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United States Attorneys' Bulletin

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TABLE OF CONTENTS

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

David Allred (Alabama, Middle District), by Tucker Cotten, District Counsel, Veterans Administration, Montgomery, for his excellent representation in a discrimination suit.

Robert Behlen, Jr. (Ohio, Southern District), by Michael Elam, Chief, Solid Waste and Emergency Response Branch, Environmental Protection Agency, Chicago, for his assistance in gaining access to an instrument company site to respond to radioactive contamination.

George W. Breitsameter (District of Idaho), by Jack Bookey, Regional Administrator, Securities and Exchange Commission, Seattle, for his successful prosecution of four defendants in a securities fraud scam.

Lance Caldwell (District of Oregon), by Danny O. Coulson, Special Agent in Charge, FBI, Portland, for his outstanding success in a $150 million fraud case involving a savings and loan association.

Darcy Cerow (District of Arizona), by Ronald B. Cox, Special Agent, Arizona Department of Public Safety, Phoenix, for her professionalism and legal skills in a complicated narcotics case.

Patricia Allen Conover (Alabama, Middle District), by Dale N. Richey, State Director, Farmers Home Administration, Department of Agriculture, Montgomery, for her professionalism in a FmHA security property case.

Stephen R. Graben (Mississippi, Southern District), by Wm. E. Pressly, Office of the General Counsel, Department of the Navy, Pascagoula, for his success in obtaining dismissal of a civil action.

Tony D. Graham, United States Attorney, and **Catherine Depew**, Assistant United States Attorney, (Oklahoma, Northern District), by Mickey D. Wilson, Judge, U.S. Bankruptcy Court, Tulsa, for their outstanding success in prosecuting a complex bankruptcy fraud case.

Patrick Hanley (Ohio, Southern District), by James E. Kagy, Special Litigation Assistant, IRS, Cincinnati, for his excellent presentation at a Government Witness Training Program.

David Hoff and **Thomas Karmgard** (Illinois, Central District), by William O'Herin, District Counsel, Department of the Army, Corps of Engineers, St. Louis, for their success in obtaining dismissal of a complex civil suit.

Joseph M. Holloman (Mississippi, Southern District), by William Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for obtaining indictments in two Labor Department cases.

Matthew L. Jacobs (Wisconsin, Eastern District), by Thomas Tantillo, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his successful prosecution of a complicated mail fraud case.

Wallace Kleindienst (District of Arizona), by William S. Sessions, Director, FBI, for his success in obtaining conviction on all charges in a murder case. Also, by P.S. Hickok, Postal Inspector, U.S. Postal Service, Phoenix, for his skillful handling of a criminal case.

Nancy Koenig (Texas, Northern District), by William S. Sessions, Director, FBI, for her successful prosecution of a civil case involving the Federal Tort Claims Act and a Bivens individual liability.

Arthur Leach (Georgia, Southern District), by Paul Williams, District Director, IRS, Atlanta, for his excellent representation in a probation revocation case.

John Leonardo (District of Arizona), by Ronald Dowdy, Chief Patrol Agent, Immigration and Naturalization Service, Tucson, for his successful prosecution of an INS case.

Dennis Moore (Florida, Middle District), by Rachel McCarthy, Assistant Regional Counsel, Immigration and Naturalization Service, Burlington, Vermont, for his excellent representation of an ancillary matter to a bankruptcy case.

Melissa Mundell (Georgia, Southern District), by William Hough, District Counsel, U.S. Army Corps of Engineers, Savannah, for her excellent representation in a complicated civil case.

Lee Pico (District of Wyoming), by M. Danny Wall, Chairman, Federal Home Loan Bank Board, Washington, D.C. for his successful prosecution of a criminal fraud case.

Walter Postula (Florida, Middle District), by Kahlman Fallon, Assistant Regional Solicitor, Department of the Interior, Atlanta, for his excellent representation of the U.S. Fish and Wildlife Service in a civil case.

Eric Ruschky (District of South Carolina), by R.M. Hazelwood, III, Inspector in Charge, U.S. Postal Service, Charlotte, North Carolina, for his successful prosecution of a post office burglary case.

Kurt Sherunk (District of Kansas), by Otto Privette, Resident Agent in Charge, Drug Enforcement Administration, Wichita, for his expertise and legal skill in the prosecution of a complicated DEA Task Force case.

Paul Alan Sprowls (Florida, Northern District), by Jack Kean, Regional Inspector General for Investigations, Office of Inspector General, Department of Labor, Atlanta, for his successful prosecutive efforts in two cases involving interstate unemployment insurance fraud.

Richard T. Starrett (Mississippi, Southern District), by Lt. Col. James A. Peden, Jr., Staff Judge Advocate, Mississippi Air National Guard, Jackson, for his assistance in proceedings against an individual posing a threat to aircraft and other Defense Department resources at Thompson Field.

Robert M. Twiss (California, Eastern District), by Randol Brune, Regional Inspector General for Investigations, Department of Agriculture, Kansas City, for his assistance in obtaining search warrants and recovering records in a U.S. Postal Service case.

Bert Vargas (District of Arizona), by Ronald Edwards, Vice Chairman, The San Carlos Apache Tribe, San Carlos, Arizona, for his outstanding representation in the investigation and trial of a major criminal case.

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PERSONNEL

On January 20, 1989, **Donald A. Carr** became Acting Assistant Attorney General for the Land and Natural Resources Division.

On January 20, 1989, **James I. K. Knapp** became Acting Assistant Attorney General for the Tax Division.

On January 31, 1989, **Joe D. Whitley** was designated Acting Associate Attorney General.

On February 1, 1989, **Benito Romano** was sworn in as the interim United States Attorney for the Southern District of New York.

On February 1, 1989, **Jeremiah O'Sullivan** was sworn in as the interim United States Attorney for the District of Massachusetts.

On February 6, 1989, **Stewart C. Walz** became Acting United States Attorney for the District of Utah.

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CAREER OPPORTUNITIES

Criminal Division

The National Obscenity Enforcement Unit of the Criminal Division, Department of Justice, Washington, D.C., is seeking experienced trial attorneys, preferably with child pornography or child sexual exploitation background or obscenity and organized crime prosecution background. Applicants must have excellent investigative, litigative, analytical, and writing skills. These attorney positions will range in salary from GS-13 to GS-15, and are available immediately. Please submit your resume or SF-171 (Application for Federal Employment) to: National Obscenity Enforcement Unit, Criminal Division, U.S. Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530. No telephone calls, please.

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Financial Litigation Staff
Executive Office For United States Attorneys

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced attorneys for the Financial Litigation Staff, Executive Office for United States Attorneys, in Washington, D.C. Applicants will provide advice and assistance to the 94 United States Attorneys' offices in all areas pertaining to financial litigation (i.e., bankruptcy, foreclosure, civil and criminal debt enforcement, asset forfeiture and property issues). Applicants will develop procedures for implementation of the United States Attorneys' financial litigation programs, provide guidance to the United States Attorneys on asset forfeiture program management, develop training programs and materials and serve as a liaison with other components. Some travel to field locations is required. Applicants must possess a J.D. degree and be an active member of the bar in good standing. The position will be at the GS-12 through GS-14 level and is open until filled.

Please submit a resume or SF-171 (Application for Federal Employment) to: Financial Litigation Staff, Executive Office for United States Attorneys, Room 6402, Patrick Henry Building, 601 D Street, N.W., Washington, D. C. 20530.

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POINTS TO REMEMBER

New Charge By Administrative Office Of U.S. Courts For Handling Of Registry Funds

John R. Bolton, Assistant Attorney General for the Civil Division, has advised that on November 30, 1988, the Administrative Office of United States Courts determined that it would assess a charge of 1.5 percent for the handling of registry funds deposited with the clerks of the respective United States District Courts. According to William R. Burchill, Jr., General Counsel, the charge does not apply, however, to funds deposited on behalf of federal agencies or the United States, or to the extent it would diminish disbursements to federal agencies or the United States from funds as to which the agencies or the United States assert an interest or claim. For example, the charge would not apply to disbursements to federal agencies or the United States as a result of IRS tax claims, land condemnations, admiralty sales, civil or criminal forfeitures, or interpleader actions. The Office's authority to assess the charge against private parties has recently been challenged in Federal District Court (Eirhart v. Administrative Office of the United States Courts, No. 89C 0192 (N.D. Ill.).

If you have any questions, contact Ted Hirt (FTS 633-4785) or Owen Cooper (FTS 633-4710).

(Civil Division)

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Criminal Fine Enforcement

On January 18, 1989, Associate Attorney General Francis A. Keating II issued a memorandum to all United States Attorneys regarding criminal fine enforcement. Mr. Keating's memorandum reads as follows:

> As the new year begins, I am writing to ask that you give your personal attention to the criminal fine collection effort in your office. The effective enforcement of criminal monetary penalties remains a high priority of the Department. A criminal who does not pay his fine is a criminal who has beaten the system. The failure to aggressively enforce court-ordered criminal fines and restitution, breeds disrespect for the law. During my tenure as United States Attorney, I found that there are several critical steps in managing this portfolio.

First, the "deadwood" must be cleaned out of the inventory. You should seek to have the court remit the uncollectible fines pursuant to our new legislative authority (18 U.S.C. §3573). If remission is not granted, uncollectible cases can be suspended administratively with our new computer codes. Secondly, you must ensure maximal cooperation between the criminal and civil sections of your office. Criminal prosecutors play an important role in criminal fine enforcement. They must seek to avoid imposition of uncollectible amounts. When fines are imposed or made a part of a plea agreement, the criminal prosecutor must get as much up-front cash and security as possible. He also has an obligation to make certain that any information he has regarding assets is shared with the attorney who must enforce the fine.

The United States Attorneys currently have $705 million in criminal fines on the books. The most recent figure shows that we went behind $188 million in FY 1988. Projections indicate that we will reach $1 billion in uncollected fines during 1989. We can expect the wrath of Congress if we do not move quickly to deal with this crisis. In the current fiscal environment, the ability of the Department of Justice to bring money into the federal coffers is critical. The Congress and the Office of Management and Budget are looking hard for sources of additional revenue--criminal fines can be a substantial source. We must resolve to improve our criminal fine enforcement effort. It can and must be done. We have an obligation to the criminal justice system, and the law abiding citizen to make certain that crime does not pay.

(Executive Office for United States Attorneys)

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Customs Service Jurisdiction Under 21 U.S.C. §881

On February 9, 1989, Joe D. Whitley, Acting Associate Attorney General, issued a memorandum concerning an opinion issued by the Office of Legal Counsel (OLC), dated November 23, 1988, on the authority of the United States Customs Service to seize and forfeit property or assets under 21 U.S.C. §881. A copy of the memorandum and the OLC opinion are attached as Exhibit A at the Appendix of this Bulletin.

Questions or comments relating to the policy set forth in this memorandum should be addressed to Margaret Love, Deputy Associate Attorney General, Department of Justice (FTS 633-3951) or Gerald Hilsher, Deputy Assistant Secretary for Law Enforcement, Department of the Treasury (FTS 566-5054). Specific problems in implementing the cross-designation procedure should be brought to the attention of DEA Assistant Administrator David Westrate (FTS 633-1329), or Customs Assistant Commissioner William Rosenblatt (FTS 566-2416).

(Associate Attorney General)

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Delegation Of Authority To Approve Immunity Requests

Edward S.G. Dennis, Assistant Attorney General, Criminal Division, has advised the following:

> Section 7020(E) of the Anti-Drug Abuse Act of 1988 amended 18 U.S.C. §6033(B) to empower the Attorney General to delegate to designated Deputy Assistant Attorneys General the authority to approve immunity requests under 18 U.S.C. §6003, which covers proceedings before courts and grand juries.
>
> Acting upon the authority of the recent amendment, the Attorney General, on December 22, 1988, signed an order delegating his authority to approve immunity requests to Deputy Assistant Attorneys General. The Order became effective on January 5, with publication in the Federal Register (54 FR §296, Jan. 5, 1989).

(Criminal Division)

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Monetary Recovery Statistics

On January 6, 1989, Robert G. Ulrich, United States Attorney, Western District of Missouri and Chairman of the Attorney General's Advisory Committee, issued a memorandum to all United States Attorneys advising that in FY 1988, the United States Attorneys returned 75 cents for every dollar of our authorized budget authority. The relief granted to us from severe budgetary restraints came about in large measure from the Congress' realization that the efforts of the United States Attorneys significantly contributed to the monies that have been collected and deposited into the federal coffers.

It is requested that you take a personal interest in ensuring that your district takes appropriate credit for dollars collected through any of your monetary recovery activities to ensure that the United States Attorneys' collective record reflects the work we perform on behalf of the United States taxpayers. The ability to statistically demonstrate the impact of your monetary recovery efforts is of critical importance. In the budget process, the Office of Management and Budget and the Congress are most interested in the numbers--not the stories--that demonstrate the effectiveness of our monetary recovery work.

There have been occasions when a Department of Justice Division has instructed a defendant to make payment of an extremely large settlement or fine to the Division's lock box code. This results in statistics which do not reflect the substantial contribution made by the United States Attorney. This is unfair as well as harmful to our ability to make our own case before OMB and the Hill. Our concern must be to get appropriate credit for the work the United States Attorneys perform. In cases involving large sums, the funds should be wire transferred. The delay in getting the funds into the lock box can result in significant amounts of lost interest.

The Debt Accounting Operations Group, Justice Management Division, can easily apportion the proper credit for the collection between the United States Attorney and the Division if they are advised in advance of the deposit. Robert Niffenegger, Assistant Director, Debt Accounting Operations Group, is coordinating this effort and can be reached at FTS 633-5343.

Your strong support of the financial litigation program -- civil and criminal collections, bankruptcy, foreclosure, affirmative civil and asset forfeiture -- is critical in the tight fiscal days ahead.

(Western District of Missouri)

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Office Of National Drug Control Policy

On February 8, 1989, Attorney General Dick Thornburgh issued a memorandum to the Heads of Department Components concerning the coordination of Department of Justice activities with the Office of National Drug Control Policy. The Attorney General discusses the Anti-Drug Abuse Act of 1988 which created an Office of National Drug Control Policy within the Executive Office of the President. William Bennett, former Secretary of Education, was nominated by

the President to serve as the Director, more commonly referred to as the "drug czar." Upon confirmation, Mr. Bennett will have statutory responsibility for coordinating the federal war on drugs, including both supply and demand reduction programs. He will be the President's chief advisor on the organization, management and budget requirements of the federal agencies charged with implementing these programs. The primary responsibilities will fall within two broad categories: preparation of a consolidated national drug control program budget for each fiscal year, and the annual development of the national drug strategy, including a state and local component.

Dick Weatherbee, Assistant to the Attorney General, has been designated to serve as the liaison between the Department of Justice and the Office of National Drug Control Policy. Please direct all communications or telephone inquiries involving our drug control efforts to Mr. Weatherbee, Office of the Attorney General, Room 5125, Department of Justice, FTS 633-2927.

(Executive Office for United States Attorneys)

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Transmission Of Adverse Decisions In Social Security Cases

In the United States Attorneys' Bulletin, Volume 36, No. 1, dated January 15, 1988, an article entitled "Social Security Disability Litigation" set forth procedures to be followed in our continuing efforts to handle social security disability litigation in cooperation with the Department of Health and Human Services. The article included procedures on transmission of adverse decisions in social security cases. A copy is attached as Exhibit B at the Appendix of this Bulletin.

The Department of Health and Human Services (HHS) has raised the concern that some United States Attorneys' offices consider only "reversal" orders to be "adverse" decisions. This is to clarify that "adverse" decisions include both remand orders and reversals. Since both remands and reversals require additional action on the part of the Social Security Administration, remand orders require the same kind of prompt transmission as orders reversing the Secretary of HHS. Therefore, please forward both remand orders and reversals to the office of the General Counsel, Social Security Division, Baltimore, Maryland, with a copy to the Office of the Chief Counsel, Department of Health and Human Services (in your region), and a copy to the Civil Division, within two working days of receipt by the United States Attorney.

(Executive Office for United States Attorneys)

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Supreme Court Opinion On The Constitutionality Of The Sentencing Guidelines

On January 18, 1989, the Supreme Court, by a vote of 8-1, affirmed the judgment of the United States District Court for the Western District of Missouri, ruling the Sentencing Guidelines constitutional. Please refer to the Civil Division Case Notes in this Bulletin (p. 54) for a detailed summary of this matter. This opinion is being published in Law Week and will be made available on JURIS.

If you have any questions, please contact Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, FTS 633-4024.

(Executive Office for United States Attorneys)

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Supervisory Training

The Personnel Management Staff, Executive Office for United States Attorneys, wishes to remind you that non-attorneys who are assigned to supervisory positions are required to receive at least 80 hours of formal training (or its equivalent) within their first two years in a supervisory position. See DOJ Order 1410.1C 6b, dated April 28, 1983 and USAM 3-8.520, dated October 1, 1988 (previously USAM 10-2.833).

When determining what constitutes a "supervisor" for purposes of the required training, you are guided by the definition in the Order, which defines a supervisory position as one ". . .which involves direct responsibility for regularly assigning and reviewing the work of three or more non-supervisory employees." It is important to note that the Order only applies to supervisory positions in the competitive service. The Executive Office, however, recommends that attorney supervisors receive the same type of training.

If you have any questions, please contact Gail Williamson, Assistant Director, Personnel Management Staff, at FTS 272-6921.

(Executive Office for United States Attorneys)

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Temporary Leave Transfer Program

The Department of Justice initially implemented the Temporary Leave Transfer Program on June 1, 1988. From June 1 through September 30, 1988, the Executive Office for United States Attorneys received and approved nine applications to be leave recipients. A total of 1,912 hours were donated to the nine recipients during FY '88. The following indicates the statistics reported by the other components of the Department:

	DEA	USMS	OBDs	BOP	FBI	OJP	INS
Recipients	1	3	12	14	0	0	1
Approved	1	3	12	14	0	0	1
Hrs. Donated	244	504	2,281	4,097	0	0	857

NOTE: The FBI and OJP were unable to implement programs in FY '88.

(Executive Office for United States Attorneys)

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United States Attorneys' Bulletin

The United States Attorneys' Bulletin staff has moved to the Patrick Henry Building, Room 6419, 601 D Street, N.W., Washington, D.C. 20530. The new telephone number is: FTS 272-5898.

If you have any items of interest to other Department of Justice attorneys, please forward them for inclusion in the Bulletin no later than the first of each month. Any address or name changes should also be forwarded to the above address.

(Executive Office for United States Attorneys)

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LEGISLATION

Omnibus Anti-Drug Abuse Act Of 1988

On November 30, 1988, William W. Wilkins, Jr., Chairman, United States Sentencing Commission, issued a memorandum to all recipients of the Guidelines Manual concerning H.R. 5210, the Omnibus Anti-Drug Abuse Act of 1988 (Public Law 100-690), which was signed by the President on November 18, 1988.

The Act contains new criminal offenses, specific directions to the Commission regarding the promulgation of sentencing guidelines, new or increased mandatory minimum penalties, increased statutory maxima for various offenses, new non-incarcerative penalty provisions, and miscellaneous changes to existing criminal law. While it can be expected that the Act will necessitate significant revisions to the Guidelines Manual, the Commission is continuing to analyze this complex legislation in order to determine its impact and to draft appropriate guideline amendments.

Following its established practice, the Commission intends to seek public comment on proposed guideline modifications. However, this does not foreclose the possibility that the Commission may determine that some of the changes mandated by the legislation should be implemented through the emergency guideline authority conferred on the Commission by Section 21 of the Sentencing Act of 1987. In the interim, the Commission has prepared a summary of the Act's major provisions relating to sentencing. This summary is attached at the Appendix of this Bulletin as Exhibit C.

The Commission also offers the following suggestions to facilitate implementation of the Anti-Drug Abuse Act's provisions in relevant sentencing proceedings. Keep in mind that many of the Act's provisions will apply only to offenses committed subsequent to the effective date of the Act.

1. Transmission of Statement of Reasons. Section 7102 of the Act amends 18 U.S.C. §3553(c) to permit the court to transmit either a transcript or "other appropriate public record" of the sentencing judge's statement of reasons to the appropriate agencies, including the Sentencing Commission. This amendment, which the Commission requested with the support of the Judicial Conference of the United States, affords courts flexibility to determine the most suitable form for transmittal of sentencing reasons. The Commission hopes this provision will facilitate the expeditious transmittal to the Commission in accordance with 28 U.S.C. §3553(c) in every case. This information is essential to the Commission's monitoring, evaluation, and guideline amendment functions.

2. New or Enhanced Mandatory Minimum Penalties. Application of the current guidelines may result in a sentence below a newly enacted or enhanced mandatory minimum penalty (see parts II and III of the attached summary). In that event §5G1.1(b) of the Guidelines provides that the statutory minimum supercedes and becomes the guideline sentence. See also §5G1.2(a) of the Guidelines relating to consecutive sentences mandated by statute.

3. New Criminal Offenses. In accordance with 2X5.1 of the Guidelines, the court is to apply the most analogous guideline when sentencing for an offense for which the Commission has not yet promulgated a guideline in Chapter 2 of the Guidelines Manual or expressly indicated that an existing guideline would apply. If no existing guideline is sufficiently analogous to a newly created offense, the court should be guided by the provisions of 18 U.S.C. §3553(b).

4. Increased Statutory Maximum Penalties for Existing Offenses. Existing offenses for which the Act increases the maximum authorized penalty are listed in Part IV of the attached summary. Whether an increase in the statutory maximum warrants an upward departure from the existing guideline range is a matter for decision by the sentencing judge.

The Commission has prepared 50 frequently asked questions about guideline application, which are attached to Exhibit C.

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Senate Select Committee On Indian Affairs

The Special Committee on Investigations of the Senate Select Committee on Indian Affairs (Dennis DeConcini, Chairman, and John McCain, Vice Chairman), continued its hearings on issues involving the enforcement of criminal law on Indian reservations. Testifying on behalf of the Department of Justice were Anthony Daniels, Deputy Assistant Director, Criminal Investigative Division, FBI; and five United States Attorneys: Philip Hogan (South Dakota), William Lutz (New Mexico), Stephen McNamee (Arizona), William Price (Western District of Oklahoma), and Richard Stacy (Wyoming).

The Special Committee has thus far focused on alleged corruption in minority contracting on the reservations; the involvement of organized crime in Indian gaming, particularly bingo operations; and investigation and enforcement of violent crime, including sexual abuse of children, in Indian country. The Special Committee has asked the United States Attorneys to work with the Department and Committee staff to develop recommendations for legislation to address any gaps in federal criminal law relating to these issues.

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Whistleblower Protection

On January 3, 1989, Congresswoman Schroeder and Congressman Horton reintroduced the Whistleblower Protection bill that was pocket-vetoed at the close of the last Congress as H.R. 25. The bill was referred to the Committee on Post Office and Civil Service.

On January 25, 1989, Senator Levin reintroduced the same bill as S. 20 and invoked Senate Rule 14 in an effort to send the bill directly to the Calendar, bypassing the Committee process. The Department of Justice has coordinated with representatives of the Office of Personnel Management and the Office of Management and Budget in presenting preliminary objections to the bill on an informal basis to certain minority staff. The Department plans to finalize its position soon so that work can begin with Senator Levin's staff to resolve the most important areas of disagreement. Floor action, subject to a unanimous consent agreement, has been tentatively set for February 22, 1989.

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CASE NOTES

CIVIL DIVISION

Supreme Court Upholds Federal Sentencing Guidelines As Constitutional

The Supreme Court has upheld against separation-of-powers attacks on the constitutionality of the United States Sentencing Commission, a body including both judges and non-judges, which is assigned the task of formulating mandatory guidelines to govern criminal sentencing. The Ninth Circuit, and more than a hundred district judges, had struck down the sentencing guidelines on the ground that the participation of judges in this non-judicial activity violates constitutional separation of powers. With this decision, the sentencing guidelines remain in effect and those courts which had rejected the guidelines must now re-sentence criminal defendants who had been given non-guideline sentences.

The Court first rejected, without hesitation, the defendant's argument that Congress had effected an excessive delegation of legislative power by authorizing the Sentencing Commission to issue guidelines. The Court concluded the statute provided guidance to the Commission that was "sufficiently specific and detailed to meet constitutional requirements." The Court next affirmed the location

of the Commission within the Judicial Branch, holding that despite its "significantly political nature," it was not inappropriate to create an independent commission in the Judicial Branch that engaged in non-judicial policymaking activities. The Court also rejected the argument that the participation of judges on the Commission infringes the independence and impartiality of the Judiciary. The Court noted there is no constitutional or precedential bar to extrajudicial service by judges, and said the crucial factor was that the Commission is engaged in an "essentially neutral endeavor" in which judicial participation is "particularly appropriate" because of judicial experience and expertise with regard to sentencing. Finally, the Court ruled that the President's limited removal power over the judge-members of a judicial branch commission does not offend separation of powers principles because the removal power is limited to their status as commissioners and does not affect their separate role as Article III judges.

Mistretta v. United States, Nos. 87-7028, 87-1904 (Jan. 18, 1989). DJ # 77-43-559.

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

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Fourth Circuit Agrees That Attorney's Fees Must Be Computed On The Lodestar Method, But Holds That The Fees May Be Enhanced To Account For Risk and Delay

When a claimant obtains, on judicial review, a reversal of a Department of Health and Human Services decision denying disability benefits, the claimant's attorney may be awarded a "reasonable" fee not exceeding 25 percent of the accumulated, past-due benefits which the claimant would have received but for the agency's error. Often the delays in adjudication on the merits can push the past-due benefits quite high. Here, claimant's counsel sought and received $5,970.90 for 8.6 hours of court work, which was the statutory ceiling. On appeal, the Court agreed that no presumption attaches to the statutory ceiling and, in each case, the court must ascertain a reasonable fee based on the work actually performed. The proper starting place, the court held, is the reasonable hourly rate multiplied by the number of hours reasonably expended, i.e., the "lodestar" fee. The court, however, joined the Second and Third Circuits holding that, because these cases are not "fee-shifting" cases (i.e., the burden of the fee is not shifted from the winner to the loser), these cases are not subject to the general rule proscribing "enhancements" or "multipliers" for contingency risk that no fee at all might be collected.

Craig v. HHS, NO. 88-3994 (4th Cir. Jan. 3, 1989). DJ # 137-80-993.

Attorneys: William Kanter, FTS 633-1597
Bruce Forrest, FTS 633-2496

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Eighth Circuit Rules That Farmer Litigation Against FmHA Is Moot In Light Of Agricultural Credit Act Of 1987

The district court declared FmHA's Form 1924-26 unconstitutional because the form, which was sent to borrowers when they were delinquent in their loan repayments, arbitrarily deprived farmers of a property right by requiring them to select one, and only one, of four available options to address the default. The court also issued an injunction granting a large portion of the retroactive relief the plaintiffs sought. While we were briefing the cross-appeals, the Agricultural Credit Act of 1987 was enacted into law. We argued that the Act mooted both the appeal and the cross-appeal. The court of appeals ruled that the Act mooted the cross-appeals and remanded the case to the district court with directions to dismiss the complaint as moot.

The court of appeals observed that the legislative history made quite clear that the Act was intended to address this litigation, and concluded that "Congress's obvious intent was that the 1987 Act would function as a legislative enactment of the remedy for the grievances presented in this case." The court also noted that the actual source of relief was the statute before its amendment by the 1987 Act; that "Congress is free to alter such a system of entitlements during the pendency of a case, and when it does so, the reviewing court 'must apply the law as it is now, not as it stood below'"; and that courts have no further remedial power when Congress validly amends the statute authorizing benefits.

Coleman v. Lyng, Nos. 87-5477, 88-5003 (8th Cir. Dec. 28, 1988). DJ # 145-8-1578.

Attorneys: Robert Greenspan, FTS 633-5428
Howard Scher, FTS 633-3180

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Eighth Circuit Affirms Lower Court's Holding That 1985 Amendments To Food Stamp Act Require Retroactive Application Of Implementing Regulations By The Secretary Of Agriculture

On December 23, 1985, Congress amended the student loan provision of the Food Stamp Act of 1977 to permit an exclusion from income for lender-retained loan origination fees and insurance premiums. Although the 1985 Act provided generally that its terms were to become effective immediately, Title XV of the Act--the only title pertaining to the food stamp program--contained its own implementation provision allowing the Secretary of Agriculture until April 1, 1987, to implement the changes. On August 22, 1986, the Secretary issued a final rule implementing the new student loan provision. Marge Metzer, whose food stamps were decreased in March, 1986 as a result of application of the pre-amendment regulation in the calculation of her income, instituted this class action against the Secretary of Agriculture and the Minnesota Department of Human Services alleging that the amendment was effective immediately upon enactment, and that she and all others similarly situated were entitled to retroactive benefits to December 23, 1985. The district court agreed with plaintiffs and ordered that the class was entitled to seek retroactive benefits to that date. The court of appeals affirmed the district court's judgment. In so doing, the panel held, inter alia, that Congress explicitly provided that the Act be effective on the date of its enactment and "[i]f Congress had intended prior contrary portions of the pre-amendment act to govern in the period before new rules were implemented, [it] could have so provided." Although we directed the court's attention to several district court decisions upholding the Secretary's position, the panel made no mention of these cases in its opinion.

Metzer v. Lyng, No. 88-5192MN (8th Cir. Dec. 20, 1988). DJ # 147-39-77.

Attorneys: Michael Jay Singer, FTS 633-5432
Jeffrica J. Lee, FTS 633-3469

* * * * *

Eleventh Circuit Affirms In Part, Vacates And Remands District Court Decision Awarding $1.2 Million In Attorney's Fees Under The Equal Access To Justice Act

This case involved a challenge to the Immigration and Naturalization Service's "practice" of detaining Haitian refugees during the pendency of their asylum applications. The merits portion of the case was appealed, reheard en banc, and, ultimately, reviewed by the Supreme Court. The final result was that plaintiffs did not succeed on their central claim that INS' practice violated their equal protection rights. They did obtain injunctive relief on their claim that INS changed its policy without following the notice and comment procedures required by the APA, but the Eleventh Circuit later remanded the case to the district court with directions to vacate the injunction as moot. Despite the fact that plaintiffs' success was rather limited, the district court awarded them $1.2 million in attorney's fees. This figure included cost of living increases, enhancements, fees for fees and thousands of dollars in costs.

A divided Eleventh Circuit has now affirmed the district court's determination that plaintiffs were the prevailing parties, and that the government's position was not substantially justified. Finding that the district court's calculation of the award was improper, however, the appellate court vacated and remanded the case for a recalculation. The court concluded that: (1) contemporaneous time sheets are not required when there is other reliable evidence to support a claim for attorney's fees; (2) the starting point for determining fees should not be the Johnson factors, but rather prevailing market rates; (3) courts must describe mathematically the basis for all cost of living adjustments; (4) EAJA's reenactment in 1985 does not bar cost of living adjustments for services rendered prior to that date; (5) specialization in immigration law or fluency in foreign languages may constitute "special" factors justifying increased hourly rates; (6) the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on plaintiffs' counsel cannot justify enhancement of a fee award; (7) the government's unusually litigious position in this case might be a special factor which would justify an increased award; (8) costs are not limited to those enumerated in the statute; and (9) the government may not oppose "fees for fees" solely on the grounds that its position in the fee litigation was substantially justified.

Jean v. Nelson, No. 86-5887 (11th Cir. Dec. 27, 1988). DJ # 39-18-495.

Attorneys: Michael Singer, FTS 633-5432
Mary K. Doyle, FTS 633-3377

* * * * *

CIVIL RIGHTS DIVISION

Supreme Court Invalidates Minority Set-Aside Program Challenged Under The Equal Protection Clause

In City of Richmond v. J.A. Croson Co., No. 87-998 (Jan. 23, 1989), the Supreme Court held that a Richmond city ordinance that required every non-minority prime construction contractor to subcontract at least 30 percent of the value of its city contracts to "Minority Business Enterprises" (MBEs) violated the Equal Protection Clause of the Fourteenth Amendment because (1) the ordinance was not justified by a compelling governmental interest (i.e., there was no evidence of specific instances of prior discrimination in the contracting process) and (2) the 30 percent set-aside was not narrowly tailored to achieve a remedial purpose. While a majority of the Court acknowledged that "[s]tates and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination," the Court warned that "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Slip Op. 29. Accordingly, in the absence of proper findings demonstrating that there is "'a strong basis in evidence [to support a] conclusion that remedial action was necessary'" as to "both the scope of the injury and the extent of the remedy," a racial classification adopted by a state or local legislature will not pass constitutional scrutiny. Id. at 35, quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986). Justice O'Connor wrote the opinion on behalf of the Court. While a majority of the Justices did not join all sections of her opinion, five other Justices (Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.) concurred in the result, while three Justices (Marshall, Brennan, and Blackmun, JJ.) dissented.

For the first time, a majority of the Court (Rehnquist, C.J., O'Connor, White, Scalia, and Kennedy, JJ.), held that strict scrutiny applies to all racial classifications challenged under the Equal Protection Clause, regardless of which racial group is burdened or benefitted. Slip Op. 18. See id. at 2 (Kennedy, J. concurring in part and concurring in the judgment); id. at 1 (Scalia, J., concurring in the judgment). A majority of the Court (Rehnquist, C.J., O'Connor, White, Stevens, and Kennedy JJ.) concluded that the City of Richmond failed to establish a factual predicate sufficient to demonstrate that there was a compelling need for the racial classification contained in the ordinance. Id. at 22-31; id. at 8 (Stevens, J., concurring in part and concurring in the judgment); id. at 3 (Kennedy, JJ., concurring in part and concurring in the judgment); see also id. at 7 (Scalia, J., concurring in the judgment). A majority of the Court (Rehnquist, C.J., O'Connor, White, Stevens, and Kennedy, JJ.) also held that the Plan

was not narrowly tailored since it was "not linked to identified discrimination in any way." Id. at 31. In addition, the Court found the Plan to be overbroad since there was no "consideration of the use of race-neutral means to increase minority business participation in city contracting." Ibid. The Court further concluded that the Plan was not narrowly tailored to any goal "except perhaps outright racial balancing." Id. at 32.

In Part II of her opinion, Justice O'Connor, joined by Rehnquist, C.J., and White, J., distinguished Fullilove v. Klutznick, 448 U.S. §448 (1980), in which the Court upheld the constitutionality of a federal law requiring that at least 10 percent of funds for local public works projects be set aside for contracts with MBEs. Finally, a majority of the Court (Rehnquist, C.J., White, O'Connor, Stevens, and Kennedy, JJ.) suggested that a city can employ nonracial classifications which provide benefits and increase minority participation. "If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation." Slip Op. 32. Justice O'Connor (joined by Rehnquist, C.J., White, and Kennedy, JJ.) went on to suggest that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." Id. at 34.

City of Richmond v. J.A. Croson Co., Sup.Ct. No. 87-998 (Jan. 23, 1989). DJ 170-79-168.

Attorneys: David K. Flynn, FTS 633-2195
Lisa J. Stark, FTS 633-4491

* * * * *

Title VII Complaint Filed Against The Prince George's County, Maryland School System

On January 23, 1989, we filed a complaint in United States v. The Board of Education of Prince George's County (D.Md.), alleging a pattern or practice of employment discrimination on the basis of race and sex. Our complaint alleges that the teacher transfer policies of the county unlawfully discriminate on the basis of race and that the 30-day maximum sick leave for pregnancy unlawfully discriminates against women on the basis of sex. The complaint further alleges that the Board of Education has transferred teachers and other professional employees to different schools, solely on the basis of their race and without regard to their seniority, in order to maintain a strict racial balance of faculty and staff in each school, and that the Negotiated Agreement between the Board and the Prince George's Educators' Association discriminates on the

basis of sex by limiting the paid sick leave available for pregnancy to 30 days, while not similarly limiting paid sick leave for nonpregnancy-related disabilities to 30 days. Both of the policies are in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

United States v. The Board of Education of Prince George's County, C.A. No. K-89-186. D.J. # 170-35-196.

Attorneys: Barbara Thawley, FTS 633-3895
Michael Ricciuti, FTS 633-3861

* * * * *

LAND AND NATURAL RESOURCES DIVISION

Nevada Court Sustains Right Of United States To Appropriate Water For Recreational, Cattle, And Wildlife Watering Purposes

The United States, acting on behalf of the Bureau of Land Management (BLM), Department of the Interior, and the Forest Service, Department of Agriculture, applied to the Nevada State Engineer to appropriate water under Nevada law from springs and wells for cattle and wildlife watering purposes. The Federal Government also filed an application to appropriate water in order to protect Blue Lake, a popular recreational lake on BLM lands. The State Engineer, finding the appropriations to be in accordance with Nevada law and the public interest, granted the applications over the objections of the Nevada Board of Agriculture and others. The Board of Agriculture and other objectors then sought judicial review in the state district court. The district court upheld the Blue Lake application but also ruled that all of the other applications must be rejected because water could not be appropriated for such purposes under Nevada law. Both sides then sought further judicial review in the Nevada Supreme Court.

The Nevada Supreme Court affirmed in part and reversed in part. First, upholding the district court, the Nevada Supreme Court found that the Nevada statutes governing the use of water allow water to be appropriated for recreational uses and that Nevada water law does not make a physical diversion of the water an indispensable element of an appropriation. Hence, where, as here, the State Engineer finds a proposed appropriation for an in situ recreational use to be in the public interest, he may grant the application for such a use. Second, reversing the district court, the Nevada Supreme Court found that the BLM and the Forest Service

were proper parties to appropriate water for the purposes of watering livestock which are grazed on the public lands. In so ruling, the Nevada Supreme Court rejected the district court's assertion that the fact that the United States did not own the livestock disqualified it from appropriating water for stock-watering purposes. Finally, again reversing the district court, the Nevada Supreme Court ruled that the federal agencies could validly appropriate water for wildlife watering purposes. The court found that the Nevada statutes authorized appropriations for recreational purposes and that such appropriations encompass the use of water for wildlife management and enhancement purposes. As the United States is the proprietor of the federal lands, and as the Nevada statutes expressly include the United States within the statutory definition of "persons" entitled to appropriate water pursuant to Nevada law, the federal agencies may validly appropriate water under Nevada law for wildlife watering purposes.

State of Nevada And Nevada State Board Of Agriculture v. Peter G. Morros, State Engineer, And United States of America, Nevada Supreme Court, No. 18105l (December 21, 1988). DJ # 90-1-2-1239, 90-1-2-1255.

Attorneys: Robert L. Klarquist, FTS 633-2731
Jacques B. Gelin, FTS 633-2762.

* * * * *

Untimely Motion For Intervention In Clean Water Act Case Denied. Court Lacks Jurisdiction Under Torres Decision Where Notices Of Appeal Not Timely Filed

In 1985, the United States brought an enforcement action under the Clean Water Act against the Metropolitan District Commission in Massachusetts to remedy the pollution of Boston Harbor resulting from sewage and wastewater discharge. The district court entered partial summary judgment as to liability in 1985, and a long-term consent decree as a remedy in 1986. The remedy contemplated construction of a secondary treatment facility and outfall pipe. In 1986, the Massachusetts authorities noticed an intent to consider locations for the outfall including several locations in Massachusetts Bay. In 1987, several towns bordering on the Bay and a local environmental group sought to intervene as of right, pursuant to 33 U.S.C. 1365(b)(1)(B) and Rule 24(a), in the enforcement action. The district court denied the motion as untimely.

On appeal, the court of appeals ruled that the district court did not abuse its discretion in denying the motion to intervene, and the towns had an adequate remedy in the administrative processes to challenge the location of the outfall pipe. As a sidelight, two of the towns failed to file a timely notice of appeal. The court of appeals ruled it had no jurisdiction over their appeals filed out of time citing the recent Supreme Court decision in Torres v. Oakland Scavenger Co.

United States of America v. Metropolitan District Commission, 1st Cir. No. 88-1493, etc. (January 6, 1989). DJ # 90-5-1-2310.

Attorneys: Anne S. Almy, FTS 633-2749
Andrew Hoagland, Assistant United States Attorney, District of Massachusetts

* * * * *

TAX DIVISION

Supreme Court Grants Certiorari In FOIA Case Involving Tax Division

United States Department of Justice v. Tax Analysts (Sup. Ct.). On January 9, 1989, the Supreme Court granted our petition for a writ of certiorari to review the decision of the D.C. Circuit in this Freedom of Information Act case. The question presented is whether the Tax Division of the Department of Justice, in denying FOIA requests by the publisher of a weekly tax magazine for copies of all U.S. District Court opinions and orders in tax cases, "improperly withheld" documents that constitute "agency records" within the meaning of the Act. We maintain that the judicial orders and opinions, which are matters of public record and are obtainable from the court clerks, have not been improperly withheld by the Tax Division, and that as material generated by the Judicial Branch in the course of disposing of cases, they are not "agency records" within the meaning of that term in the FOIA.

* * * * *

Fifth Circuit Upholds Tax Court Rulings Regarding Imposition Of Section 6659 (Overvaluation) Penalty

Richard J. and Denese W. Todd v. Commissioner (5th Cir). On December 16, 1988, the Fifth Circuit affirmed the Tax Court's ruling in the taxpayers' favor in this case involving a Section 6659 penalty for tax underpayments attributable to valuation overstatements. The taxpayers invested in an abusive tax shelter scheme, which involved the acquisition of greatly overvalued refrigerated food containers. The taxpayers ostensibly purchased the containers for $260,000; they were worth $60,000. Their claimed depreciation deductions and investment tax credits (based on a $260,000 price) were disallowed. The Todds lost in the Tax Court, based not on the overvaluation, but rather on a finding that the containers had not been placed in service during the tax year. Section 6659 imposes a graduated penalty if there is a tax underpayment "attributable to" a valuation overstatement. The Tax Court read this as "attributed to," and since the deficiency had not been sustained on this ground, no penalty could be imposed.

On appeal to the Fifth Circuit, we argued that the language of the statute and its purpose compelled the Tax Court to find that the underpayment could have been caused by the overvaluation, even though this was an alternative ground for the Commissioner's position. The Fifth Circuit rejected our arguments. Finding the statutory language ambiguous, and no "formal" legislative history illuminating the issue, the court found support for the Tax Court's result in the form of explanatory material in the 1981 "blue book" prepared by the Joint Committee on Taxation. The court was unimpressed by our argument that the Tax Court's decision would reward a taxpayer whose case was so flimsy that not only was there a valuation overstatement, there was also a failure to even put the property into service. The Tax Court has continued to follow Todd in later cases, and we are prosecuting appeals on the same question in both the Second and Ninth Circuits. The Second Circuit case (Irom v. Commissioner) was argued on December 19, 1988.

* * * * *

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

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

* * * * *

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street, NW Washington, DC 20005

THRIFT SAVINGS PLAN

THRIFT SAVINGS PLAN FACT SHEET

C, F, and G Fund Monthly Returns

October 18, 1988

The 1988 C, F, and G Fund monthly returns below represent the actual total rates of return used in the monthly allocation of earnings to individual accounts of participants in the Thrift Savings Plan.[1]

	C FUND	WELLS FARGO EQUITY INDEX FUND *	F FUND	WELLS FARGO BOND INDEX FUND**	G FUND
January	(.20%)	4.22%	(.06%)	3.47%	.69%
February	4.82%	4.67%	.81%	1.13%	.62%
March	(3.47%)	(3.01%)	(.80%)	(1.01%)	.66%
April	.73%	1.03%	(.46%)	(.59%)	.68%
May	1.42%	.76%	(.63%)	(.68%)	.71%
June	4.08%	4.62%	1.97%	2.26%	.72%
July	(.24%)	(.42%)	(.49%)	(.55%)	.72%
August	(2.74%)	(3.29%)	.33%	.27%	.76%
September	4.12%	4.22%	2.07%	2.23%	.76%
9 Months					
Period	8.49%	13.09%	2.72%	6.62%	6.49%
Annualized	11.45%	17.78%	3.64%	8.90%	8.72%

* Tracks the S&P 500 index
**Tracks the Shearson Lehman Hutton Government/Corporate bond index
Numbers in ( ) are negative.

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1. The C Fund (Common Stock Index Investment Fund), F Fund (Fixed Income Investment Fund), and G Fund (Government Securities Investment Fund) were established by the Federal Retirement Thrift Investment Board as part of the Thrift Savings Fund for Federal employees, pursuant to the Federal Employees' Retirement System Act of 1986. The G Fund commenced operations on April 1, 1987, and the C and F Funds began operations on January 1, 1988.

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Wisconsin, W	Patrick J. Fiedler
Wyoming	Richard A. Stacy
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* * * * *

EXHIBIT A

DEPARTMENT OF JUSTICE

DEPARTMENT OF THE TREASURY

February 9, 1989

MEMORANDUM

TO: United States Attorneys
Assistant Attorney General, Criminal Division
Administrator, Drug Enforcement Administration
Commissioner, United States Customs Service

FROM: Joe D. Whitley
Acting Associate Attorney General
Department of Justice

Salvatore R. Martoche
Assistant Secretary for Enforcement
Department of the Treasury

SUBJECT: Customs Service Jurisdiction under 21 U.S.C. 881

On November 23, 1988, the Office of Legal Counsel (OLC), Department of Justice, issued an opinion addressing the authority of the United States Customs Service to seize and forfeit property or assets under 21 U.S.C. 881. A copy of the OLC opinion is attached. This opinion concludes that the Customs Service lacks independent statutory authority to conduct Title 21 seizures and forfeitures, and that Customs agents may perform such seizures and forfeitures only if they have been cross-designated by the Attorney General pursuant to 21 U.S.C. 873(b). The OLC opinion does not affect Customs Service authority to seize and forfeit pursuant to other statutes.

The OLC opinion emphasizes the importance of using the cross-designation procedure to deal simply and effectively with jurisdictional issues confronting the Drug Enforcement Administration and the Customs Service in cases involving Title 21 violations. This procedure, which has been expanded and revitalized in recent efforts by DEA Assistant Administrator David Westrate and Customs Assistant Commissioner William Rosenblatt, was proving an effective tool in resolving jurisdictional questions even before the issuance of the OLC opinion. It will now be instituted on a national level by the Administrator of DEA and the Commissioner of the Customs Service.

The cross-designation process must accomplish several things. On the one hand, it must meet the legal standards indicated in the OLC opinion, and it must permit the DEA to supervise activities within its area of statutory responsibility. At the same time, it must encourage continued effective and vigorous activity by the Customs Service in the drug enforcement area, and facilitate Customs and DEA cooperation in the field. Upon mutual agreement by the DEA and Customs Special Agents in Charge that circumstances exist where the cross-designation of Customs Special Agents should be sought, procedures will be initiated in accordance with the Implementing Memorandum of March 2, 1984, its addendum dated February 19, 1985, and specific cross-designation agreements already implemented in such locations as New York, San Diego, Florida, Arizona and Texas. All Title 21 investigations by the Customs Service must be conducted under DEA supervision pursuant to the cross-designation mechanism.

In implementing the cross-designation procedures referenced above, it will be necessary to ensure that all requests for criminal complaints, for warrants to arrest, search or seize persons or property, for Title III wire or oral interceptions, and for civil arrest warrants or complaints for forfeiture, which state an offense under the Controlled Substances Act or the Controlled Substances Import Export Act, be made only by agents of the DEA, the FBI, or by Customs agents cross-designated pursuant to 21 U.S.C. 873(b) operating under DEA supervision as noted above. When requests do not comply with the above procedures, the Customs agents should be required to obtain the proper cross-designation.

The OLC opinion makes clear that when the Customs Service possesses independent statutory authority to seize and forfeit property, and the United States Attorney prosecutes the forfeiture under section 881, forfeited cash and/or the proceeds of any subsequent forfeitures must be deposited in the Customs Forfeiture Fund. With respect to tangible property seized in such cases, the Attorney General will ordinarily exercise his discretion under section 881 to transfer such seized tangible property to the Customs Service, or, through the Customs Service, to a state or local law enforcement agency designated by the Customs Service.

By contrast, in those instances when the Customs Service seizes property solely under authority of section 881, pursuant to the cross-designation procedures, forfeited cash and/or the proceeds of a forfeiture must be deposited in the Department of Justice Assets Forfeiture Fund. Such cash or proceeds, as well as tangible property seized by the Customs Service under authority of section 881, will be shared in accordance with applicable rules of equitable sharing. Notwithstanding section III.A.2 of the Attorney General's Guidelines on Seized and Forfeited Property, which prohibits cash transfers to any Federal agency, forfeited cash and proceeds from the sale of forfeited

assets may be transferred by the Attorney General to the Customs Forfeiture Fund.

Pending judicial forfeiture pursuant to section 881, the Customs Service shall maintain custody and control of seized tangible property in accordance with currently applicable rules and procedures.

The Customs Service has made and will continue to make important contributions in drug enforcement. It is our hope and expectation that the procedures to implement the OLC opinion, as outlined above, will permit uninterrupted continuation of the cooperative efforts of Federal law enforcement agencies in drug enforcement activities. DEA and Customs Service supervisory personnel in the field should be provided with a copy of this memorandum and the OLC opinion for dissemination to all affected personnel.

Questions or comments relating to the policy set forth in this memorandum should be addressed to Margaret Love, Deputy Associate Attorney General, Department of Justice (FTS 633-3951) or Gerald Hilsher, Deputy Assistant Secretary for Law Enforcement, Department of the Treasury (FTS 566-5054). Specific problems in implementing the cross-designation procedure should be brought to the attention of DEA Assistant Administrator David Westrate (FTS 633-1329), or Customs Assistant Commissioner William Rosenblatt (FTS 566-2416).

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

November 23, 1988

MEMORANDUM FOR FRANCIS A. KEATING II
Associate Attorney General

Re: United States Customs Service Jurisdiction
Pursuant to 21 U.S.C. 881 Forfeiture Provisions

Introduction

This memorandum responds to your request that this Office consider (1) whether the United States Customs Service has independent authority to seize and forfeit property pursuant to 21 U.S.C. 881, and (2) whether property forfeited under 21 U.S.C. 881 may be deposited into the Customs Forfeiture Fund maintained under the authority of 19 U.S.C. 1613b. These questions were first posed by the Administrator, Drug Enforcement Administration (DEA),[1] and have been the subject of memoranda from the DEA, the United States Customs Service (Customs) and the Department of Treasury to this Office over the past year.[2] In addition, these

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[1] Memorandum to the Assistant Attorney General, Office of Legal Counsel, from John C. Lawn, Administrator, DEA, regarding U.S. Customs Authority in Matters Relating to 21 U.S.C. 881 (November 3, 1986).

[2] See, e.g., Memorandum from Dennis F. Hoffman, Chief Counsel, DEA, to Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, regarding U.S. Customs Authority in Matters Relating to 21 U.S.C. 881 (June 2, 1987) (hereafter "Memorandum from Dennis F. Hoffman"); Memorandum from Michael H. Lane, Acting Commissioner of Customs, to Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, regarding Customs Seizures under 21 U.S.C. 881 (April 5, 1988) (hereafter "Memorandum from Michael H. Lane"); Memorandum from Selig S. Merber, Assistant General Counsel, Department of the Treasury, to Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, regarding U.S. Customs Service Use of 21 U.S.C. 881 (June 6, 1988).

questions have caused disagreement between field offices of DEA and Customs during the past several months, and the United States Attorneys in several districts have been called upon to mediate the disputes.

Section 881 of the Controlled Substances Act generally provides statutory authority to seize and forfeit the proceeds of drug transactions and the property used to facilitate such transactions. Although this Office has indicated in prior opinions that Customs does not have independent Title 21 seizure authority,[3] and we have no basis to disturb that opinion, we have never specifically addressed whether Customs has independent forfeiture authority under 21 U.S.C. 881 or the extent to which property forfeited under section 881 may be deposited in the Customs Forfeiture Fund (Customs fund). The DEA contends that Customs has no independent forfeiture authority under section 881 because Congress has designated the Department of Justice as the authority responsible for enforcing the federal drug laws and because section 881 specifically confers forfeiture authority only upon the Attorney General. The DEA further contends that property forfeited under section 881 may not be deposited into the Customs fund because Customs is not the proper authority to perform seizures under these drug laws. In contrast, Customs and the Department of Treasury maintain that section 881 provides Customs with independent forfeiture authority and that any property seized by Customs must be deposited into the Customs fund.

For the reasons set forth below, we conclude that Customs does not have independent forfeiture authority under section 881. In 1973, Reorganization Plan No. 2 transferred drug enforcement authority to the Department of Justice. While Customs' limited independent authority to seize drugs under laws other than Title

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[3] See, e.g., Memorandum to the Attorney General regarding Request by the Department of Justice for Assistance from the Department of Treasury in the Enforcement of the Controlled Substances Act, 21 U.S.C. 801 et seq., and the Controlled Substances Import and Export Act, 21 U.S.C. 951 et seq. (December 23, 1983) (hereafter "OLC Memorandum of December 23, 1983"), from Theodore Olson, Assistant Attorney General, Office of Legal Counsel (courts would probably uphold a grant of limited Title 21 authority granted to Customs officials acting under the supervision of DEA personnel); Memorandum for the Deputy Attorney General regarding United States Customs Service Jurisdiction Over Title 21 Drug Offenses (June 3, 1986) (hereafter "OLC Memorandum of June 3, 1986"), from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel (19 U.S.C. 1589 and 1589(a) provide warrant and arrest authority to Customs, but do not alter its drug-related authority under the Reorganization Plan No. 2 of 1973).

21 is acknowledged by this Plan, Customs is required to turn over to the Department of Justice all drugs and related evidence. Customs agents can only seize and forfeit property pursuant to section 881 when they assist the Drug Enforcement Administration under designation by the Attorney General. As we discuss below, the 1984 and 1988 amendments to section 881 confirm our conclusion that the Attorney General is solely responsible for seizing, forfeiting and, in the first instance, disposing of property forfeited under that statute.

The second issue, pertaining to the Customs Forfeiture Fund, poses a closer question. For the reasons set forth below, however, we conclude that under 28 U.S.C. 524(c)(10) the proceeds of property forfeited after a seizure by Customs must be deposited in the Customs fund when the seizure was made by Customs under a law administered or enforced by Customs, or custody was maintained by Customs, regardless of whether the forfeiture was handled by the Department of Justice under section 881.[4]

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[4] As this opinion was being finalized, the President signed into law the omnibus drug bill, Pub. L. No. 100-690 (1988 drug bill). We have reviewed the new law's provisions, and incorporated them into our analysis.

Two provisions contained in the 1988 drug bill are worthy of additional comment here. Section 6078 of Title VI provides for an addition to the end of Part E of the Controlled Substances Act (21 U.S.C. 871 et seq.) as follows:

> The Attorney General and the Secretary of the Treasury shall take such action as may be necessary to develop and maintain a joint plan to coordinate and consolidate post-seizure administration of property seized under this title, title III, or provisions of the customs laws relating to controlled substances.

Similarly, Section 6079 of Title VI of the 1988 drug bill provides that the Attorney General and the Secretary of the Treasury are to consult and prescribe regulations for expedited administrative procedures for certain seizures under several acts, including both the Controlled Substances Act and the Tariff Act of 1930.

We believe that neither of these provisions constitutes a grant of additional seizure or forfeiture authority to Customs. It is significant in this regard that both provisions are procedural, and both specifically refer to the customs laws. The plain language of these provisions indicates that Congress has acknowledged here, as it has elsewhere, that Customs agents,

(continued...)

Discussion

I. Forfeiture Authority Pursuant to 21 U.S.C. 881

A. Statutory Language

Section 881 provides the Attorney General broad authority both to seize and to forfeit specified controlled substances as well as certain property connected with the manufacture, distribution or sale of those substances,[5] and further provides for the disposition of the forfeited property.[6] In addition, section 881

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[4](...continued)
acting under the customs laws, have some seizure authority in drug cases. Nothing in the provisions suggests that Congress meant to grant Customs seizure authority under Section 881. We note that the complete legislative history of the 1988 drug bill is not yet available for our review from the Department of Justice's Office of Legislative Affairs; we note further, however, that legislative history cannot be used to subvert the plain meaning of the statutory text.

[5] Section 881(a)(1) through (5) provides for the forfeiture of controlled substances, material and equipment, containers, conveyances, and records involved in drug trafficking. Section 881(a)(6) provides for the forfeiture of all assets -- including moneys, negotiable instruments and securities -- furnished or intended to be furnished in exchange for illegal drugs or traceable to such an exchange, as well as all such assets used or intended to be used to facilitate any drug violations. Section 881(a)(7) and (8), added as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, grant authority to seize and forfeit real property used or intended to be used in a drug felony, and controlled substances possessed in violation of the Act. Section 881(a)(7) was further amended by the 1988 drug bill to make clear that that subsection included leasehold interests. Section 881(a)(9), added as part of the 1988 drug bill, grants authority to seize and forfeit certain chemicals, drug manufacturing equipment, and related items which have been or are intended to be imported, exported, manufactured, possessed or distributed in violation of specified felony provisions.

[6] Subsection 881(e)(1), as amended by the 1988 drug bill, grants the Attorney General authority to retain the seized and forfeited property for official use; transfer the property pursuant to section 616 of the Tariff Act of 1930 to any federal agency, or to any state or local agency that participated directly in the seizure or forfeiture; sell the property; require the General Services Administration to handle the disposal;
(continued...)

grants the Attorney General the authority to use the proceeds from the sale of forfeited property to pay many of the expenses pertaining to the seizure, maintenance, and sale of the property.

Property may be forfeited pursuant to 21 U.S.C. 881 through two separate processes. Under some circumstances, property may be forfeited administratively, that is, forfeited without judicial action.[7] A judicial forfeiture proceeding may also be filed under section 881 by the United States Attorney in federal district court.[8]

We are advised informally by Customs that they may currently seek to rely on section 881 for forfeiture authority in a variety of situations. For example, Customs might stop and search a vessel pursuant to the customs laws,[9] find illegal

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[6](...continued)
forward it to the DEA for disposition; or in certain circumstances, transfer the property or proceeds to foreign countries that participated in the seizure or forfeiture. Section 881(e)(2)(A) sets forth the permissible uses of proceeds from the sale of forfeited property, including certain property management and sale expenses and payments to informants. Section 881(h) codifies the "relation back" doctrine, which holds that the government's interest in the seized property vests in the United States at the time of the act giving rise to the forfeiture under 881. Subsection 881(i) provides for a stay of civil forfeiture proceedings when the government has filed a criminal action relating to the civil case.

[7] Section 881(d) adopts by incorporation the procedures established under the customs laws; these procedures authorize the administrative forfeiture of property that does not exceed $100,000 in value, conveyances that are used to transport controlled substances, and illegally imported goods. 19 U.S.C. 1607. However, anyone who files a timely claim and posts a cost bond in an administrative forfeiture proceeding can move the action into federal district court. 19 U.S.C. 1608.

[8] A civil judicial forfeiture proceeding is required where the value of the property exceeds $100,000 and the property is not a conveyance or an illegally imported item (19 U.S.C. 1610); where the defendant has filed a claim and cost bond in an administrative forfeiture proceeding (19 U.S.C. 1608); or if the United States Attorney decides that the property should not be seized until a warrant of arrest in rem is issued pursuant to the filing of a formal complaint.

[9] Pursuant to 19 U.S.C. 1581(a), Customs officers may, at any time, board any conveyance (e.g., a vessel or vehicle) within
(continued...)

drugs, and prepare an administrative forfeiture action pursuant to 21 U.S.C. 881, even though in this circumstance, Customs has forfeiture authority not dependent on section 881.[10] In other cases, however, Customs may not have alternative forfeiture authority. For example, this situation may arise when Customs agents are conducting a search while investigating a suspected violation of a law enforced by Customs, such as the Currency and Foreign Transaction Reporting Act, 31 U.S.C. 5316 et seq., and agents discover cash that is evidence of a federal drug law violation. If no currency violations are found and the drug violation is the only viable case, Customs may desire to handle the forfeiture action administratively within Customs or, if the cash amount is over $100,000 or a claim and cost bond is filed, refer the action to the United States Attorney. In either case, the forfeiture is sought pursuant to section 881, the only forfeiture statute available under the facts of the case. Finally, contrary to our conclusion that Customs lacks Title 21 enforcement authority, Customs agents in some federal districts may seek to conduct Title 21 drug investigations without DEA designation, and forfeit property solely on the basis of their asserted authority under section 881.[11]

In determining whether Customs has the independent forfeiture authority under 21 U.S.C. 881 that it would need to have in the above and analogous examples, we begin by examining

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[9](...continued)
a customs-enforcement area and examine the manifest and other documents, as well as inspect and search every part of that conveyance. If, upon examination of the conveyance it appears to the Customs officers that a violation of federal laws is being or has been committed so as to render the conveyance or anything aboard it liable to forfeiture, the officers may, pursuant to 19 U.S.C. 1581(e), seize the conveyance.

[10] Under 19 U.S.C. 1595a(a), Customs is authorized to seize and forfeit any vessel, vehicle, animal, aircraft, or other thing used to facilitate the importation into the United States of any article contrary to law. Because the importation of illegal drugs into the United States is contrary to law, a boat used to smuggle drugs into the United States may be seized by Customs under section 1595a(a).

[11] We are also apprised that, on occasion, Customs will "adopt" cases investigated and prepared by state or local law enforcement officers, forfeit the seized property administratively under section 881, and then transfer a portion of the proceeds to the state or local law enforcement authorities who made the seizure in accordance with 19 U.S.C. 1616a(c).

the plain language of that statute.[12] Doing so, the text of section 881 reveals that Congress intended the Attorney General, and not Customs, to handle the drug forfeiture functions outlined in that section. For example, section 881(b), which authorizes seizure of property subject to forfeiture under the Controlled Substances Act, specifically mentions only the Attorney General, not the Customs Service or any other federal agency. Similarly, section 881(c), providing for the custody of seized property, grants such authority only to the Attorney General. Moreover, section 881(e), authorizing the disposition of property seized under the Controlled Substances Act, grants this power specifically and solely to the Attorney General. The exclusive forfeiture role of the Attorney General under section 881 was re-emphasized when, in 1984, Congress amended section 881, but continued to place all seizure and forfeiture responsibility under the Controlled Substances Act solely with the Attorney General. For example, Congress amended subsection 881(e)(1) to provide the Attorney General authority to transfer the custody or ownership of any forfeited property to any federal agency or to any state or local agency that directly participated in the seizure or forfeiture, yet continued to recognize that the Attorney General is in exclusive control of the forfeiture and disposition of forfeited property under the Controlled Substances Act. Similarly, amendments to section 881 contained in the 1988 drug bill preserve the Attorney General's exclusive forfeiture authority.[13]

Congress' intent that the Attorney General hold exclusive authority to seize and forfeit property under section 881 is also evident in the broader statutory scheme of the Controlled Substances Act. No other section of the Act grants authority to the Customs Service to seize and forfeit property under the

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[12] The first rule of statutory construction is to examine the language of the statute itself. See, e.g., Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978).

[13] We note that section 881(l), added as part of the 1988 drug bill, authorizes the Attorney General to delegate certain of his section 881 functions, by agreement, to the Postal Service. The 1988 drug bill also amended 18 U.S.C. 3061 to grant the Postal Service seizure authority with respect to postal offenses, and "to the extent authorized by the Attorney General pursuant to agreement between the Attorney General and the Postal Service, in the enforcement of other laws of the United States, if the Attorney General determines that violations of such laws have a detrimental effect upon the operations of the Postal Service." Section 881(e)(2)(B), as amended by the 1988 drug bill, provides that the proceeds of forfeitures conducted by the Postal Service shall be deposited in the Postal Service Fund.

Act.[14] Indeed, section 878(4) affirmatively grants authority to "make seizures of property pursuant to the [Controlled Substances Act]" only to officers and employees of the DEA or any state or local law enforcement officer designated by the Attorney General to make such seizures. Congress amended section 878 in 1986,[15] yet did not include Customs in this specific, affirmative grant of authority. Similarly, 21 U.S.C. 873(b) vests only in the Attorney General the authority to request assistance from other federal agencies to carry out his functions under the Controlled Substances Act.[16]

The only part of section 881 that makes any reference to the Customs Service is section 881(d), which sets forth "other laws and proceedings applicable" to civil forfeiture proceedings under the Controlled Substances Act. Customs relies on that section to argue that it has section 881 forfeiture authority.[17] The argument is unavailing. Section 881(d) merely provides that the forfeiture procedures of the customs laws are applicable to forfeitures conducted under section 881; it does not confer on Customs itself any forfeiture authority. The statute reads as follows:

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred,

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[14] Part E, entitled "Administrative and Enforcement Provisions," contains several sections, none of which refers to anyone other than the Attorney General with respect to enforcement authority under the Controlled Substances Act. For example, section 871 empowers the Attorney General to delegate any of his functions under the Act to any officer or employee of the Department of Justice, and to promulgate and enforce any rules, regulations and procedures which he deems necessary for efficient execution of his functions under the Act. 21 U.S.C. 871(a)-(b). Section 875 authorizes the Attorney General to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses and receive evidence anywhere in the United States in carrying out his functions under the Act.

[15] 21 U.S.C. 878 was amended in 1986 by Pub. L. No. 99-570.

[16] In the OLC Memorandum of December 23, 1983, we concluded that the Attorney General could likely designate Customs agents to exercise Title 21 authority by virtue of this provision.

[17] See Memorandum from Michael H. Lane, supra, at 3.

> under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

21 U.S.C. 881(d), as amended (emphasis added).

Contrary to Customs' position, section 881(d) is correctly read to be a procedural provision, and not an affirmative grant of authority. The first half of the section, which ends with the phrase "insofar as applicable and not inconsistent with the provisions hereof," mandates that the procedures governing the seizure and forfeiture of property under the customs laws shall also govern, to the extent not inconsistent, seizures and forfeitures arising under the Controlled Substances Act. Thus, section 881(d) explicitly incorporates by reference a statutory procedural scheme already in existence.[18] The second half of the section, up until the final phrase, states that the procedural duties connected with seizures and forfeitures under the Controlled Substances Act shall be handled by officers, agents, or other persons authorized or designated by the Attorney General. The final phrase of section 881(d) merely qualifies that procedural mandate by providing that the incorporated customs procedures shall be followed by the Attorney General's agents or designees with respect to seizures and forfeitures under the Controlled Substances Act except to the extent that such duties arise from seizures and forfeitures effected by any customs officer, acting as a customs officer, rather than as a designee of the Attorney General.[19]

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[18] These procedural provisions are codified at 19 U.S.C. 1602-1621.

[19] As already indicated in the text, Customs has no independent Title 21 seizure or forfeiture authority. Therefore, for a seizure or forfeiture to be effected as suggested by the final clause, it must be pursuant to a source of Customs authority other than the Controlled Substances Act. Nevertheless, it was important for Congress to include the final clause in section 881(d) to distinguish the situation where Customs acts on its own authority under the customs laws from the situation where Customs is designated by the Attorney General to

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Our interpretation of the exception clause in 881(d) as a procedural provision is supported by the fact, discussed above, that the Controlled Substances Act as a whole places all enforcement authority under the Act's provisions with the Attorney General. Any limit to this broad and exclusive mandate would be a significant departure from the overall enforcement scheme. We therefore find the proposition that Congress would place within a clearly procedural subsection a substantive provision so significantly at odds with the Attorney General's Title 21 authority to be untenable.

This interpretation is consistent with the realignment of drug enforcement and seizure authority which took place proximate to the enactment of the Controlled Substances Act (including section 881) in 1970. Prior to 1968, the Department of Treasury was the agency charged with primary responsibility for enforcing the federal drug laws. Within the Department of Treasury, the United States Customs Service had the responsibility for enforcing all laws pertaining to the smuggling of drugs into the United States, while Treasury's Bureau of Narcotics was charged with enforcing all laws relating to drug trafficking. Reorganization Plan No. 1 of 1968 transferred the drug trafficking enforcement functions of the Department of Treasury's Bureau of Narcotics to the Attorney General, to be handled within the Department of Justice by a newly created Bureau of Narcotics and Dangerous Drugs. The responsibility for investigating smuggling, on the other hand, remained with Customs within the Treasury Department, thereby raising the possibility of jurisdictional disputes regarding the respective responsibilities of the Justice and Treasury Departments in the context of certain drug investigations. Because the Customs Service retained investigative jurisdiction to enforce the federal smuggling laws, it would have been entirely reasonable for Congress to include in the Controlled Substances Act's forfeiture provision a proviso like that in the final clause of section 881(d) recognizing that the Attorney General's new, vast and exclusive seizure and forfeiture authority under Title 21 did not preclude Customs from pursuing seizures and forfeitures under the customs laws.

B. Reorganization Plan No. 2 of 1973

Customs also relies on Reorganization Plan No. 2 of 1973[20]

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[19](...continued)
seize and forfeit under the Controlled Substances Act. In the latter event, Customs -- as agent of the Attorney General -- must follow the duties being incorporated in section 881(d) so long as not inconsistent with the Act, not the potentially inconsistent duties that the Act contemplates may separately be imposed on Customs by the customs laws.

[20] 87 Stat. 1091 (1973).

as a basis for its claim to independent forfeiture authority under 21 U.S.C. 881. That Plan transferred "all intelligence, investigative, and law enforcement functions" pertaining to "the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana" from Customs to DEA.[21] The Plan also contained a clause (hereafter the "retention clause"), which provided in part that "[t]he Secretary [of Treasury] shall retain, and continue to perform [drug intelligence, investigative and enforcement] functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States."[22] Customs contends that it is clear from the language in that clause that Customs officers were intended to enforce all federal drug laws, including section 881, in the border context.[23] The proviso immediately following the retention clause, however, states that any drugs or drug-related evidence seized by Customs at those points "shall be turned over forthwith to the jurisdiction of the Attorney General." Read in conjunction with one another, the retention clause and the proviso that follows it appear to recognize that Customs may legally seize drugs in the context of its role of enforcing the customs laws in the border context, but that any drugs or drug trafficking evidence Customs seizes must be turned over to the Attorney General for appropriate processing. Thus, under the 1973 Reorganization Plan, Customs only retained whatever seizure authority it had under laws other than Title 21 with respect to drugs and the Attorney General maintained control over the forfeiture of drug-related property and the disposition of that forfeited property.

In addition, in light of the fact that the 1973 Reorganization Plan was intended to consolidate federal drug law enforcement responsibility under a single agency, the Drug Enforcement Administration within the Department of Justice,[24] the most reasonable interpretation of the retention clause is that the words merely make clear that the transfer of drug enforcement functions does not disrupt Customs' authority to make seizures

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[21] Reorganization Plan No. 2 of 1973, supra, at section 1.

[22] Id.

[23] Memorandum from Michael H. Lane, supra, at 4.

[24] See, e.g., the Message of the President, transmitting Reorganization Plan No. 2 of 1973 to the Congress, in which the President noted that the newly created DEA would carry out "[t]hose functions of the Bureau of Customs pertaining to drug investigations and intelligence." 5 U.S.C.A. App. 1 at 112, 115 (Supp. 1988).

of drugs discovered in the course of Customs' enforcement of the smuggling laws.[25]

For the foregoing reasons, we find Customs' reliance on Reorganization Plan No. 2 of 1973 as a basis for its claim to independent forfeiture authority under 21 U.S.C. 881 to be without merit. As we have held in the past, under the 1973 Reorganization Plan "Customs officials have authority [under customs laws and under Title 21 when so designated by the Attorney General] only to search for and seize drugs at the borders and ports," and "[s]uspects and drug contraband are to be immediately turned over to DEA for investigation and prosecution."[26] We reached a similar conclusion in our memorandum of June 11, 1985, stating the view that Customs personnel must work under the supervision of the DEA and "may undertake drug enforcement investigations beyond the interdiction of drugs at the border, but only with the specific approval of, and the supervision of, [the Department of Justice]."[27] We find no case law or subsequent executive or legislative action that would change these conclusions.

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[25] For example, as mentioned earlier, under 19 U.S.C. 1595a, Customs is authorized to seize and forfeit any vessel, vehicle, animal, aircraft, or other thing used to facilitate the importation into the United States of any article contrary to law. Because the importation of illegal drugs into the United States is contrary to law, a boat used to smuggle drugs into the United States may be seized lawfully by Customs under section 1595a. We believe that the retention clause in Reorganization Plan No. 2 of 1973 was intended to cover Customs seizures made pursuant to laws such as section 1595a. This interpretation is consistent with our reading of the final clause in section 881(d) which, as we concluded above, was Congress' acknowledgement that, while the Attorney General has exclusive enforcement authority over federal drug violations even at the border, Customs retains its authority over enforcement of the customs laws.

[26] OLC Memorandum of December 23, 1983, supra, at 3. We confirmed this interpretation of the 1973 Reorganization Plan in our memorandum of June 3, 1986. See OLC Memorandum of June 3, 1986, supra, at 7-9.

[27] Memorandum for Joseph R. Davis, Chief Counsel, DEA, regarding Authority of the United States Customs Service to Participate in Law Enforcement Efforts Against Drug Violators (June 11, 1985), from Ralph Tarr, Acting Assistant Attorney General, Office of Legal Counsel.

C. Other Arguments Raised by the Customs Service

Although we find, based on the language of the statute and Reorganization Plan No. 2 of 1973, that Customs does not have independent forfeiture authority under section 881, we briefly address below additional arguments raised by Customs in support of its assertion of section 881 authority.

1. 19 U.S.C. 1589a

As evidence that it has section 881 authority in the border context, Customs cites 19 U.S.C. 1589a(2), which permits a Customs officer to execute and serve "any order, warrant, subpoena, summons, or other process issued under the authority of the United States", and 1589(a)(3), which generally provides that a Customs officer may make a warrantless arrest for any federal offense committed in his presence or any federal felony "committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony." In our June 3, 1986 opinion,[28] we specifically examined the question of whether passage of section 1589a, and the nearly identical 19 U.S.C. 1589,[29] altered the conclusions of this Office in its memorandum of December 23, 1983 that Customs does not have independent enforcement authority over Title 21 drug offenses. We concluded that (1) the legislative histories behind sections 1589 and 1589a clearly state that the sections were not intended to change Customs jurisdiction over drug offenses or to alter the basic relationship between Customs and DEA established by the Reorganization Plan No. 2 of 1973;[30] (2) Congress' intent in passing the sections was to clarify Customs authority in the face of case law questioning the validity of warrants pursued and arrests made by Customs officers in drug cases in which Customs officers act under the supervision of DEA;[31] and (3) while

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[28] OLC Memorandum of June 3, 1986, supra.

[29] In October 1984, Congress passed the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2056, and the Tariff and Trade Act, Pub. L. No. 98-573, 98 Stat. 2988, which contain two provisions identical for all practical purposes and codified at 19 U.S.C. 1589a and 1589, respectively.

[30] OLC Memorandum of June 3, 1986, supra, at 5-8.

[31] Id. at 5-7. In United States v. Harrington, 520 F. Supp. 93, 95 (E.D. Cal. 1981), the court held that the Reorganization Plan No. 2 of 1973 deprived Customs agents of any search or arrest authority with respect to the federal drug laws, and suggested that Customs agents accordingly lacked "secondary

(continued...)

sections 1589 and 1589a acknowledge the authority of Customs officers to execute and serve warrants, and to make arrests, for a wide range of federal crimes, the provisions do not grant Customs additional authority to pursue and prosecute such offenses.[32] We have reexamined our June 3, 1986 opinion in light of Customs' most recent memorandum and reaffirm our conclusions as outlined above. Accordingly, we find that sections 1589 and 1589a do not provide Customs with substantive authority to make seizures and forfeitures pursuant to 21 U.S.C. 881.

2. Common Law Seizure Authority

Customs also argues that Customs officers can make seizures and forfeitures outside of the border context under common law authority, stating that it is a "well settled principle of common law that anyone may seize property for forfeiture to the Government and the seizure is valid if the Government adopts the act and proceeds to enforce the forfeiture," and therefore that there is "no reason why a Customs officer should be disabled from making seizures under 21 U.S.C. 881 when even a private person could perform such seizures."[33] We address later in this opinion Customs' argument that their agents have common law authority for making seizures for forfeiture.[34] However, assuming arguendo that such authority exists, any common law authority is separate and apart from express statutory authority under section 881 and therefore provides no additional support to Customs' position that its agents have independent forfeiture authority under section 881.

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[31](...continued)
authority" to perform drug enforcement searches under the "primary responsibility" of the DEA. Although the district court's decision ultimately was reversed on appeal, 681 F.2d 612 (9th Cir. 1982), cert. denied, 471 U.S. 1015 (1983), Congress clearly had the decision in mind when it passed sections 1589 and 1589a. The relevant House Report stated: "Enactment of [this provision] would also make it clear that Customs officers may serve search and arrest warrants for any Federal offense including drug offenses. This would eliminate the problem raised in U.S. v. Harrington, [cite], which . . . questioned Customs authority to serve search warrants in joint DEA-Customs investigations away from the border." H.R. Rep. No. 845, 98th Cong., 2d Sess., pt. 1, at 28 (1984).

[32] See OLC Memorandum of June 3, 1986, supra, at 2.

[33] Memorandum from Michael H. Lane, supra, at 4-5.

[34] See pages 16-19, infra.

3. 28 U.S.C. 524(c)(10)

Finally, Customs cites 28 U.S.C. 524(c)(10) as evidence of Congress' recognition that Customs has seizure authority under section 881 of Title 21.[35] Section 524, enacted in 1984, established the Department of Justice Assets Forfeiture Fund, which serves as the depository for moneys realized from profitable forfeitures of property after the payment of certain expenses of forfeiture and sale.[36] Section 524(c)(4) requires "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice" to be deposited in that fund. Section 524(c)(10) provides:

> For the purposes of this subsection, property is forfeited pursuant to a law enforced or administered by the Department of Justice if it is forfeited pursuant to --
>
> (A) any criminal forfeiture proceeding;
> (B) any civil judicial forfeiture proceeding; or
> (C) any civil administrative forfeiture proceeding conducted by the Department of Justice, except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply.

(Emphasis added.)

The Customs Service apparently interprets the final clause of section 524(c)(10), underscored above, to demonstrate Congress' understanding that Customs has independent seizure

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[35] The provision relied upon by Customs, formerly 28 U.S.C. 524(c)(8), now appears at 524(c)(10) as a result of amendment by the 1988 drug bill.

[36] The fund may be used to pay expenses incurred by the Department of Justice and assisting federal, state, and local law enforcement agencies for the detention, inventory, safeguarding, maintenance, and disposal of seized and forfeited property. See The Attorney General's Guidelines on Seized and Forfeited Property, as amended, at 17-26 (June 29, 1988).

authority under section 881.[37] However, nothing on the face of the provision indicates in the least that Customs has section 881 seizure or forfeiture authority. The general reference in the final phrase of subsection 524(c)(10) does not specify particular Customs seizure or forfeiture authority, and therefore cannot be said to enlarge or affect Customs' underlying substantive authority in any manner.[38] Accordingly, the language of 28 U.S.C. 524(c)(10) does not support Customs' position that it has independent section 881 forfeiture authority.

D. Summary: Section 881 Seizure and Forfeiture Authority

For the reasons set forth above, we conclude that Customs does not have independent seizure or forfeiture authority under section 881. We base our conclusion on the prior opinions of this Office, the language of section 881(d) as viewed by itself and as examined in the context of section 881, the other provisions of the Controlled Substances Act, and the Reorganization Plan No. 2 of 1973. After another thorough review of these laws and their legislative histories, we believe that Congress intended the Attorney General to be the sole administrator of section 881 and the other enforcement provisions of the Controlled Substances Act. In addition, nothing supports Customs' claim of independent forfeiture authority under Section 881.

This is not to say, of course, that Customs can never make seizures or forfeit property pursuant to section 881. As we concluded in a prior opinion,[39] the Attorney General in all likelihood has the authority under 21 U.S.C. 873(b) and 965 to provide Customs agents with substantive legal authority to assist the Drug Enforcement Administration in the enforcement of Title 21 drug offenses, including the undertaking of law enforcement functions that Customs agents are not normally empowered to perform but which DEA agents are authorized to perform in executing the Controlled Substances Act.[40] We must emphasize,

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[37] See Memorandum from Michael H. Lane, supra, at 7.

[38] We discuss the Department of Justice Assets Forfeiture Fund and the Customs Forfeiture Fund in more detail below, when we address the question of which fund should be the depository of proceeds from forfeitures under section 881.

[39] OLC Memorandum of December 23, 1983, supra, at 5-9.

[40] 21 U.S.C. 873(b) provides in pertinent part that "when requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter." See also 21 U.S.C. 965, which adopts the authority of section 873 by reference.

however, that absent any such grant of authority from the Attorney General, Customs would be operating without statutory authority to enforce Title 21 drug offenses. Moreover, as we have cautioned in the past, DEA would be well-advised to exercise particular caution not to permit Customs officials to undertake independent, unsupervised enforcement responsibilities where a successful court challenge would seriously jeopardize a prosecution.[41]

Although our opinion is not intended to have retrospective impact, our conclusion that Customs does not have independent authority under 21 U.S.C. 881 necessarily raises questions about the legality of any seizures and forfeitures already conducted by Customs under that section without a proper designation from the Attorney General or his designee. A comprehensive analysis of that issue is beyond the scope of this memorandum. For the reasons discussed below, however, we believe that those seizures and forfeitures may be upheld under a theory of common law seizure authority.

The courts have long recognized that the United States may "adopt" seizures that have been made by private parties or other law enforcement agencies.[42] The United States Supreme Court articulated this principle in Dodge v. United States,[43] in which it stated that "anyone may seize any property for a forfeiture to the Government, and that if the Government adopts the act and proceeds to enforce the forfeiture by legal process, this is of no less validity than when the seizure is by authority originally given."[44] The Dodge Court based its holding on the rationale that the owner of the seized property suffers nothing

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[41] OLC Memorandum of December 23, 1983, supra, at 9-10. For example, we noted that the Economy Act, 31 U.S.C. 1535, might prohibit Customs from exercising law enforcement services for DEA to the extent that Customs agents are not generally authorized to perform those services under their own substantive authorizing statute. Id. at 8.

[42] See, e.g., United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926); Kieffer v. United States, 550 F. Supp. 101, 103 (E.D. Mich. 1982).

[43] 272 U.S. 530 (1926). Dodge involved a proceeding to forfeit a boat for violation of the National Prohibition Act, the initial seizure of which was made by state officers who were not authorized to make the seizure under the Act. See also United States v. One Ford Coupe Automobile, 272 U.S. 321, 325 (1926) (adoption of seizure by United States for forfeiture permissible even when seizing party lacked authority to make seizure).

[44] 272 U.S. at 532.

as a result of an unauthorized seizure that he would not have suffered if the seizure had been authorized, as the seizure, however effected, brings the res within the power of the court, "which is an end that the law seeks to attain, and justice to the owner is as safe in the one case as in the other."[45]

The reasoning of the Dodge Court regarding seizures makes sense given the nature of a forfeiture proceeding. A civil forfeiture action under section 881 is an action in rem, brought against the property itself rather than the wrongdoer, and based on the legal fiction that the property itself is guilty. Just as in the case of a seizure, the forfeiture laws can be said to seek to bring the object within the power of the court. Thus, the Dodge Court's conclusion that it makes no difference to the owner who brought his property into the court's jurisdiction is as applicable in a forfeiture action as it is in the case of a seizure.

The holding in Dodge with respect to adoptive seizures is still followed today, even in cases involving section 881 forfeiture actions.[46] We must caution, however, that our preliminary

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[45] Id.

[46] See, e.g., United States v. One 1977 Mercedes Benz, 708 F.2d 444, 450 (9th Cir. 1983) (in forfeiture action against automobile allegedly used to transport narcotics, jurisdiction of the court was secured by the fact that the res was in the possession of the party authorized to seize when the action was filed), cert. denied, 464 U.S. 1071 (1984); Kieffer v. United States, 550 F. Supp. 101, 103 (E.D. Mich. 1982) (upholding section 881 forfeiture action on basis that United States may "adopt" seizure by state officers who do not have seizure authority under section 881). In more recent years, however, courts have increasingly been asked to address the question expressly left open in Dodge: whether the fact that the property was obtained as the result of a search and seizure deemed unlawful as invading a person's constitutional rights bars the forfeiture action or deprives the court of jurisdiction to hear it. Although the United States Supreme Court has held that evidence derived from a search which violated the Fourth Amendment is inadmissible in a forfeiture proceeding, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965), the general rule is that improper seizure does not jeopardize the government's right to secure forfeiture if the probable cause to seize the vehicle can be supported with untainted evidence. See, e.g., United States v. U.S. Currency $31,828, 760 F.2d 228, 230-31 (8th Cir. 1985); United States v. MONKEY, 725 F.2d 1007, 1012 (5th Cir. 1984); United States v. U.S. Currency Total $87,279, 546 F. Supp. 1120, 1126 (S.D. Ga. 1982).

view that common law authority may be used to justify past seizures and forfeitures should not be read to suggest continued prospective reliance on that authority by Customs as the basis for future actions under section 881 without appropriate DEA authorization.

II. Department of Justice and Customs Forfeiture Funds

We turn now to the second issue we have been asked to address: must the proceeds of forfeitures resulting from lawful Customs Service seizures be deposited in the Customs Forfeiture Fund regardless of the statute under which the property was forfeited and regardless of whether the property was forfeited by the Department of Justice? The Department of Justice and Customs Forfeiture Funds were created to allow those agencies to finance certain aspects of their respective forfeiture actions and other specified law enforcement activities from the proceeds of forfeited assets. See 28 U.S.C. 524(c)(1) (Department of Justice Assets Forfeiture Fund); 19 U.S.C. 1613b (Customs Forfeiture Fund). Congress provided that both the Justice and Customs funds would receive amounts from the forfeiture of property under any law enforced or administered by the respective agencies. See 28 U.S.C. 524(c)(4); 19 U.S.C. 1613b(a), (c).

As we have discussed above,[47] 28 U.S.C. 524(c)(10) defines what property is forfeited "pursuant to a law enforced or administered by the Department of Justice" for purposes of determining whether proceeds from the sale of particular forfeited property is to be deposited in the Department of Justice Assets Forfeiture Fund. The definition includes any property forfeited under three specified forfeiture proceedings,[48] "except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a) shall apply." (Emphasis added.) The Customs fund provisions referenced in the clause of 524(c)(10) underscored above provide in part that the fund shall be the depository for "all proceeds from forfeiture under any law enforced or administered by the United States Customs Service."[49]

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[47] See pages 15-16, supra.

[48] The three proceedings specified in section 524(c)(10) are: (1) any criminal forfeiture proceeding; (2) any civil judicial forfeiture proceeding; and (3) any civil administrative forfeiture proceeding conducted by the Department of Justice. 28 U.S.C. 524(c)(10)(A)-(C).

[49] 19 U.S.C. 1613b(c). See also footnote 53, infra.

Customs takes the position that the language of 28 U.S.C. 524(c)(10) provides that the proceeds of forfeitures (even those conducted by the Department of Justice under section 881) arising from any Customs seizure be deposited in Customs' forfeiture fund, which is codified at 19 U.S.C. 1613b.[50] DEA disagrees with that interpretation, maintaining that the clause "refers only to nondrug-related seizures and forfeitures lawfully performed by Customs pursuant to [c]ustoms laws"[51] and that section 881(e) indicates that the Attorney General cannot deposit moneys or proceeds from a forfeiture conducted by the Department under section 881 in any fund other than the Department of Justice Assets Forfeiture Fund.[52] For the reasons set forth below, we conclude that although the question is not entirely free from doubt, under the most reasonable interpretation of 28 U.S.C. 524(c)(10), cash or proceeds of property forfeited as a result of a seizure made by the Customs Service pursuant to a law administered or enforced by Customs is to be deposited in the Customs fund rather than the Department of Justice fund, even though the property ultimately was forfeited by the Department of Justice under section 881.

Section 524(c)(10), standing alone, is unambiguous: the proceeds from forfeitures conducted pursuant to laws enforced or administered by the Department of Justice are to be placed in the Department of Justice Assets Forfeiture Fund unless the property was seized or custody maintained by the Customs Service, in which case the proceeds from the forfeiture are to be placed in the Customs fund. Under section 524(c)(10), it appears that Customs may receive the proceeds from the forfeiture of the property it seizes even if it has no authority to forfeit that property. In addition, the clause applies to any seizure made by Customs, not just nondrug-related seizures.

When Section 524(c)(10), however, is read in conjunction with 19 U.S.C. 1613b, to which it makes specific reference, the meaning of the exception clause is not entirely clear. Section 1613b(a), establishing the Customs Forfeiture Fund,[53] provides

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[50] Memorandum from Michael H. Lane, supra, at 7.

[51] Memorandum from Dennis H. Hoffman, supra, at 10.

[52] Id.

[53] As a preliminary matter, we note that the reference to the Customs Forfeiture Fund provisions in final clause of section 524(c)(10) specifically refers to "the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a)." However, 19 U.S.C. 1613a, which was passed in 1984, Pub. L. No. 98-473, 98 Stat. 2054, was repealed in 1986. Pub. L. No. 99-514, 100 Stat. 2924-

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as amended by the 1988 drug bill that the fund "shall be available to the United States Customs Service, subject to appropriation, with respect to seizures and forfeitures by the United States Customs Service and the United States Coast Guard under any law enforced or administered by those agencies . . . ." Similarly, section 1613b(c) provides for deposit in the fund of "all proceeds from forfeiture under any law enforced or administered by the United States Customs Service or the United States Coast Guard . . . ."

We believe that the final clause of 28 U.S.C. 524(c)(10) clearly governs those cases in which Customs has explicit forfeiture authority but the Justice Department, by law, must play a role in the forfeiture of property seized by Customs. For example, the Department of Justice, through the United States Attorneys, must handle certain civil judicial forfeiture proceedings in federal court of property seized by Customs under the customs laws.[54] Thus, there is an overlap in the definitions of

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[53](...continued)
2925. The fund was recreated in 1987, Pub. L. No. 100-71, Title I, 101 Stat. 438, and presently is codified at 19 U.S.C. 1613b. Neither section 524(c)(10) nor its predecessor provision, section 524(c)(8), was ever amended to reflect these changes and, as a result, section 524(c)(10) now refers to a Customs Forfeiture Fund that is no longer in existence. Thus, under a literal reading, the exception clause in section 524(c)(10) has no force and does not govern any deposits into the current Customs Forfeiture Fund.

Although in such cases no construction can ever be entirely free from doubt, Congress can be presumed not to have intended an absurd result. Rather, it can fairly be concluded that Congress intended to incorporate an accurate reference to the Customs Forfeiture Fund provision in 28 U.S.C. 524(c)(10). We believe this is true even though Congress' recreated Customs Forfeiture Fund is not codified at 19 U.S.C. 1613a, as referenced in section 524(c)(10), but rather appears at 1613b. See Steelworkers v. Weber, 443 U.S. 193, 201 (1979), citing Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). We note further that although the amendments to section 524 contained in the 1988 drug bill perpetuate the mis-citation to the Customs Forfeiture Fund, the 1988 drug bill, in section 7364, correctly cites 19 U.S.C. 1613b for the Customs Forfeiture Fund.

[54] Customs must refer civil forfeiture cases to the United States Attorney (1) when the property seized exceeds $100,000 in value and is not an illegally imported item or a conveyance used to transport a controlled substance, or (2) when a claim and cost bond has been filed for the property in an administrative forfeiture proceeding. See 19 U.S.C. 1607, 1608, 1610.

"those laws enforced or administered" by Customs and "those laws enforced or administered" by the Department of Justice because in certain instances Customs has authority over the seizures and the Department of Justice has authority over the forfeitures. The exception clause in section 524(c)(10) addresses the question of which fund should be used in such situations by providing that when a Customs officer seizes property or maintains custody of property under the customs laws, the proceeds of that forfeiture should be placed in the Customs fund, regardless of whether Customs conducted the forfeiture.

The more difficult question is whether the final clause also pertains to cases in which Customs has seized property pursuant to the laws it enforces, but where the property is forfeited by the Department of Justice, either administratively or judicially, under 21 U.S.C. 881 or another forfeiture statute under which Customs has no forfeiture authority. As section 1613b(c) refers only to forfeitures under "any law enforced or administered" by Customs, it can be argued that Congress intended that the Customs fund be the depository only for proceeds from property that actually was forfeited under the customs laws. In light of our conclusion above that only the Department of Justice has independent statutory authority to seize and forfeit under 21 U.S.C. 881, such an interpretation necessarily would require that the proceeds from all section 881 forfeitures be placed in the Justice Forfeiture Fund. However, we believe that interpretation would be contrary to the language of the exception clause in 524(c)(10), since it would prevent Customs from receiving proceeds from the forfeiture of property that it had seized under the customs laws. Accordingly, we conclude that the proceeds of property seized or held in custody by Customs under the customs laws must be placed in the Customs fund even though it was forfeited by the Department of Justice under 21 U.S.C. 881.

Our interpretation of the exception clause is consistent with Reorganization Plan No. 2 of 1973, which reflects legislative and executive branch recognition of Customs' traditional law enforcement role at the border. As we have already discussed above, in Reorganization Plan No. 2 of 1973 Congress left undisturbed Customs' authority under the customs laws to perform all intelligence, investigative and law enforcement functions to the extent that they relate to searches and seizures of drugs at regular inspection locations at ports of entry or the border. Thus, Customs has retained search and seizure authority with respect to illegal drugs and related evidence encountered by Customs in the course of its enforcement responsibilities under the customs laws. In light of Congress' intent that Customs maintain those particular aspects of its traditional law enforcement role at the border, it is reasonable to interpret the words "seizure" and "custody" in 524(c)(10) to refer to the functions that Customs expressly retained under Reorganization

Plan No. 2 of 1973, that is, search and seizure authority under the customs laws.[55]

Moreover, to interpret the phrase "any law enforced or administered by the United States Customs Service" to include statutes under which Customs has either seizure or forfeiture authority, but not necessarily both, is consistent with the fact that seizure and forfeiture are separate and distinct law enforcement tools.[56] Thus, statutes under which Customs only has seizure authority clearly fall within the definition of "any law enforced or administered by the Customs Service." If Customs has neither seizure nor forfeiture authority, however, as we conclude it does not under section 881, the proceeds from seizures and forfeitures premised on that statute alone are to be deposited in the Department of Justice Forfeiture Fund. This is true even if Customs has been properly designated by the Attorney General or his designee to exercise authority under that statute. Of course, the Attorney General has discretion to award the property to Customs in such joint enforcement efforts.[57]

One other point is worth mentioning. Section 881(e)(1), as amended by the 1988 drug bill, provides that when property is forfeited under the Controlled Substances Act, the Attorney General has five options with respect to disposition of that property: he may (1) retain the property for official use or transfer the custody or ownership of the property to any federal agency, or any state or local law enforcement agency that participated directly in the seizure or forfeiture;[58] (2) sell

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[55] This interpretation of the final clause in 524(c)(10) also is consistent with the legislative history of the funds, which reflects Congress' understanding that Customs has a role to play in drug enforcement efforts. See, e.g., S. Rep. No. 225, 98th Cong., 1st Sess. 217-18 (1983).

[56] Most of the seizure and forfeiture provisions used by Customs in drug-related cases are contained in the part of the Tariff Act of 1930 entitled "Enforcement Provisions." See, e.g., 19 U.S.C. 1590, 1595, 1595a.

[57] See footnote 61, infra.

[58] As amended by the 1988 drug bill, section 881(e)(3) requires the Attorney General to assure that any property transferred to a state or local law enforcement agency under this provision of section 881(e)(1) has a value that bears a "reasonable relationship to the degree of direct participation" by the agency, and, for fiscal years beginning after September 30, 1989, that the transfer is not undertaken in order to circumvent any prohibition on forfeitures, or limitations on the use of forfeited property, under state law.

the property; (3) require the General Services Administration to dispose of the property; (4) forward it to DEA for disposition; or (5) under certain circumstances, transfer forfeited personal property or the proceeds of the sale of forfeited personal or real property to any foreign country that participated in the seizure or forfeiture.[59] Pursuant to 21 U.S.C. 881(e)(2)(B), the provisions of the Department of Justice Forfeiture Fund in 28 U.S.C. 524(c) only apply to forfeitures under the Controlled Substances Act in the event of a cash seizure or the Attorney General's exercise of his option under 21 U.S.C. 881(e)(1)(B) to sell the forfeited property.[60] Thus, section 524(c)(10) does not limit the Attorney General's authority under section 881(e) to retain, sell, or transfer property forfeited under section 881, and was intended to apply only to the Attorney General's authority over the treatment of forfeited property which could ultimately be deposited (as cash) in the Justice Forfeiture Fund. Thus, Customs may receive the proceeds from property seized by Customs under the customs laws and forfeited by the Department of Justice under section 881 only if the Attorney General does not first exercise his options under section 881(e) to retain the property for official use, transfer the property, or otherwise dispose of the forfeited property under 881(e)(1).[61]

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[59] 21 U.S.C. 881(e)(1)(A)-(E).

[60] 21 U.S.C. 881(e)(2)(B), as amended by the 1988 drug bill, provides that "[t]he Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, United States Code, such moneys and proceeds." Subparagraph (A), in turn, only applies to moneys forfeited under this title and sales conducted under 881(e)(1)(B).

[61] Of course, under 21 U.S.C. 881(e)(1)(A), as amended by the 1988 drug bill, the Attorney General has explicit authority to transfer the custody or ownership of any forfeited property to any federal agency, or to any state or local agency that participated directly in the seizure or forfeiture, pursuant to section 616 of the Tariff Act of 1930. Thus, where a Customs officer has been working in cooperation with DEA in a joint investigation, or has been working under designation by the Attorney General, and property is seized and forfeited by the Department of Justice under section 881, it is within the Attorney General's discretionary authority to transfer that tangible property to the Customs Service.

It is important to note, moreover, that even if proceeds from section 881 forfeitures are to be deposited in the Customs Forfeiture Fund in accordance with 28 U.S.C. 524(c)(10), the Department of Justice first can collect costs for all property expenses of the forfeiture proceeding and sale, including expenses of maintenance and court costs. Section 881(e)(2)(B) provides that, unless the forfeiture was conducted by the Postal Service, the Attorney General shall deposit in accordance with 28 U.S.C. 524(c) all cash and proceeds remaining after payment of such expenses.[62]

Conclusion

We conclude that Customs does not have independent authority to make seizures or forfeitures pursuant to 21 U.S.C. 881. Accordingly, Customs agents should make seizures and forfeit property pursuant to that section only when they do so under the supervision of the Drug Enforcement Administration and by direct or derivative designation of the Attorney General. We further conclude that property forfeited after a Customs seizure is to be deposited in the Customs Forfeiture Fund when the seizure was made by the Customs Service under the customs laws, even though the property ultimately was forfeited by the

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[62] Moreover, 19 U.S.C. 1524 requires that reimbursable charges paid out of "any appropriation" for collecting Customs revenue shall be refunded.

Department of Justice, either administratively or in a federal district court proceeding.[63]

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Assistant Attorney General
Office of Legal Counsel

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[63] Thus, to return to one of the practical examples mentioned above, Customs may lawfully stop and search a vessel pursuant to 19 U.S.C. 1581(a), find illegal drugs on board and seize the vessel under 19 U.S.C. 1581(e). According to Reorganization Plan No. 2 of 1973, Customs must turn over to DEA the drugs and any related evidence, that is, the boat. DEA or the United States Attorney may then forfeit the boat under 21 U.S.C. 881 or allow Customs to forfeit the boat under the smuggling laws. If the boat is forfeited under section 881, the Attorney General may retain the boat for official use, sell the boat or transfer it to the Customs Service. 21 U.S.C. 881(e)(1). If the Attorney General decides to sell the boat pursuant to section 881(e)(1)(B), the proceeds of sale remaining after payment of property management expenses to the Justice Department are to be transferred to the Customs Forfeiture Fund in accordance with 28 U.S.C. 524(c)(10) because Customs made the lawful seizure of the property.

Social Security Disability Litigation

Social Security Disability cases represent both, a significant portion of United States Attorneys' civil caseload and a large dollar value. A number of case management procedures have been developed to expedite processing Social Security cases. This is a reminder of procedures to be followed in our continuing efforts to efficiently and effectively handle this litigation in cooperation with the Department of Health and Human Services (HHS).

United States Attorneys are to teletype notices of new Social Security cases to the Office of Hearings and Appeals, Arlington, Virginia, and the Office of the General Counsel, Social Security Division, Baltimore, Maryland, within three (3) business days of service. It is important to follow this procedure if we expect timely suggested answers from HHS.

Social Security court orders and settlements should be promptly transmitted to HHS. Procedures for handling adverse decisions in Social Security Act review cases (including remand orders) are found in Title 4 of the United States Attorneys' Manual, Section 4-1.511. Pursuant to that section, adverse decisions should be forwarded to both the Social Security Administration (with a copy to the Department of Health and Human Services Chief Counsel's office in your region) and the Civil Division within two (2) business days of their receipt by United States Attorneys. Expeditious action is critical if the decision is adverse to HHS since the Civil Division requires an appeal recommendation be made to the appellate staff within 30 days of the adverse decision. Moreover, in cases where the plaintiff prevails and we do not appeal, HHS needs the orders to expeditiously implement them and timely pay benefits. Where prompt electronic transmission is not possible, please make immediate telephone contact and follow it with express mail.

HHS should be advised when a notice of appeal is filed. Please provide a copy of notices filed by claimants and the government to both the Chief Counsel's office in your region and the Social Security Division, Baltimore, Maryland.

(Executive Office for U.S. Attorneys)

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RELEVANT PROVISIONS OF OMNIBUS ANTI-DRUG ABUSE ACT OF 1988 (PUBLIC LAW 100-690) CATEGORIZED BY TYPE*

I. DIRECTIONS TO U.S. SENTENCING COMMISSION:

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
Direction to USSC regarding importation of drugs by aircraft and other vessels.	6453	H11166	3012
Direction to USSC regarding involvement of children in drug trafficking.	6454	H11166	3012
Direction to USSC and increased statutory maximum penalty regarding drugs in prison.	6468	H11167	3013
Direction to USSC and increased statutory maximum penalty regarding operation of a common carrier under the influence of alcohol or drugs.	6482	H11169	3015

II. NEW MANDATORY MINIMUM PENALTIES:

New mandatory minimum penalty for possession of specified amounts of cocaine base (5 years).	6371	H11166	3012
New mandatory minimum penalty for three-time drug felon (life imprisonment).	6452	H11166	3012
New mandatory minimum penalty for use of certain weapons in crimes of violence or drug trafficking crimes (for machine guns or guns with silencers or mufflers, 30 years for first offense and life imprisonment for subsequent offenses; for other firearms, 5 years for first offense and 20 years for subsequent offenses).	6460	H11167	3012
New mandatory minimum penalty for Continuing Criminal Enterprise convictions (20 years for first offense; 30 years for subsequent offenses).	6481	H11169	3015

EXHIBIT C

* The complete text of the Act may be found at 134 Cong. Rec. H11110-H11217 (daily ed. October 21, 1988). Selected sections are reprinted in 44 Crim. L. Rep. (BNA) 3001-3029 (November 2, 1988).

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
III. REVISED MANDATORY MINIMUM STATUTES:			
Exception to mandatory minimum penalty for possession of small amounts of marihuana as first offense.	6455	H11166	3012
Broadening scope of mandatory minimum penalty to include possession of small amounts of marihuana as second offense.	6456	H11166	3012
Broadening scope of mandatory minimum penalty to include possession with intent to distribute.	6457	H11166	3012
Broadening scope of mandatory minimum penalty to include drug trafficking at or near playgrounds, youth centers, swimming pools and video arcades.	6458	H11166	3012
Broadening scope of mandatory minimum penalty to include receiving a controlled substance from a minor.	6459	H11167	3012
IV. INCREASED STATUTORY MAXIMA:			
Increased statutory maximum penalty for certain firearms offenses.	6462	H11167	3012
Direction to USSC and increased statutory maximum penalty regarding drugs in prison.	6468	H11167	3013
Increased statutory maximum penalty for explosives offenses.	6474	H11168	3014
Increased statutory maximum fines for simple possession.	6480	H11169	3015
Direction to USSC and increased statutory maximum penalty regarding operation of a common carrier under the influence of alcohol or drugs.	6482	H11169	3015
Increased statutory maximum penalty for deprivation of civil rights.	7019	H11173	—
Increased statutory maximum penalty for abusive sexual contact.	7058(a)	H11175	—

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
Increased statutory maximum penalty for murder for hire.	7058(b)	H11175	___
Increased statutory maximum penalty for attempted murder.	7058(c)	H11175	___
Increased statutory maximum penalty for certain RICO offenses.	7058(d)	H11175	___
Increased statutory maximum penalty for certain immigration offenses.	7345	H11195	___
V. NEW PENALTIES OTHER THAN INCARCERATION:			
Denial of federal benefits to drug traffickers and possessors. No Commission Action Required. The Commission lacks authority to promulgate guidelines for this penalty.	5301	H11148	3004
Civil penalties for possession of drugs.	6486	H11170	3016
Death Penalty provisions.	7001	H11171	3016
VI. NEW OFFENSES:			
New offense: Distribution of Anabolic Steroids. Needs Further Study.	2403	H11125	___
New offense: Importation/Exportation of Certain Chemicals.	6053	H11149	3005
New offense: Possession of Certain Chemicals with Intent to Manufacture Controlled Substances.	6055	H11150	3006
New offense: Possession and Distribution of Certain Drug Paraphernalia.	6057	H11150	3006
New offense: Interstate Travel to Acquire Firearm for Criminal Purposes.	6211	H11162	3011
New offense: Possession of Guns in Federal Facilities.	6215	H11163	3011
New offense: Using Hazardous or Injurious Devices on Federal Lands.	6254(f)	H11164	___

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
New offense: Using Poison, Chemical or other Hazardous Substances on Federal Lands.	6254(h)	H11165	___
New offense: Endangering Human Life While Illegally Manufacturing a Controlled Substance.	6301	H11166	3011
New offense: Money Laundering (Undercover Operations).	6465	H11167	3013
New offense: Obstruction of Federal Audit.	7078	H11176	___
New offense: Unauthorized Use of the Term "Secret Service."	7079	H11176	___
New offense: Nonmailability of Locksmithing Devices.	7090(c)	H11177	___
New offense: Forgery of Aircraft Registration Documents.	7209	H11183	___
New offense: Selling or Buying of Children.	7512	H11200	3022
New offense: Engaging in the Business of Selling or Transferring Obscene Matter.	7521	H11201	3023
New offense: Distributing Obscene Material By Cable or Subscription Television.	7523	H11205	3027
New offense: Communicating Obscene Material By Telephone.	7524	H11205	3027
New offense: Possession with Intent to Sell, and Sale, of Obscene Matter on Federal Property.	7526	H11205	3028
New offense: Causing a Violation of Cash Transaction Reporting Requirements.	7601	H11205	3028
VII. MISCELLANEOUS CRIMINAL LAW AND SENTENCING PROVISIONS:			
Chemical Diversion and Trafficking Act.	6051 et seq.	H11149-51	3002-3007
Revised definition of "drug trafficking crime."	6212	H11163	3011

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
Mandatory revocation of probation for firearm possession.	6214	H11163	3011
Inclusion of juvenile delinquency finding within the meaning of "conviction" for purposes of §924.	6451	H11166	3012
Inclusion of federal firearms violations as predicate wiretap offense.	6461	H11167	3012
Revision of money laundering forfeiture provisions.	6463	H11167	3013
Inclusion of new predicate offense for money laundering.	6466	H11167	3013
Miscellaneous controlled substance amendments (including addition of methamphetamine to list of drugs carrying mandatory minimum penalties and inclusion of conspiracy within mandatory minimum provision.	6470	H11168	3014
Miscellaneous money laundering amendments.	6471	H11168	3014
Clarification of Ballistics Knife Act.	6472	H11168	3014
Clarification of unlawful common carrier operation statute.	6473	H11168	3014
Clarification of distributing drugs on aircraft statute.	6475	H11169	3014
Revision of Assimilative Crimes Act.	6477	H11169	3014
Revision of unlawful quantities of marihuana.	6479	H11169	3015
Clarification of drug paraphernalia statute.	6485	H11170	3016
Revision of assaulting officers statute.	6487	H11170	3016
Revision of deprivation of civil rights statute.	7018	H11173	—
Clarification of altered VIN statute.	7021	H11174	—
Revision of transmission of wagering information statute.	7024	H11174	—
Clarification of crimes within Indian Country statute.	7027	H11174	—

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
Revision of obstruction of justice statute.	7029	H11174	___
Revision of offense classification statute.	7041	H11174	___
Revision of restitution enforcement statute.	7042	H11174	___
Revision of counterfeiting statute.	7048	H11175	___
Revision of escape statute.	7055	H11175	___
Revision of Armed Career Criminal Act.	7056	H11175	___
Revision of stolen securities statute.	7057	H11175	___
Revision of counterfeiting statute.	7080	H11176	___
Revision of criminal fines statute.	7082	H11177	___
Revision of special assessments statute.	7085	H11177	___
Revision of statute setting forth conditions of probation.	7086	H11177	___
Revision of misuse of Social Security number statute.	7088	H11177	___
Revised definition of petty offense.	7089	H11177	___
New provision re: prisoner transfer from foreign countries.	7101	H11179	3019
Revision of §3553(c) to permit courts to transmit statement of reasons in the form of a transcript "or other appropriate record."	7102	H11179	3020
Restructuring of appellate review statute and establishment of due deference standard for mixed questions of law and fact.	7103	H11179	3020
Technical correction of cross reference.	7107	H11180	3020
Inclusion of protection of public as a factor in setting and modifying conditions of supervised release.	7108	H11180	3020
Granting Commission greater flexibility in submitting guideline amendments to Congress.	7109	H11180	3021

Subject	Section	October 21, 1988 Cong. Record Page No.	November 2, 1988 44 Cr.L. Rep. Page No.
Clarification of restitution statute.	7110	H11180	3021
Amendment of Federal Rules of Appellate Procedure.	7111	H11180	3021
New mandatory condition of probation, parole and supervised release: defendant shall not possess illegal drugs. Violation leads to mandatory revocation and specified prison term.	7303	H11193	3021
New discretionary condition of probation, parole and supervised release: home confinement.	7305	H11194	3021
Granting magistrates authority to impose sentence for misdemeanors and infractions with consent of parties.	7322	H11194	3022
Revision of sexual exploitation of children statute.	7511	H11200	3022
Inclusion of sexual exploitation of children as a RICO predicate.	7514	H11201	3023
Inclusion of exploitation of children as an offense subjecting defendant to criminal forfeiture.	7522	H11201	3024
Revision of mail fraud statute (to overturn McNally decision).	7603	H11207	3029
Authorizing Attorney General to support U.S. prisoners in non-federal institutions.	7608(d)	H11209	___

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QUESTIONS MOST FREQUENTLY ASKED ABOUT THE SENTENCING GUIDELINES

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Nos. I & II, November 23, 1988

Disclaimer: Information provided through the Technical Assistance Service is offered to assist U.S. Probation Officers and judges in applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.

1. **QUESTION**: Do the Guidelines apply when sentencing individuals as juveniles?

   ANSWER: *No.*

2. **QUESTION**: Can home detention (house arrest) be substituted for community confinement?

   ANSWER: *No. When imposing a term of imprisonment as described under guideline 5C2.1, only community confinement is listed as an available alternative; home detention is not listed. Application Note 5 to §5C2.1 specifically states that home detention may not be substituted for imprisonment.*

   Both community confinement and home detention are listed as available options that may be imposed as conditions of probation or supervised release. (See §§5F5.1 and 5F1.2 for definitions.)

3. **QUESTION**: Do the guidelines permit "unsupervised" probation?

   ANSWER: *Yes. Supervision is not a mandatory condition of probation listed under §5B1.3. Recommended conditions of probation are included in a policy statement at §5B1.4 The recommended conditions are generally those that address reporting and necessitate supervision. While the conditions listed in §5B1.4 are recommended, they are not required.*

4. **QUESTION:** What should be done if the guideline range is below a statutory minimum mandatory sentence or above a statutory maximum?

ANSWER: *If the guideline range is below a statutory minimum mandatory sentence, the statutory minimum is controlling and becomes the guideline sentence. If the guideline range is above a statutory maximum, the statutory maximum is controlling and becomes the guideline sentence. (See §5G1.1.)*

5. **QUESTION:** What should be done when a statute mandates a consecutive sentence?

ANSWER: *According to §5G1.2, this sentence should be imposed consecutively to any other guideline sentence. If a mandatory term is required, e.g., 18 U.S.C. § 924(c) (use of a firearm in a crime of violence), the mandatory term would run consecutively to the guideline term for the remainder of the offenses. For offenses where a consecutive sentence is mandated but a specific term is not statutorily mandated, e.g., 18 U.S.C. § 3146 (failure to appear) and 18 U.S.C. § 3147 (committing an offense while on release), independent guideline calculations should be made for that offense and the sentence should be imposed to run consecutively to the guideline sentence for the remainder of the offenses. (See §3D1.2 (first paragraph) and Application Note 1 of the Commentary to §3D1.2.)*

In order to avoid double counting, when a consecutive sentence is statutorily mandated for a count, any offense elements that are addressed in this count should not be factored as a specific offense characteristic or adjustment to other guideline offenses. Example: A defendant is convicted of one count of bank robbery where a weapon was used, and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The computation of the offense level for the robbery includes a specific offense characteristic involving weapons and firearms. (See §2B3.1(b)(2).) Because this behavior will be sanctioned by the imposition of a consecutive sentence for the 924(c) violation, the specific characteristic will not be included in the computation of the robbery guideline.

6. **QUESTION:** When calculating criminal history points, does work release count as imprisonment?

ANSWER: *If the offender was sentenced to imprisonment and as part of the term of imprisonment was placed on work release status, this would be treated as a sentence of imprisonment. If the sentence did not involve a term of imprisonment (e.g., a sentence of probation with a condition requiring residency in a halfway house plus work release), the sentence would not be considered*

imprisonment and would fall under §4A1.1(c). A sentence of residency in a halfway house is not considered imprisonment. (See the Background of the Commentary to §4A1.1 (second paragraph).)

For example, a sentence of probation under §5C2.1(c) that included a requirement of residence for 60 days in a halfway house would be counted as a sentence of probation. A sentence of probation under §5C2.1(c) requiring intermittent confinement in prison or jail totaling 60 days would be counted as a sentence of imprisonment. A commitment to the custody of the Bureau of Prisons for 60 days would be treated as a sentence of imprisonment even if it included a recommendation that the defendant be permitted to serve all or part of his sentence in a halfway house.

7. **QUESTION:** Do the time periods that apply to criminal history calculations also apply to career offender determinations?

ANSWER: *Yes. Application Note 4 under §4B1.2 indicates that the applicable time periods provision of §4A1.2(e) also applies to the counting of convictions under §4B1.1 (Career Offender).*

8. **QUESTION:** What should be done if the statute of conviction is not listed in the statutory index?

ANSWER: *Appendix A (the Statutory Index) refers to §2X5.1 for offenses not listed in the index. Guideline 2X5.1 states that if the offense is a felony or a Class A misdemeanor, the most analogous guideline should be applied.*

In determining the most analogous guideline, the court should consider the conduct for which the defendant was convicted (§1B1.2(a)) and the statute(s) that the potentially analogous guidelines reflect (see Statutory Provisions listed under each offense guideline).

If no sufficiently analogous guideline exists for the felony or Class A misdemeanor, the provisions of 18 U.S.C. §3553(b) shall control. Petty offenses are excluded from sentencing under the guidelines (effective June 15, 1988) and therefore no analogous guideline is required for Class B or C misdemeanors or infractions.

9. **QUESTION:** Do the guidelines apply to cases prosecuted under the Assimilative Crimes Act?

ANSWER: *In general, yes. Refer to Guideline 2X5.1, which states that if the offense is a felony or a Class A misdemeanor, the most analogous guideline should be applied. If no sufficiently analogous guideline exists for the felony or*

Class A misdemeanor, the provisions of 18 U.S.C. §3553(b) shall control. Petty offenses are excluded from sentencing under the guidelines (effective June 15, 1988).

10. **QUESTION:** If the offender is indicted for possession with intent to distribute, but is only convicted of simple possession, does the amount of drugs affect the sentence?

ANSWER: *The guideline section utilized to compute the guideline range must be determined by the offense of conviction (§1B1.2(a)). The simple possession guideline (§2D2.1) does not utilize the amount of drugs to determine the appropriate offense level. Of course, the amount of drugs may be considered by the court for the purposes of determining the appropriate sentence within the guideline range or for possible departure.*

11. **QUESTION:** If the defendant is indicted on a drug conspiracy charge and multiple substantive counts of drug distribution and pleads to only one substantive count, are the amounts of drugs from the conspiracy and other substantive counts added to the drugs in the court of conviction for purposes of guideline calculation?

ANSWER: *Yes, if they meet the criteria for relevant conduct and are supported by sufficient evidence (it would appear that most courts will employ a "preponderance of the evidence" standard). The January 15th revisions to the relevant conduct guideline more clearly explain that behavior that was part of the same course of conduct or common scheme or plan as the offense of conviction is considered relevant conduct.*

In addition, the Background notes to this section state that "conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

12. **QUESTION:** If multiple defendants are convicted of drug conspiracy, are all the drugs in the conspiracy used in calculating the guideline ranges for all the defendants?

ANSWER: *Under the revised relevant conduct section, §1B1.3, Application Note 1, the court is instructed to include conduct "in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant." Thus the amount of drugs used in calculating the guideline range for each defendant may vary accordingly.*

13. **QUESTION:** If an indictment includes separate counts under pre-guideline law and post-guideline law, how should the defendant be sentenced?

ANSWER: *Congress passed the Sentencing Reform Act of 1987 on December 7, 1987 (under Public Law 100-182), that included a provision that the guidelines apply to offenses occurring on or after November 1, 1987. The pre-guideline counts would therefore be sentenced under pre-guideline provisions and counts that pertain to offenses occurring after November 1st would be sentenced under the guidelines.*

The issue of whether to include relevant conduct that occurred prior to November 1 when computing guidelines for an offense that occurred after November 1 is not as clear. The guidelines clearly direct one to include it, but if relevant conduct already covered by pre-guideline counts is included, there would be a potential for double counting unless the pre-guideline counts were sentenced concurrently. Additionally, concerns regarding ex-post facto problems could arise. This issue is a legal one that the courts will have to consider at the time of sentencing.

14. **QUESTION:** If the court does not impose a fine, is it a departure?

ANSWER: *The answer depends on the defendant's ability to pay a fine. If a defendant has the ability to pay a fine but one was not imposed, the sentenced would be a departure. However, if the fine was waived due to an inability to pay, the sentence would not be a departure. The guidelines require a fine in every case unless the defendant does not have the ability to pay or unless imposition of a fine would unduly burden the defendant's dependents. In such a case the court may impose a lesser fine or waive the fine. (See §5E4.2(f).)*

15. **QUESTION:** Upon revocation of probation or supervised release, how does the court impose sentence?

ANSWER: *The Commission has not yet promulgated guidelines for revocation proceedings, although it has issued some general policy statements contained in Chapter Seven of the Guidelines Manual. Therefore, upon revocation the court should consider any applicable policy statements (see in particular, Policy Statement 7A1.4) and impose a sentence that is consistent with the purposes of sentencing (as set forth in 18 U.S.C. § 3553(b)). If probation is revoked, the maximum sentence is governed by the statutory maximum sentence provided by the offense(s) of conviction. In general, if supervised release is revoked the maximum available sanction is a term of imprisonment equal in length to the term of supervised release imposed, but in no event more than 5 years in the case of a Class A felony, 3 years in the case of a Class B felony, 2 years in the case of a Class C or D felony, and 1 year in the case of a Class A misdemeanor.*

16. **QUESTION:** Can the court impose the maximum statutory sentence for an offence and also impose a term of supervised release?

ANSWER: *Yes. Do not confuse supervised release with the concept of parole. When Congress abolished parole and created supervised release (18 U.S.C. § 3583), a term of supervised release was intended as separate from, and in addition to, the statutory maximum penalty for the offense. It is possible, therefore, for a defendant to be sentenced to the statutory maximum term of imprisonment for the offense and after release be subject to further imprisonment if supervised release is revoked. Supervised release is analogous to provisions providing for a "special parole term."*

17. **QUESTION:** If the basis of revocation of a previously imposed term of probation is the instant offense for which the offender is being sentenced, is that revocation sentence factored into the computation of the criminal history category?

ANSWER: *Yes. Points are allocated based on the original sentence combined with any sentence resulting from the revocation. A good rule of thumb is that each conviction is given only one set of criminal history points.*

18. **QUESTION:** What is the current definition of a petty offense?

ANSWER: *When the provisions of the Sentencing Reform Act of 1984 went into effect on November 1, 1987, the classification of petty offenses was repealed. However, the Criminal Fines Improvement Act of 1987 reinstated the offense classification and defined petty offenses as Class B or C misdemeanors and infractions (the maximum penalty for which is six months).*

19. **QUESTION:** Are petty offenses subject to the guidelines?

ANSWER: *No. Effective June 15, 1988, petty offenses will no longer be subject to the guidelines. See §1B1.9 (Petty Offenses).*

20. **QUESTION:** When must a judge state the reasons for a sentence?

ANSWER: *Title 18 U.S.C. § 3553(c)(1), as amended by Section 17 of the Sentencing Act of 1987, states, "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a*

particular point within the range..." (emphasis added)

Thus, it appears that (1) the court must always state its reasons for imposing the particular sentence, and (2) if the range exceeds 24 months, must also state a reason for imposing the sentence at a particular point in the range.

21. **QUESTION:** How are multiple counts of drug distribution handled when the distribution is to both juveniles and adults?

ANSWER: *If a defendant is convicted of at least one count of distribution to a juvenile, §2D1.2 applies. This guideline directs that §2D1.1 be applied, doubling or tripling the amount of drugs distributed to juveniles. The commentary to §2D1.2 (Application Note 1) instructs that if multiple counts are involved in applying §2D1.1, the drugs that involve juveniles are doubled or tripled, as appropriate, and added to the drugs that do not involve juveniles.*

If a defendant is not convicted of distribution to a juvenile, no reference is made to §2D1.2. As a result, any relevant conduct (involving juveniles) to a drug trafficking conviction would result in adding the drugs only in their actual amount, not doubled or tripled.

22. **QUESTION:** In a case involving escape from prison (or work release) as the instant offense, does the defendant receive two criminal history points for §4A1.1(d) and one more for §4A1.1(e)?

ANSWER: *Yes, providing the prior sentence of imprisonment (or work release from confinement) is at least 60 days. The defendant receives two points pursuant to §4A1.1(d) for committing the instant offense while under any criminal justice sentence. Another point is received for committing the offense less than two years after release from imprisonment on a sentence of at least 60 days §4A1.1(e)). As stated in Application Note 5, §4A1.1(e) "also applies if the defendant committed the instant offense while still in confinement on such a sentence."*

If the escape was from a halfway house (or work release from the halfway house) and the residence is not a portion of a sentence of imprisonment of at least 60 days, the defendant would only receive two points under §4A1.1(d) for being under a criminal justice sentence. No points would be given for §4A1.1(e) for this prior sentence.

23. **QUESTION:** Can restitution be ordered for offenses not under Titles 18 or 49?

ANSWER: *Yes. This issue has been clarified in the revisions to §5E4.1, which now states that restitution "may be ordered as a condition of probation or*

supervised release in any other case."

Senate Report Number 225, 98th Congress, 1st Session 95-96, indicates that restitution for other offenses is authorized by Title 18, Section 3563(b)(20) as a discretionary condition.

24. **QUESTION:** Is the cost of imprisonment/supervision considered to be a fine?

ANSWER: *Yes. The guidelines provide that the court shall order a fine within the guideline fine range and the court "shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." (emphasis added) Of course, the guideline fine and the costs of imprisonment/supervision fine cannot total more than the maximum fine provided by statute. (See §5E4.2(i).)*

25. **QUESTION:** Under the sentencing reform act, how much "good time" can an inmate receive toward service of sentence?

ANSWER: *For a prisoner serving a sentence of one year or less, or a life sentence, there is no good time credit available. An inmate serving a sentence of at least one year and one day to any determinate number of years is eligible for 54 days of good time credit each year, beginning after service of the first year of the term (18 U.S.C. § 3624(b)).*

26. **QUESTION:** What documentation should probation officers send to the U.S. Sentencing Commission?

ANSWER: *As part of its effort to monitor guideline sentencing practices, the Commission (through a memorandum dated March 7, 1988, from L. Ralph Mecham, Director of the Administrative Office) has requested the following documents from each probation office:*

1) *Guideline Worksheets -- one set of the worksheets submitted to the court;*
2) *Presentence Report -- the presentence report including any addendum;*
3) *Statement of Reasons for Imposing Sentence -- statement of reasons or a written transcript;*
4) *Written Plea Agreement -- if applicable;*
5) *Judgment of Conviction.*

These documents should be sent as soon as they are available, preferably within 30 days from the date of sentencing. A transcript should be sent later if it is not available at the time the probation office is ready to send the other documentation.

Materials should be sent to the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, N. W., Suite 1400, Washington, D. C. 20004, ATTN: Monitoring Unit.

27. **QUESTION:** Is a diversionary sentence based upon a plea of nolo contendere -- adjudication withheld -- considered a prior sentence for the purpose of criminal history computation?

ANSWER: *Yes. Guideline §4A1.2(f) and its accompanying commentary state that a diversionary disposition, other than diversion from juvenile court, that involves a finding of guilt or admission of guilt is counted as a prior sentence under §4A1.1(c). Guideline §4A1.2(a)(1) states that a plea of nolo contendere is treated the same as a guilty plea or finding of guilt after trial for the purpose of defining the term "prior sentence." This is in accord with the Federal Rules of Criminal Procedure (see Rule 11, in particular) that generally treat a nolo contendere plea the same as a guilty plea or determination of guilt for sentencing purposes.*

28. **QUESTION:** There appears to be a disagreement between 18 U.S.C. § 3559 and 18 U.S.C. § 3581 regarding the classification of crimes and the authorized terms of imprisonment. Which statute should we follow?

ANSWER: *Section 3559 is the more relevant provision for present sentencing purposes. Subsection (a) of this section establishes the classification for sentencing purposes of each criminal offense, based upon the maximum term of imprisonment authorized in the statute(s) describing the offense. The sentencing classification (whether the offense is a Class B or C felony, for example) then determines (1) whether a sentence of probation is authorized by law (see 18 U.S.C. § 3561(a)(1)); (2) the statutory maximum fine (see 18 U.S.C. § 3571); (3) the statutory maximum term of supervised release (see 18 U.S.C. § 3583(b)); and (4) the sentencing guideline term of supervised release (see §5D3.2). Section 3559(b) specifically states that the maximum imprisonment term for any offense is the maximum stated in the law describing the offense (rather than the maximum listed in § 3581).*

Section 3581 of title 18 is a provision of the Sentencing Reform Act that was intended to be used in conjunction with the once-planned, later-abandoned comprehensive revision of the Federal Criminal Code. Under that contemplated scheme, Congress would have graded existing crimes by sentencing classification without specifying a maximum penalty in the provisions describing the offense. Section 3581 would then have been used to determine the maximum authorized imprisonment term for each offense (e.g., an offense graded as a Class C felony would, under §3581, carry a maximum imprisonment of 12 years). Section 3581 remains a dormant provision because Congress, subsequent to the 1984

Sentencing Reform Act, has continued to specify maximum penalties rather than simply classifying offenses by letter grade.

29. **QUESTION**: When using the drug table, is the weight of the drug's packaging added in to determine the drug amount?

ANSWER: *The footnote to the Drug Quantity Table in §2D1.1 designated by a single asterisk states that total weight of the controlled substance is to be used in determining the guideline offense level.*

Packaging materials are not per se a controlled substance, and under the drug statutes and the guidelines are not considered to be part of a controlled substance mixture. With respect to blotter paper or sugar cubes on which LSD or some other controlled substance has been absorbed, the Commission has not addressed the issue and the court may have to make a determination.

30. **QUESTION:** If a defendant commits an offense after the instant offense but is sentenced for the subsequent offense prior to sentencing on the instant offense, can it be counted under criminal history as a prior sentence?

ANSWER: *Yes. According to §4A1.2, Application Note 1, a sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was a sentence for conduct other than conduct that was part of the instant offense.*

31. **QUESTION:** In computing criminal history, should a defendant who committed the instant offense when subject to an active warrant issued for absconding from probation supervision but after the probation term had expired be given 2 points under §4A1.1(d)?

ANSWER: *If the warrant was issued for violation of a term of federal probation, 18 U.S.C. § 3565(b) states that "the power of the court extends beyond the term of probation if, prior to its expiration, a warrant or summons was issued." The effect of this provision is to extend the period of criminal justice control. Therefore, if the defendant committed the instant offense while under federal probation, he would receive two points under §4A1.1(d), assuming that the probationary sentence meets the requirements for counting a prior sentence listed in §4A1.2. If the probation term was imposed outside the federal system, it would be necessary to determine if the term of probation was tolled in that jurisdiction by the issuance of the warrant.*

32. **QUESTION:** Does a defendant serving unsupervised probation at the time of the instant offense receive two criminal history points under §4A1.1(d) for being under a criminal justice sentence?

ANSWER: *Yes. Under §4A1.1(d), 2 points would be added if at the time the defendant committed the instant offense he was under a criminal justice sentence. A criminal justice sentence includes probation, as stated in Application Note 4 to §4A1.1. Keep in mind that the prior offense must meet the definition of prior sentence at §4A1.2(a) and not be a sentence that would be excluded under §4A1.2(c). Whether or not the defendant was being supervised at the time of the instant offense is not a determining factor.*

33. **QUESTION:** The defendant was convicted in 1984 and sentenced in state court to 20 years imprisonment. He served 90 days and was released on appeal bond, which is still pending when he commits the instant offense. Would he receive any criminal history points under 4A1.1(a)?

ANSWER: *Yes. The possibility that the prior conviction may be overturned on appeal is irrelevant in application of the guidelines to the instant offense. Therefore, the defendant should receive 3 points under §4A1.1(a). Application Note 2 of §4A1.2 states that criminal history points are based on the sentenced pronounced, not the length of time actually served.*

34. **QUESTION:** The defendant's instant offense is for distributing drugs. He has two prior sentences for the same type of offense, but one of the prior convictions came after he committed the instant offense. Should he be treated as a career offender?

ANSWER: *No. Although the defendant may be awarded criminal history points under §4A1.1, he would not qualify as a career offender under §4B1.1. The definition of "two prior felony convictions" at §4B1.2(3) states that the defendant must have already been convicted of the prior offenses before he committed the instant offense.*

35. **QUESTION:** The instant offense is bribery of a witness. The defendant bribed the witness not to testify against him in another case. Does the enhancement for obstruction of justice apply?

ANSWER: *Section 3C1.1 states that the obstruction must have taken place "during the investigation or prosecution of the instant offense." For offenses covered under Part J (Offenses Involving the Administration of Justice), the Chapter Three adjustment for obstruction does not apply unless the defendant obstructed the investigation or trial of the obstruction of justice count.*

36. **QUESTION:** Does the firearm enhancement in a bank robbery case apply if the defendant used a toy gun?

ANSWER: *No. The guideline for robbery at §2B3.1(b)(2) provides for an increase in the offense level for the presence of a firearm or other dangerous weapon. Application Note 1 refers to the commentary to §1B1.1 for definitions of firearm and dangerous weapon. A firearm is defined as a weapon that is designed or may be readily converted to expel any projectile by the action of an explosive. "Dangerous weapon" is defined as an instrument capable of inflicting death or serious bodily injury. Because a toy gun does not meet the requirements of a firearm or dangerous weapon, the enhancement should not be applied. This result would be true for sentencing purposes even in a jurisdiction in which the case law supports a conviction for armed bank robbery by a defendant using a toy gun.*

37. **QUESTION:** A plea agreement contains several stipulations as to the amount of drugs, role in the offense, and so forth. Must the court automatically accept the stipulations as binding?

ANSWER: *No. Policy Statement 6B1.4(d) states that "The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing." The commentary under §6B1.4 further instructs that in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. Therefore, the probation officer should calculate the guideline sentence on the basis of all the relevant facts. Of course, if the court accepts the stipulations the guidelines would be calculated accordingly.*

Additionally, in the event of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, §1B1.2 states that the court shall apply the guideline most applicable to the stipulated offense.

38. **QUESTION:** Fleeing from the scene of a bank robbery, the defendant crashed into another vehicle, causing extensive damage. In applying the specific offense characteristics under robbery, does the value of the automobile figure into the determination of loss?

ANSWER: *Yes. Section 1B1.3(a)(1) directs that conduct relevant to determining the applicable guideline range includes all acts committed by the defendant in the course of attempting to avoid detection or responsibility for the offense. If the destruction of the car fits this criteria, the monetary damage to the car would be added to the amount of money stolen from the bank in determining the total loss under §2B3.1(b)(1).*

39. **QUESTION:** A defendant was sentenced for two separate robberies on the same day in the same court and received consecutive sentences. Can each robbery be counted individually when calculating criminal history points?

ANSWER: *No. Guideline §4A1.2(a)(2) states that prior sentences imposed in related cases are to be treated as one sentence for purposes of computing the criminal history score. The guideline further states that the "aggregate sentence of imprisonment imposed" should be used when consecutive sentences are imposed. Furthermore, Application Note 3 to §4A1.2 states that cases are considered related if they (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) were consolidated for trial or sentencing. Thus, if the two robbery cases were consolidated for sentencing they would be considered one sentence for the purpose of calculating criminal history.*

40. **QUESTION**: During the presentence interview, the defendant provides information about his past criminal conduct for which he was never arrested. While unrelated to the instant offense, it is similar in nature. Can this information be considered in determining the defendant's criminal history category?

ANSWER: *No. This activity would not be used to calculate the criminal history category. However, the court may consider such behavior as criteria for a specific point within the guideline range or as grounds for departure. Adequacy of Criminal History (§4A1.3(3)) states that the court may consider imposing a sentence that departs from the otherwise applicable guideline range if there is reliable information of "...prior similar adult criminal conduct not resulting in a criminal conviction."*

41. **QUESTION**: Do the guidelines apply to conspiracies that began prior to November 1, 1987, and continued past that date?

ANSWER: *The Sentencing Commission's legal staff agrees with the opinion of the Department of Justice and an opinion by legal counsel for the Administrative Office of the U.S. Courts that a defendant convicted of a continuing offense, such as a conspiracy, which began prior to November 1, 1987, but concluded after that date should be sentenced under the guidelines. It is the consensus of these opinions that such an application does not violate the ex post facto clause of the Constitution. (See Prosecutors Handbook on Sentencing Guidelines, pg. 72.) See also, "Looking at the Law," Federal Probation, (December 1987), that addresses this issue.*

42. **QUESTION**: Can the court depart downward and impose probation on a defendant convicted of a Class A or B felony?

ANSWER: *According to 18 U.S.C. § 3561, a defendant may not be sentenced to a term of probation if convicted of a Class A or B felony. Subsequent to the enactment of that provision in the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986 added a provision codified as 18 U.S.C. § 3553(e), an amendment to Rule 35(b) of the Rules of Criminal Procedure, and a provision codified as 28 U.S.C. § 994(n). Both provisions were intended to permit a defendant to have his sentence reduced upon motion of the government -- even below the level of an applicable statutory minimum -- to reflect a defendant's substantial assistance in the investigation or prosecution of another offender. The legislative history is not clear as to whether Congress intended the prohibition on probation for Class A or B felonies to be treated in the same manner as a mandatory minimum term of imprisonment. Moreover, even if 18 U.S.C. § 3553(e) is interpreted by a court to permit "override" of 18 U.S.C. § 3561, there is a further question as to the authority to grant probation for some drug offenses for which the statutory language specifically prohibits a court from sentencing a defendant to probation. Thus, these are legal issues that may have to be addressed by the courts. For a further discussion, see the Shop Talk article in the November 14, 1988, issue of News and Views.*

In general, the Commission has implemented the 28 U.S.C. directive in §5K1.1, which states that upon motion of the government indicating substantial assistance by a defendant, the court may depart from the applicable guideline range. Application Note 1 to §5K1.1 explains that under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), substantial assistance may justify a sentence below a statutory minimum.

43. **QUESTION**: The defendant committed the instant offense while on bond pending trial for an unrelated offense. Does the offense for which he was on bond qualify as a prior sentence in calculating criminal history points in the instant case?

ANSWER: *Perhaps. If the defendant is sentenced for the earlier unrelated offense before sentencing for the instant offense, it may be considered a prior sentence. According to Application Note 1 of §4A1.2, a sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. If sentencing for the earlier behavior occurs after or in conjunction with sentencing on the instant offense, it would not be considered a prior sentence. In such cases, the court may consider the fact that the defendant was on bond as possible grounds for departure (See §4A1.3).*

44. **QUESTION**: Is bank larceny considered a crime of violence when applying the career offender enhancement? What if the defendant actually committed bank robbery but is charged with bank larceny?

ANSWER: *Application of the career offender provision of the guidelines requires use of the offense of conviction (i.e., the statutory violation charged in the count of the indictment or information for which the defendant was convicted) to determine if the defendant meets the criteria. Guideline 4B1.2 and Application Note 1 state that "crime of violence" is defined as in 18 U.S.C. § 16 as: (1) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."*

Although Application Note 1 lists several offenses that the Commission considers to be crimes of violence, bank larceny is not among them. Thus, the court must make a determination based upon the above definitional criteria and the conduct described in the indictment for which the defendant was specifically convicted.

45. **QUESTION**: The defendant, having met the requirements for classification as a career offender, is set for sentencing on two counts. Are the statutory maxima for the two counts added together to determine the adjusted offense level under §4B1.1?

ANSWER: *No. Only the count carrying the greater statutory maximum is used in computing the offense level via the Offense Statutory Maximum table of §4B1.1. The combined offense level computed for the two counts controls if it is greater than that calculated using the table.*

46. **QUESTION**: The defendant was convicted under a statute that requires a four year mandatory minimum term of supervised release. What is the maximum term of supervised release permitted by the guidelines?

ANSWER: *According to §5D3.2(a), when a defendant is convicted under a statute that requires a term of supervised release, the term shall be "at least three years but not more than five years, or the minimum period required by statute, whichever is greater." In the example cited, the minimum period required by statute (4 years) is not greater than the upper end of the guideline range. Therefore, since the court cannot impose less than the four year mandatory minimum sentence required by statute, the effective guideline range is four to five years.*

47. **QUESTION**: Do the guidelines require imposition of a term of supervised release on each count when sentencing on multiple counts?

ANSWER: *No. The guidelines do not require a term of supervised release on each count. According to §5D3.1, the court is required to impose a term of supervised release in conjunction with sentences of more than one year. Section 5D3.2 identifies the appropriate terms of supervised release. While the court's final sentence must be within the guideline range as determined in §5D3.2, no instructions are provided as to how the term of supervised release is to be allocated among multiple counts. The guidelines do not require nor do they prohibit imposition of a term of supervised release on each count. Note: 18 U.S.C. § 3624(e) requires that terms of supervised release imposed on more than one count run concurrently, commencing on the day the defendant is released from imprisonment.*

48. **QUESTION**: The defendant faces sentencing on one count of drug distribution and one count of perjury. The perjury count involves lying on the witness stand during the trial for the drug distribution. Would these two counts be grouped together in applying the guidelines?

ANSWER: *Testifying untruthfully during the drug distribution trial provides grounds for applying the Obstruction enhancement (§3C1.1) when calculating the adjusted offense level for the drug count. (See §3C1.1, Application Note 1(c).) Assuming that the obstruction enhancement is applied to the drug count, the perjury count would subsequently be grouped with the drug count pursuant to §3D1.2(c). This rule calls for grouping when one of the counts embodies conduct that is treated as a specific offense characteristic in, or adjustment to, the guideline applicable to another of the counts.*

49. **QUESTION:** The defendant assaulted a law enforcement officer and is charged with 18 U.S.C. § 111. Guideline §2A2.2, Aggravated Assault, has been applied. Is the Chapter Three adjustment for official victim (§3A1.2) applicable or has the enhancement for official victim already been taken into account under §2A2.2?

ANSWER: *The offense level determined through application of §2A2.2 does not include consideration of an official victim. The Aggravated Assault guideline (§2A2.2) was developed to cover numerous statutory provisions, including 18 U.S.C. §§ 112, 113, and 114 and other statutes that do not ordinarily involve official victims. (See Statutory Provisions under §2A2.2.) Therefore, if an official victim is involved, the Official Victim enhancement at §3A1.2 would be applied.*

50. **QUESTION**: How many Worksheet A's should be used in a multiple count case?

ANSWER: *As noted at the top of Worksheet A, a separate worksheet should be completed for each count of conviction or stipulated offense before applying the multiple count rules. The only exceptions to this general rule are 1) counts that are based on aggregate value or quantity that are grouped pursuant to §3D1.2(d); and 2) counts involving conspiracy and a substantive offense that was the sole object of the conspiracy. Separate worksheets should be completed for all other offenses, even though they may later be grouped together pursuant to §3D1.2(a), (b), or (c).*