

EXTENSIONS OF REMARKS

HONORING ROBERT J. MCCARTHY

HON. NANCY PELOSI

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 18, 2008

Ms. PELOSI. Madam Speaker, I rise to pay tribute to the life of Robert J. McCarthy, an outstanding San Franciscan and an outstanding American, who passed away on Sunday, September 14th.

Bob grew up in New York, attending the prestigious Jesuit school Regis High School in Manhattan. He attended Santa Clara University where, as editor of the school newspaper, he met and fell in love with Suzanne Bazzano, a co-ed working as the paper's office manager. After graduating from law school at the University of Chicago, he and Suzanne returned to the Bay Area, living in San Francisco and raising five children.

Bob's legal career and involvement in politics took off when he joined the San Francisco District Attorney's office in the mid-70s. As Chief Deputy, he became friends with a newly elected supervisor, DIANNE FEINSTEIN, a relationship that would last 30 years.

At FEINSTEIN's encouragement, Bob became general counsel to the local Democratic Party. His fundraising and people skills made him invaluable to countless campaigns in San Francisco. Members of the Board of Supervisors, Senatorial, Gubernatorial, and Presidential candidates relied on his generosity and counsel.

Over 25 years ago, McCarthy and restaurateur and political activist Angelo Quaranta started a tradition of Election Day luncheon, inviting all the elected officials, staff, commissioners, and other dignitaries in San Francisco. It is a place where rivalry ends and food and wine begins, and helps calm many a nervous candidate on Election Day.

In 1980, he formed with Lester Schwartz a general practice law firm which lasted until he died. Bob represented some of the largest developments in San Francisco. He was a generous donor to charities and served on the boards of numerous school, community, and religious organizations throughout the city. One of the highlights of his pro bono legal career was working to save the San Francisco Giants from being relocated to St. Petersburg, Florida.

I hope it is a comfort to his beloved wife Suzanne and his children Brendan, Matthew, Ryan, Margaret, and Bobby, and his many friends that so many mourn their loss and are praying for them at this sad time.

The following was printed in yesterday's RECORD and the end notes were inadvertently left off. The following is the statement in its entirety.

SUPPORTING PROPOSED REGULATIONS TO THE PUBLIC SAFETY OFFICERS' BENEFIT PROGRAM

HON. DONALD A. MANZULLO

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, September 17, 2008

Mr. MANZULLO. Madam Speaker, I rise to recognize the Department of Justice for recently proposed regulations relating to the Public Safety Officers' Benefit Program. The program provides death benefits for the survivors of public safety officers who die in the line of duty; and disability benefits to those officers who have been permanently and totally disabled by a catastrophic personal injury sustained in the line of duty, and thereby prevented from performing any gainful work; and also educational assistance benefits for surviving family members. Among other things, these proposed regulations will help to shore up the program against fraud and abuse by clarifying the requirements for certifications and their effect. I strongly support the mission of the Public Safety Officers' Benefit Program, and I commend the Department of Justice for keeping the regulations up to date and for taking action to ensure that the funds available go to those public safety officers (and their survivors) that deserve them. I would like to take a moment to comment on the statutory predicate for some of these regulations.

As the 9th Circuit Court of Appeals recognized,¹ Public Law 94-430 creates a "limited program," whose principal purpose is to help ensure that the families of "public" officers be protected from financial calamity that is likely to result from the death or permanent and total disability, in the line of duty, of the primary money-maker. The statute (including the two parallel 2001 benefits statutes, which do not, strictly speaking, amend the Public Law or directly affect the precise program it creates) enshrines various and competing policy considerations and purposes that it proposes to achieve by particular means that have been worked out, over the last 30 years and more, in the legislative process. Because no law pursues its ends at all costs, the limitations expressly or implicitly contained in its text and structure are no less an articulation of its purposes (and the intent, goals, and policies that inform it), than its substantive grants of authority are. Benefits under these statutes—charges on the public fisc—are to be granted fairly, but not speculatively, or beyond what the statutory language unequivocally requires and unequivocally expresses, or beyond the letter of the difficult judgments reached in the legislative process and clearly reflected in the statutory text. It is precisely to enable the Department to balance and harmonize these various considerations into a single workable and coherent program that the law confers extraordinary administrative and interpretive authority on the Department. For example, at least seven distinct statutory provisions—42 U.S.C. §§ 3796c(a) (twice), 3796(a) & (b), 3796d-3(a)

& (b), 3782(a)—expressly authorize the Department to issue program regulations and policies here, and the law expressly provides that those regulations and policies are determinative of conflict of law issues relating to the program, and that responsibility for making final determinations shall rest with the Department. Under the Public Law (as under the parallel 2001 statutes), the very right to a death or disability benefit, which the Supreme Court correctly has recognized as a legal "gratuity"² (and thus not "remedial" in nature), is not freestanding, but contingent, rather, upon a determination by the Department.

When Public Law 94-430 was enacted in 1976, only the Circuit Courts or the old Court of Claims (of similar rank) heard appeals from final rulings of the Department of Justice thereunder, which meant that only one level of judicial review ordinarily was available to claimants and the Department, alike. In 1982 (when the appellate functions of the Court of Claims generally were merged into the newly-created Court of Appeals for the Federal Circuit), jurisdiction over these appeals—apparently as a result of an oversight—was not transferred to the Federal Circuit, and thus (unlike the case with other administrative appeals, see, e.g., 28 U.S.C. §§ 1295, 1296), by default, lay in what is now the Court of Federal Claims, established under Article I of the Constitution, rather than Article III, with an additional level of appeals available in the Federal Circuit. Although there are notable and distinguished exceptions,³ over the past decade or so, many of the Federal Claims Court's rulings on these appeals applied the law incorrectly,⁴ sometimes disregarding the express terms of the relevant statute⁵ or implementing regulations,⁶ or binding and applicable Federal Circuit/Court of Claims precedent,⁷ and even Supreme Court precedent.⁸ To order the administering agency to pay on a claim when payment is not clearly warranted by the programmatic statutes and their implementing regulations and administrative interpretive superstructure is as much an affront to the law as for the agency not to pay when payment is clearly required by those statutes and regulations.

Overall, the sixteen opinions issued to date by the Federal Circuit (and its predecessor) under the statute⁹ indicate a proper understanding of the law and the application of the Chevron doctrine to the Department's determinations. (All but two of these opinions were affirmances of the administering agency; in *Demutiis*, the agency was affirmed on all points but a very minor one (relating to application of a (now-repealed) regulation),¹⁰ and the 1980 holding in *Harold*, which reversed the Department's determination, itself soon thereafter was rendered moot, as a practical matter, by a statutory amendment consonant with the Department's position.) For these reasons, the corrective proviso in the consolidated appropriations legislation, entrusting judicial appeals under Public Law 94-430 (and the two

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Matter set in this typeface indicates words inserted or appended, rather than spoken, by a Member of the House on the floor.

2001 statutes) exclusively to the Federal Circuit¹¹ (and returning to a single level of judicial review, as originally intended) should further the purposes of the program, reduce litigation costs for claimants and the taxpayers, and serve the interests of justice.

ENDNOTES

1. *Russell*, 637 F.2d 1261 (1980); *Holstine*, No. 80-7477 (Aug. 4, 1982), 688 F.2d 846 (table).

2. *Rose v. Arkansas State Police*, 479 U.S. 1, 4 (1986) (quoting legislative history).

3. E.g., *Dawson*, 75 Fed. Cl. 53 (2007); *LaBare*, 72 Fed. Cl. 111 (2006); *Cook*, No. 05-1050C (Jun. 15, 2006); *Porter*, 64 Fed. Cl. 143 (2005); *One Feather*, 61 Fed. Cl. 619 (2004); *Davison*, No. 99-361C, (Apr. 19, 2002); *Brister*, No. 01-180C (Mar. 27, 2002); *Yanco*, 45 Fed. Cl. 782 (2000); *Ramos-Vélez*, No. 93-588C (Jan. 31, 1995); *Chacon*, 32 Fed. Cl. 684 (1995); *Nease*, No. 91-1518C (Mar. 29, 1993); see also *Cartwright*, 16 Cl. Ct. 238 (1989); *Durco*, 14 Cl. Ct. 423 (1988); *Wydra*, No. 764-83C (Jan. 31, 1986); *Tafoya*, 8 Cl. Ct. 256 (1985); *North*, 555 F.Supp. 832 (1982). When appealed, these decisions invariably have been affirmed.

4. E.g., *Winuk*, 77 Fed. Cl. 207 (2007) (holding that the Department was required to accept, as legally sufficient certifications, instruments and language that would have been insufficient even for an ordinary certificate of service in court); *White*, 74 Fed. Cl. 769 (2006), appeal filed, No. 2007-5126; *Hillensbeck*, 74 Fed. Cl. 477 (2006) (holding that the position of the Department (which was actually correct, see, e.g., *Nease*, *supra*, slip op. at 5 n.4; 132 Cong. Rec. 27,928-929 (1986) (colloquy between Sens. Sasser and Thurmond)) was “substantially unjustified”); *Bice*, 72 Fed. Cl. 432 (2006); *Groff*, 72 Fed. Cl. 68 (2006); *Messick*, 70 Fed. Cl. 319 (2006); *Hillensbeck*, 69 Fed. Cl. 369 (2006) (this holding immediately occasioned the enactment of corrective legislation, Pub. L. 109-162, §1164(a)(2)); *Cassella*, 68 Fed. Cl. 189 (2005); *Hawkins*, 68 Fed. Cl. 74 (2005) (this holding immediately occasioned the enactment of corrective legislation, see Pub. L. 109-162, §1164(a)(4)); *Hillensbeck*, 68 Fed. Cl. 62 (2005); *Bice*, 61 Fed. Cl. 420 (2004); *Davis*, 50 Fed. Cl. 192 (2001); *Demutiis*, 48 Fed. Cl. 81 (2000); *Davis*, 46 Fed. Cl. 421 (2000); *Greeley*, 30 Fed. Cl. 721 (1994); see also *Canfield*, No. 339-79C (July 27, 1982).

5. E.g., *Winuk*, 77 Fed. Cl. at 225 (directing the agency to pay only one of two living parents the full benefit amount, despite the statutory command that the amount be divided between living parents “in equal shares”), and at 224 (holding certain instruments to be legally sufficient certifications, even though they did not contain elements expressly required by the statute—e.g., “identification of all eligible payees of benefits,” and acknowledgment that the decedent actually was “employed by [the certifying] agency” itself), and at 220-21 (holding that “under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,” even though the statute distinguishes between “eligible payees of benefits” (i.e., individuals—potentially eligible for payment of benefits under the statute—for whom the certifications are made by the public safety agencies), on the one hand, and “qualified beneficiaries” (i.e., individuals whose claims the Department of Justice determines to qualify for benefits under the statute and implementing regulations, upon considering those certifications as prima facie evidence), on the other), and at 218-225 (holding that a certification under the 2001 statutes could go to status (i.e., that they authorize certification that an individual was an officer at the time of injury), even though, under those statutes, such certifications may go only to line-of-duty (i.e., properly speaking, they

authorize certification only that an individual, acknowledged otherwise to have the requisite status, “was killed or suffered a catastrophic injury” under the required circumstances); *Hillensbeck*, 69 Fed. Cl. 381-82 and 68 Fed. Cl. at 73-74 (holding, despite an express statutory reference to “public employee member of a rescue squad or ambulance crew,” that the agency committed legal error in understanding the statute to require members of rescue squads or ambulance crews to be public employees).

(6) E.g., *Winuk*, 77 Fed. Cl. at 222 (holding the agency to have committed legal error, “in the absence . . . of a regulatory definition of service to a public agency in an official capacity”); but see 28 C.F.R. §32.3 (containing a highly relevant definition of “Official capacity”), and at 220-21 (holding that “under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification”); but see 28 C.F.R. §32.3 (definitions of “Eligible payee” ¶(1), “Employed by a public agency” ¶(1), & “Qualified beneficiary” ¶(1)(i), 32.6(b)(2)(ii), 32.53(b)(2)); *Bice*, 61 Fed. Cl. at 434 (finding the agency to have committed prejudicial legal error when it declined to consider action by a private non-profit memorial foundation chartered under State law to be “evidence [or a] finding[] of fact presented by [a] State, local, [or] Federal administrative [or] investigating agenc[y]” under since-repealed 28 C.F.R. §32.5).

(7) E.g., (a) *Winuk*, 77 Fed. Cl. at 221-22, 225 (giving dispositive effect to post-hoc State government action purporting to alter the actual facts at issue; but see *Chacon*, 48 F.3d 508, 513 (1995) (post-hoc State government actions “do not erase the fact[s]”); cf. also *Groff*, 493 F.3d 1343, 1355 (2007) (“post-mortem statements” of government agencies do not “transform [private parties] into government employees”), and at 218-21 (declaring it erroneous for the agency not to have understood “should” to mean “must”; but see *Maggitt*, 202 F.3d 1370, 1378 (2000) (“should” in benefits law not understood to mean “must”), and at 224 (holding the decedent’s lack of any legal authority or legal duty to engage in public safety activity to be irrelevant to whether he was a public safety officer (as opposed to being a good Samaritan); but see *Amber-Messick*, 483 F.3d 1316, 1323-25 (2007) (public safety officer status turns on actual legal authority to engage in requisite public safety activity); *Cassella*, 469 F.3d 1376, 1386 (2006) (public safety officer status turns on whether one is “appointed for and given the authorization or obligation to perform [requisite public safety] duties”); *Hawkins*, 469 F.3d 993 (2006) (the decedent’s “actual responsibilities or obligations as appointed, rather than some theoretical authorizations, are controlling” for determining public safety officer status); *Howard*, 231 Ct. Cl. 507, 510 (1981) (“eligibility under the Act turns on whether the specific activity causing death was an inherent part of employment as an officer and whether it was required” of the decedent); *Budd*, 225 Ct. Cl. 725, 726-27 & n.6 (1980) (the activity causing “the death must be ‘authorized, required, or normally associated with’ an officer’s . . . duties”));

(b) *White*, 74 Fed. Cl. at 776-79 (terming “ridiculous” the agency’s position that the inchoate right to the gratuity expired upon the death of the statutory beneficiary prior to actually receiving it); but see *Simple*, 24 Ct. Cl. 422 (1889) (the inchoate right to a legal gratuity expires upon the death of a statutory beneficiary prior to actually receiving it); cf. also 16 Att’y Gen. 408 (1879);

(c) *Hillensbeck*, 74 Fed. Cl. at 481 (directly contrary to the precise rationale that informs the Federal Circuit’s reversal of the same judge, a few days earlier, in a substantially-similar case, *Hawkins*, 469 F.3d 993, 1002

(2006)), and at 482-84 (adjusting and awarding attorney fees in a manner directly contrary to the holding in *Levernier Constr.*, 947 F.2d 497, 503-04 (1997)); and

(d) *Davis*, 50 Fed. Cl. at 211 and 46 Fed. Cl. at 424-25 (declaring controlling language in *Budd*, 225 Ct. Cl. at 727 n.6, to be mere “dicta” and “non-precedential,” and either “erroneous[]” or “mistaken[]”); but see *Howard*, 229 Ct. Cl. at 510 (holding that same *Budd* language to be legally “dispositive”).

(8) E.g., *Winuk*, 77 Fed. Cl. at 225 (declaring the 2001 statutes to be “remedial laws”); *White*, 74 Fed. Cl. 773 (declaring P.L. 94-430 to be a “remedial statute”); *LaBare*, 72 Fed. Cl. at 124 (a correct ruling, overall, but unfortunately describing P.L. 94-430 as “remedial legislation”); *Bice*, 72 Fed. Cl. at 450 (declaring P.L. 94-430 to be a “remedial statute”); *Groff*, 72 Fed. Cl. at 79 (declaring P.L. 94-430 to be “remedial in nature”); *Bice*, 61 Fed. Cl. at 435 (declaring P.L. 94-430 to be a “remedial statute”); *Davis*, 50 Fed. Cl. at 208 (describing P.L. 94-430 in remedial terms); *Demutiis*, 48 Fed. Cl. at 86 (declaring P.L. 94-430 to be “remedial in nature”); but see *Rose*, 479 U.S. at 4 (holding the program benefit to be a legal “gratuity” (cf. *Lynch*, 292 U.S. 571, 577 (1934); 36 Att’y Gen. 227, 230 (1930))). No opinion of the Federal Circuit/Court of Claims describes the program as “remedial.”

(9) *Groff*, 493 F.3d 1343 (2007) (two cases); *Amber-Messick*, 483 F.3d 1316 (2007); *Cassella*, 469 F.3d 1376 (2006); *Hawkins*, 469 F.3d 993 (2006); *Demutiis*, 291 F.3d 1373 (2002); *Yanco*, 258 F.3d 1356 (2001); *Greeley*, 50 F.3d 1009 (1995); *Chacon*, 48 F.3d 508 (1995); *Canfield*, No. 339-79 (Dec. 29, 1982); *Russell*, 231 Ct. Cl. 1022 (1982); *Melville*, 231 Ct. Cl. 776 (1982); *Howard*, 231 Ct. Cl. 507 (1981); *Smykowski*, 647 F.2d 1103 (1981); *Morrow*, 647 F.2d 1099 (1981); *Budd*, 225 Ct. Cl. 725 (1980); *Harold*, 634 F.2d 547 (1980). No opinion was issued in *Bice*, 227 Fed. App’x 927 (2007); *Porter*, 176 Fed. App’x 111 (2006); or *One Feather*, 132 Fed. App’x 840 (2005).

(10) Without opinion, in *Bice*, the Federal Circuit affirmed the Federal Claims Court judgment, which was based entirely on a misapplication of this same now-repealed regulation.

(11) In providing that the “appeals from final decisions of the Bureau” that it refers to specifically include those “under any statute authorizing payment of benefits described under subpart 1” of Pub. L. 90-351, title I, part L (i.e., the 2001 statutes), the legislation (among other things) is framed to counter the holding in *Winuk*, 77 Fed. Cl. at 220-21, that “under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,” as a result of which holding the Department was ordered by the court to accept as “certified” purported “facts” that were known not to be true, and, further, to accept such “certification” not as mere prima facie evidence (rebuttable by other evidence) of those purported “facts,” but as dispositive and binding on the Department, thus purporting to deny it its legal authority to render meaningful, substantive “final decisions” under those statutes.

HONORING BRADLEY NEW

HON. SAM GRAVES

OF MISSOURI

IN THE HOUSE OF REPRESENTATIVES

Thursday, September 18, 2008

Mr. GRAVES. Madam Speaker, I proudly pause to recognize Bradley New of Gladstone, Missouri. Bradley is a very special young man who has exemplified the finest qualities of citizenship and leadership by taking an active