communications Act of 1986
9-11.220 C.8.*	TITLE 9	4/14/86	All Writs Act Guidelines
9-11.368(A)*	TITLE 9	2/04/86	Amendment to Rule 6(e), Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials
9-20.215*	TITLE 9	2/11/86	Policy Concerning State Jurisdiction Over Certain Offenses in Indian Reservations
9-38-211*	TITLE 9	4/23/87	Administrative Forfeiture of Real Property
9-75.120*	TITLE 9	9/23/87	Multiple Prosecutions of Obscenity Offenses
9-79.252*	TITLE 9	4/01/87	Consultation Prior to Institution of Criminal Charges Under 31 U.S.C. §5324

<u>AFFECTS USAM</u>	<u>TITLE NO.</u>	<u>DATE</u>	<u>SUBJECT</u>
9-100.205**	TITLE 9	4/01/87	Controlled Substance Analogue Enforcement Act
9-100-280*	TITLE 9	1/15/87	Consultation Prior to Institution or Dismissal of Criminal Charges Under Continuing Criminal Enter- prise Statute
9-103-132; 9-103.140*	TITLE 9	6/30/86	Revisions to the Prosecutive Guidelines for the Con- trolled Substance Registrant Protection Act Concerning Consultation Prior to Prosecution
9-103.300*	TITLE 9	5/28/87	Mail Order Drug Paraphernalia Control Act (One-Year Sunset Provision Included)
9-105.000*	TITLE 9	1/15/87	Money Laundering
9-105.000**	TITLE 9	5/12/88	Prosecution Policy for Violations of the Money Laundering Act
9-105.200**	TITLE 9	4/01/87	Forfeiture of Proceeds of Foreign Controlled Substance Violations (One-Year Sunset Provision Included)
9-110.800*	TITLE 9	7/07/86	Murder-for-Hire and Violent Crimes in Aid of Racketeering Activity
9-111.800*	TITLE 9	1/15/87	Forfeiture of Substitute Assets (Bluesheet will expire 6/15/88)
9-131.030*	TITLE 9	5/13/86	Consultation Prior to Prosecution
9-131.040; 9-131.180	TITLE 9	10/06/86	Hobbs Act Approval
9-131.110*	TITLE 9	5/13/86	Hobbs Act Robbery

<u>AFFECTS USAM</u>	<u>TITLE NO.</u>	<u>DATE</u>	<u>SUBJECT</u>
10-2.186	TITLE 10	9/27/85	Grand Jury Reporters
10-2.315*	TITLE 10	11/17/86	Veterans Readjustment Appointment (VRA) Authority
10-2.340* <u>et seq.</u>	TITLE 10	5/18/87	Youth and Student Employment Programs
10-2.420	TITLE 10	11/12/87	Position/Resource Manage- ment Review
10-2.517*	TITLE 10	8/16/87	Performance Management and Recognition System
10-2.534*	TITLE 10	3/20/86	Compensatory Time
10-2.643/644	TITLE 10	1/06/88	Performance Appraisal
10-2.645*	TITLE 10	7/23/87	Performance Appraisal -- Performance Management and Recognition System
10-2.650*	TITLE 10	1/07/87	Awards
10-2.910*	TITLE 10	7/16/87	Attendance and Leave and Hours of Duty
10-8.120*	TITLE 10	1/31/86	Policy Concerning Handling of Agency Debt Claim Referrals Where the Applicable Statute of Limitations Has Run
11-9-120.000	TITLE 11	7/26/88	Consolidation of Criminal Fine Responsibility Within the Executive Office for U.S. Attorneys
11-10-3.320; 321*	TITLE 11	9/23/87	Return of Certain Bankruptcy Cases to Agencies for Collection
11-10-5.220**	TITLE 11	9/18/87	Closing Judgment Cases as Uncollectible

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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)

<u>Effective Date</u>	<u>Annual Rate</u>	<u>Effective Date</u>	<u>Annual Rate</u>
01-16-87	5.75%	11-20-87	6.93%
02-13-87	6.09%	12-18-88	7.22%
03-13-87	6.04%	01-15-88	7.14%
04-10-87	6.30%	02-12-88	6.59%
05-13-87	7.02%	03-11-88	6.71%
06-05-87	7.00%	04-08-88	7.01%
07-03-87	6.64%	05-06-88	7.20%
08-05-87	6.98%	06-03-88	7.59%
09-02-87	7.22%	07-01-88	7.54%
10-01-87	7.88%	07-29-88	7.95%
10-23-87	6.90%		

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.

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