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COMMENDATIONS

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

Arnold T. Aikens (Florida, Southern District), by Mary S. Elcano, Vice President and General Counsel, U.S. Postal Service, Washington, D.C., for his excellent representation and outstanding litigative skill in bringing a $5 million negligence case to a successful conclusion.

Bill Allen (Mississippi, Southern District), by K. D. Kell, Inspector in Charge, U.S. Postal Service, New Orleans, for his outstanding efforts in the successful prosecution of two cases, one of which was resolved by a plea agreement, and the other which resulted in a guilty verdict on two counts.

Robert G. Anderson (Mississippi, Southern District), by David W. Johnson, Jr., Special Agent in Charge, FBI, Jackson, for his successful defense of the U.S. Government in a $2.5 million lawsuit arising from an automobile accident involving an FBI vehicle, the outcome of which was a court award of $18,117.34.

Michael Arkfield (District of Arizona), by Thomas J. Davis, Chairman, Executive Committee, Trial Practice Section, State Bar of Arizona, Tucson, for his participation at the Annual State Bar Convention, and for his excellent presentation on "the cutting edge of technology."

Ana Barnett (Florida, Southern District), by Ronald K. Noble, Assistant Secretary, Enforcement, Department of the Treasury, Washington, D.C., for her valuable assistance and cooperative efforts in the development of asset forfeiture legislation.

Thomas Bondurant, Jr. (Virginia, Western District), by Sergeant Stephen G. Marchi, Criminal Investigation Division, Front Royal Police Department, for his superior efforts and outstanding success in the prosecution of a double homicide/drug conspiracy case, which resulted in the removal of extremely dangerous individuals from the community. ***Kim Suter*** provided valuable paralegal assistance and services throughout the trial.

Jeff Bornstein and ***Special Assistant United States Attorney Jeff Nedrow*** (California, Northern District), by Wayne D. Brazil, U.S. Magistrate, U.S. District Court, San Francisco, for their expert handling of the Petty Offense Calendar which resulted in a dramatic reduction in cases, thereby allowing the Magistrates more time to devote to other more significant matters.

Marina Utgoff Braswell (District of Columbia), by Daniel D. Campbell, General Counsel, National Transportation Safety Board (NTSB), Washington, D.C., for her outstanding legal support in a Freedom of Information Act case involving records pertaining to the December 1985 Arrow Air DC-8 crash in Gander, Newfoundland. (This is the second time Ms. Braswell has successfully represented the NTSB in a suit seeking access to records regarding the Board on its participation in accident investigations in foreign countries.)

Charles A. Caruso (New York, Northern District), by William R. Imfeld, Assistant Special Agent in Charge, FBI, Albany, for his outstanding legal skill in developing a skillfully crafted plea bargain in a difficult kidnapping case complicated by language barriers and international boundaries, with the result that the two kidnappers now face lengthy prison terms.

Kevin Comstock and ***Arenda W. Allen*** (Virginia, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their outstanding efforts in the prosecution of members of a large cocaine and crack cocaine distribution network in Norfolk, three of whom were involved in a brutal double homicide.

Patrick Crank (District of Wyoming), by Tom Pagel, Director, Division of Criminal Investigation, Office of the Attorney General, Cheyenne, for his successful prosecution of eight drug traffickers and for dismantling a sophisticated criminal enterprise that distributed over ten pounds of methamphetamine from Greeley, Colorado, into Gillette, Wyoming.

Jim Crowe (Missouri, Eastern District), by L. S. Crawford, Jr., Postal Inspector in Charge, U.S. Postal Service, Pasadena, California, for his outstanding efforts in bringing a critical case to a successful conclusion, and for his continuing support of the postal inspectors in the Los Angeles Division.

David Detar-Newbert (Missouri, Western District), by Kenneth M. Riche, Acting Chief, Criminal Investigation Division, Internal Revenue Service, Kansas City, for his professionalism and legal skill in the successful settlement of a difficult case involving the evasion of over $136,000 in fuel excise taxes over a period of two years.

Maureen Donlan (Florida, Southern District), by John F. Lenihan, Assistant Area Director, Inspection and Control, JFK Airport, U.S. Customs Service, Jamaica, New York, for her outstanding professional efforts on behalf of the U.S. Customs Service in a complex sexual harassment case.

Edward L. Dowd, Jr., United States Attorney, and ***Joseph Landolt, Assistant United States Attorney*** (Eastern District of Missouri), by James W. Nelson, Special Agent in Charge, FBI, St. Louis, and Gary W. Easton, Superintendent, Jefferson National Expansion Memorial, National Park Service, St. Louis, for their outstanding success in obtaining a guilty jury verdict in a homicide case which occurred on the St. Louis Arch Grounds. ***Mr. Landolt*** was also commended for his successful efforts in another criminal case involving the brutal assault and rape of a 17-year-old during a carjacking spree.

Gerald Doyle and ***Nancy Herrera*** (Texas, Southern District), by Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, for their outstanding success in obtaining the conviction of an officer on six counts of violating 18 U.S.C. §242, deprivation of civil rights under color of law, and for their dedication and forceful advocacy on behalf of the United States.

Cynthia A. Everett (Florida, Southern District), by Thomas V. Cash, Special Agent in Charge, Drug Enforcement Administration, Miami, for her valuable assistance and successful efforts in the recent trial of a physician, as well as a number of other cases initiated by the Diversion Control Group of the Drug Enforcement Administration.

James Fleissner (Illinois, Northern District), by Kenneth G. Cloud, Special Agent in Charge, Drug Enforcement Administration, Chicago, for his valuable assistance and cooperative efforts on several large and complex investigations over the years, especially the successful prosecution of nine members of the traditional Organized Crime family in Chicago in 1990.

Constance Frogale and ***Margaret Smith*** (Virginia, Eastern District), by James E. Childs, Special Agent in Charge, Defense Criminal Investigative Service (DCIS), Arlington, for their major contribution to the success of the annual In-Service Training Program for DCIS agents last May.

H. Gordon Hall (District of Connecticut), by Carole S. Schwartz, Assistant United States Attorney Coordinator, New England Organized Crime Drug Enforcement Task Force, Boston, for his participation in the 1994 New England OCDETF Regional Conference in Hyannis, and for his excellent presentation on "The New Haven Gang Case."

Daniel David Hu (Texas, Southern District), by Captain J. P. Wiese, Chief, Claims and Litigation Division, U.S. Coast Guard, Washington, D.C., by direction of the Commandant, for his excellent representation of the Coast Guard in a case involving a myriad of issues, many of which were unique to the military, and which eventually ended in the dismissal of the case.

Sharon Jaffe and ***John B. Hughes*** (District of Connecticut), by Colonel Brink P. Miller, Division Engineer, New England Corps of Engineers, Waltham, Massachusetts, for their outstanding success in obtaining a favorable settlement of a case in which a yacht club agreed to pay $61,000 to the government as disgorgement of economic gain from illegal activities and removed unauthorized structures from the Federal Navigation Project in Southport Harbor.

Dexter Lee (Florida, Southern District), by William B. Wharton, Director, Office of Passport Policy and Advisory Services, Department of State, Washington, D.C., for his outstanding success in obtaining the first clear appellate ruling that approval of a certificate of loss of nationality starts the statutory limitations period to run as a bar to jurisdiction for a complaint filed under 8 U.S.C. 1503(a).

Howard Marcus, Suzanne Modlin, and ***Richard Poehling, Assistant United States Attorneys, Judy Schmelig, Victim/Witness Coordinator,*** and ***Christy Marshall, Public Information Coordinator*** (Missouri, Eastern District), by Linda Riekes, Unit Director, and Rose Thompson, Project Specialist, Law and Citizenship Education Unit, Dropout Prevention Project, Understanding Law Enforcement Camp, St. Louis Public Schools, for their kind hospitality extended to middle school participants and staff during a visit to the United States Attorney's office, and for providing valuable instruction on law enforcement, the courts, and many other topics of interest to the students.

Bill Meiners and ***Mike Green*** (Missouri, Western District), by Kenneth M. Riche, Acting Chief, Criminal Investigation Division, Internal Revenue Service, Kansas City, for their successful prosecution of eight defendants for possession and distribution of cocaine, money laundering, and operating a continuing criminal enterprise over a period of five years.

Robert Moscati (New York, Western District), by Special Agent Matthew G. Barnes, Acting Resident Agent in Charge, Drug Enforcement Administration, Rochester, for his outstanding assistance in a year-long investigation that has resulted thus far in the return of a 63-count indictment naming 23 defendants, all of whom were participants in three separate cocaine distribution organizations based in Rochester, New York. Among those indicted were the out-of-state sources of supply for each organization.

James C. Murphy and ***Robert Gay Guthrie*** (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for their excellent representation and outstanding joint efforts in bringing a difficult and sensitive case of long standing to a final conclusion.

Lauren Nash (District of Connecticut), by James A. Friedman, Deputy Chief Field Counsel, Law Department, U.S. Postal Service, Windsor, for her outstanding efforts in representing the Postal Service in an employment discrimination case, the thorough preparation of which resulted in the plaintiff's withdrawal on the eve of trial. ***Julie Goggins*** provided valuable assistance in preparing the exhibits and pretrial submissions.

Paul Newby (North Carolina, Eastern District), by Carolyn McAllaster, Senior Lecturer at Law, Duke University School of Law, Durham, for his excellent presentation to a group of judges from Taiwan, and for providing them with helpful and useful information.

Jill Ondrejko (Louisiana, Eastern District), by Ralph M. Minton, Compliance Officer-In-Charge, Food and Nutrition Service, Department of Agriculture, Dallas, Texas, and Michael L. Cruse, Deputy Associate Regional Attorney, Office of the General Counsel, Department of Agriculture, Little Rock, Arkansas, for her outstanding success in obtaining a judgment in favor of the United States in an action in which the False Claims Act was applied against a violator of the Food Stamp Program.

Peter M. Ossorio (Missouri, Western District), by John R. Steer, General Counsel, United States Sentencing Commission, Washington, D.C., for his valuable assistance while on assignment at the Commission, and for contributing important proposals relating to drug guidelines, national security offenses, and various other issues.

Karl A. Pedersen (District of Connecticut), by William F. Gill III, Regional Inspector, North Atlantic Region, Internal Revenue Service, New York, for her professionalism and outstanding litigative skill in successfully resolving a bribery case involving a public official.

Gerald J. Rafferty and ***Vincent J. Oliva*** (District of Colorado), by Joseph C. Johnson, Special Agent in Charge, FBI, Denver, for their outstanding prosecutorial skill in bringing a complex white collar crime case to a successful conclusion.

Andrew M. Scoble (California, Northern District), by Randolph Lobban, Director of Merchant Investigations, NaBANCO, Fort Lauderdale, Florida, for his outstanding success in obtaining a conviction in a credit card fraud case, for which the defendant was ordered to pay $106,079.37 restitution for NaBANCO's losses.

Jeffrey Sloman (Florida, Southern District), by R. B. Cesa, Inspector in Charge, U.S. Postal Inspection Service, Miami, for his successful prosecution of numerous individuals involved in a stolen credit card ring, and for obtaining the conviction of a postal employee for narcotics trafficking.

Margaret Smith (Virginia, Eastern District), by D. Jerry Rubino, Director, Security and Emergency Planning Staff, Justice Management Division, Department of Justice, for serving as Guest Speaker at the Personnel Security Training Symposium, and for her outstanding presentation on the Freedom of Information/Privacy Act requirements.

James W. Swain (Florida, Southern District), by H. Thomas Kirsche, Supervisory Special Agent, FBI, Miami, for his participation in the Asset Seizure and Forfeiture Conference held recently in the Southern District, and for his excellent presentation on the legal aspects of forfeiture.

Thomas P. Swaim (North Carolina, Eastern District), by Mike Bradford, United States Attorney, Eastern District of Texas, Tyler, for serving as an instructor at a criminal forfeiture training course held recently in the Eastern District, and for his excellent presentations which were well received by the attorneys and staff in attendance.

Susan Watt (Virginia, Eastern District), by Robert J. Koons, Resident Agent in Charge, Defense Criminal Investigative Service, Norfolk, and James E. Childs, Special Agent in Charge, Defense Criminal Investigative Service, Arlington, for her participation in the annual In-Service Training program, and her excellent presentation on agent liability.

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF VIRGINIA

George Kelley, Assistant United States Attorney for the Eastern District of Virginia, was commended by Richard J. Riseberg, Chief Counsel, Public Health Service, Department of Health and Human Services, Rockville, Maryland, for his excellent legal representation in the Malloy case. On May 9, 1994, the United States Court of Appeals for the Fourth Circuit affirmed the district court's decision denying the discharge of Malloy's Health Education Assistance Loans (HEAL) on the basis of unconscionability.

Mr. Riseberg stated that the HEAL statute sets a high standard for discharge, barring discharge for the first seven years following the repayment period, and then permitting it only after a finding of "unconscionability," rather than undue hardship, has been made by the Bankruptcy Court. This finding is factually based on an analysis of the debtor's circumstances. The Malloy case maintained the strict test for unconscionability, finding that the nondischarge of the debt would have to be "shockingly unfair or unjust." The Malloy decision is consistent with the ten other Court rulings obtained by HHS on the question of unconscionability and will assist the government in its collection of HEAL judgments in the Eastern District of Virginia, as well as nationally.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF FLORIDA

Eduardo Palmer and ***Martin Goldberg, Assistant United States Attorneys for the Southern District of Florida,*** were commended by Louis J. Freeh, Director, FBI, Washington, D.C., for their valuable contributions to the success achieved in the investigation and prosecution of senior officers of Sahlen and Associates, Inc., a securities firm that conspired to create an illusion of financial success. This was one of the largest and most significant securities fraud prosecutions in the history of the 1934 Securities Exchange Act and included a loss of $194 million to financial institutions and to thousands of investors. Through the efforts of the Assistant United States Attorneys, several officials pleaded guilty prior to the trial, and three individuals who chose to go to trial were convicted.

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SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF NORTH CAROLINA

The following Assistant United States Attorneys in the Eastern District of North Carolina were commended by L.M. Flippin, Resident Agent in Charge, U.S. Customs Service, Wilmington, North Carolina, for their demonstration of the highest prosecutorial standards associated with the Department of Justice and the United States Attorney's Office:

Jane H. Jolly, for her successful prosecution of the son of a prominent Bahamian government official for smuggling cocaine from the Bahamas to North Carolina via private aircraft. The investigation disclosed that the defendant was importing kilogram quantities of cocaine concealed in modified fire extinguishers located onboard the aircraft.

J. Douglas McCullough, for his successful prosecution of two U.S. Customs cases. The first case involved international drug smuggling and money laundering activities of a drug smuggling organization in the United States, the Caribbean and England. The organization's leader was sentenced to life in prison, several associates were sentenced to long prison terms, and other distributors and couriers were also convicted. The second case involved smuggling over 15,000 pounds of marijuana from Mexico. The leader and 17 associates were convicted and several other individuals have been indicted, arrested, and are awaiting trial.

Robert E. Skiver and ***Thomas P. Swaim,*** for their successful prosecution of a drug smuggling organization that earned more than $10 million and laundered the profits through movie productions and real estate. Following an investigation of four and a half years and a multi-defendant jury trial of four weeks, the leader and several associates were convicted on charges of operating a continuing criminal enterprise, conspiracy to import cocaine, marijuana and hashish, and money laundering.

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SPECIAL COMMENDATION FOR THE DISTRICT OF CONNECTICUT

Christopher Droney, United States Attorney for the District of Connecticut, was commended by John M. Bailey, Chief State's Attorney, Division of Criminal Justice, State of Connecticut, Wallingford, for the outstanding efforts of his office in coordinating state, local and federal law enforcement in the arrests of 20 Latin Kings for extensive drug dealing, violence and organized gang activities. The Latin Kings, also known as the Almighty Latin Charter Nation, has chapters in Connecticut, New York, Illinois and Florida. Law enforcement authorities described them as a well-organized criminal enterprise devoted to profit-making through the sale of narcotics.

The arrests are the result of an investigation by a task force consisting of 15 federal, state and local police agencies that was created in 1992 -- the United States Attorney's office; the FBI; the Drug Enforcement Administration; Bureau of Alcohol, Tobacco and Firearms; Department of Housing and Urban Development; the State's Attorney's Office; State Police; State Corrections Department; and local police in Bridgeport, New Haven, Hartford, Meriden, Norwalk and Fairfield. Mr. Bailey stated that when the task force concept was first announced, there were many who thought it could not be successful because of prior turf wars between the federal and state authorities, and that there could not be a unified effort to combat gang violence in Connecticut. Mr. Bailey added, "Through your leadership, you proved this to be wrong."

United States Attorney Droney said, "Our job is not done yet, but we have made a substantial step in reducing drugs and violence in Connecticut." Mr. Droney was assisted by ***Assistant United States Attorneys Theodore Heinrich*** and ***Joseph Martini.***

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HONORS AND AWARDS

Eastern District Of North Carolina

Wayne A. Rich, Jr., First Assistant United States Attorney, Eastern District of North Carolina, was presented a Certificate of Commendation by John Raley, United States Attorney, and Sheldon J. Sperling, First Assistant United States Attorney, Eastern District of Oklahoma, Muskogee, for his outstanding performance and invaluable assistance in the administration of justice.

Mr. Raley stated that during Mr. Rich's service as Deputy Director of the Executive Office for United States Attorneys, the Eastern District of Oklahoma has been the beneficiary of his remarkable efforts on their behalf and the Department of Justice generally. Mr. Rich's professionalism, candor, procedural acumen, and courtesy with regard to matters of mutual concern have been extended to the United States Attorney's office in the Eastern District of Oklahoma on many occasions.

* * * * *

District Of Connecticut

Christine Sciarrino, Assistant United States Attorney for the District of Connecticut, received a Certificate of Appreciation from Naugatuck Valley Community-Technical College, Waterbury, Connecticut, for her special efforts in instituting a paralegal internship program to assist the Financial Litigation Unit within the United States Attorney's office for the District of Connecticut. The college already had in place a cooperative education program which allows students to gain work experience during a semester with approved employers and earn school credit at the same time.

As Supervisor of the paralegal interns, Ms. Sciarrino monitored assignments and completed mid-term and final evaluations, the results of which were considered in the student's grade. Not only did the students gain valuable legal experience, but the Financial Litigation Unit benefited from the student's efforts.

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Central District Of Illinois

Kendall Tate Chambers, Patricia A. Tomaw, and ***Esteban F. Sanchez, Assistant United States Attorneys for the Central District of Illinois,*** were presented Certificates of Appreciation in recognition of their outstanding performance in an investigation targeting major marijuana and cocaine traffickers operating in an eight-county area in West Central Illinois. ***Mary K. Kedzior*** was also recognized for her valuable secretarial support. To date, approximately 27 defendants have been charged, arrested, prosecuted and convicted either by guilty plea or jury trial. Not only were the career criminals incarcerated for life, but their assets were seized and forfeited. U.S. currency, real estate, businesses, jewelry, boats, motorcycles and vehicles characterize the assets the defendants accumulated from the drug proceeds. To date, approximately $1,112,727.29 in assets has been seized and forfeited. The Drug Enforcement Administration, and specifically the DEA Springfield, Illinois Resident Office, is extremely proud to be associated with individuals of such high caliber and unselfish work habits.

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Southern District Of Iowa

Robert C. Dopf, Assistant United States Attorney for the Southern District of Iowa, was presented a plaque by Mark Grey, Regional Inspector in Charge, U.S. Postal Inspection Service, Kansas City, Missouri, for his aggressive assault against fraudulent 1-900 telephone promotions. This initiative involved the first use of the fraud injunction statute, 18 U.S.C. § 1345, to suspend the operations and impound the proceeds of what was then a wave of fraudulent 1-900 promotions.

In August, 1990, a suit was filed against Disc Sweepstakes after a preliminary Postal Service investigation determined that it was engaged in fraudulent practices involving the mass mailing of in excess of one and one-half million postcards. An injunction was immediately sought and granted which impounded in excess of $700,000.00 in promotion proceeds before they could be paid by the telephone company to the Des Moines-based give-away promotion. While the litigation was pending, a second almost identical sweepstakes postcard sponsored by Sweepstakes International was mailed into the state. Suit against this new entity was filed in November, 1990, and again, in excess of $1,700,000 was impounded by the Court before it could be paid to the promoter by the phone company. United States Attorney Don Nickerson stated, "Our primary objectives were to shut down the fraudulent promotions and deprive the perpetrators of the fruit of their activity. Through Bob Dopf's perseverance and ingenuity, we succeeded in both objectives."

In addition to seizing the money, the U.S. Attorney's office and the Postal Service combined resources to implement what is believed to be the largest consumer refund program in the history of the Postal Service. United States Attorney Nickerson noted, "We felt a real obligation to make an effort to return as much of the money to the victims of the scheme as possible. It was not an easy task given the fact that the average loss was only $10.00." Nevertheless, with Court approval, attempts were made to contact over 250,000 consumers who were victimized and over 45,000 consumers received refunds which totalled over $450,000.00.

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PERSONNEL

United States Attorneys

On August 15, 1994, ***Eddie J. Jordan, Jr.*** was nominated by President Clinton to serve as United States Attorney for the Eastern District of Louisiana. Mr. Jordan will serve in an interim capacity until his anticipated confirmation by the United States Senate.

On September 13, 1994, President Clinton stated his intention to nominate ***Charles R. Wilson*** to serve as United States Attorney for the Middle District of Florida. Mr. Wilson has served as a United States Magistrate Judge in the Middle District of Florida since 1990. ***Donna Bucella***, Deputy Director, Executive Office for United States Attorneys, has been serving as Interim United States Attorney in this District since July 29, 1994.

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Office Of Legal Education

Carol DiBattiste, Director, Executive Office for United States Attorneys, recently announced that ***James A. Hurd, Jr.*** was selected to serve as the Director for the Office of Legal Education (OLE). Mr. Hurd will serve a one-year detail to OLE and will be responsible for directing the development of continuing legal education for Assistant United States Attorneys, Department of Justice attorneys, and other attorneys in the Executive Branch of the Federal government. Mr. Hurd was formerly First Assistant United States Attorney for the District of Virgin Islands.

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United States Trustees

On August 15, 1994, ***Donald M. Robiner*** was appointed by Attorney General Janet Reno to serve as United States Trustee for Region 9, which includes the federal judicial districts of Michigan and Ohio. Mr. Robiner will oversee the administration of bankruptcy cases out of the region's principal office in Cleveland, Ohio.

On August 15, 1994, ***Richard W. Simmons*** was appointed by Attorney General Janet Reno to serve as United States Trustee for Region 7, which includes the federal judicial districts of the Southern District of Texas and the Western District of Texas. Mr. Simmons will oversee the administration of bankruptcy cases out of the principal offices in Houston, Texas.

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ATTORNEY GENERAL HIGHLIGHTS

The Violent Crime Control And Law Enforcement Act Of 1994

On August 25, 1994, after four days of closed-door meetings and extensive floor debate, the Senate passed the $30.2 billion anti-crime bill by a margin of 61-38. The issue was settled on a procedural vote when six Republicans broke ranks to join the majority to advance the legislation. Shortly after the Senate gave final approval to the bill, President Clinton said, "This crime bill is going to make every neighborhood in America safer -- and the bipartisan spirit that produced it should give every American hope that we can come together to do the job they sent us here to do." Attorney General Janet Reno issued the following statement:

> Tonight, the United States Senate acted on the best instincts that lead us to be public servants, and passed the President's crime bill with bipartisan support. This historic bill provides for the most sweeping federal effort to combat violent crime in 25 years. More police, more prisons, more prevention, will not mean an end to crime or violence in our society -- but it will mean fewer victims, fewer tragedies, fewer lost lives. I want to thank the members of both parties, in both Chambers, who made this victory for common sense possible. I want to especially commend Senator Biden, Chairman Brooks, and Congressman Schumer for their leadership and untiring efforts.
>
> Tonight, my thoughts are with all the people I have met and spoken with over the past few months in our efforts to get this bill passed: the victims of crime and their families, who have spoken out so strongly about the need for this legislation; the police, the prosecutors, the mayors, the Governors, and others, who have contributed so much to this effort; and the young children whose lives may be saved -- or at least changed -- as a result of this legislation.
>
> Tomorrow, the hard work of implementing this ambitious legislation begins. But tonight, we celebrate a victory for all Americans for the public interest over the special interests -- and for safety and sanity, in our streets and neighborhoods.

* * * * *

Significant Provisions Of The Crime Bill

The Violent Crime Control and Law Enforcement Act of 1994 is the largest crime bill in the history of the country and will provide for 100,000 new police officers, $9.7 billion in funding for prisons and $6.1 billion in funding for prevention programs which were designed by experienced police officers. The Act also significantly expands the government's ability to deal with problems caused by criminal aliens. The Crime Bill provides $2.6 billion in additional funding for the FBI, DEA, INS, United States Attorneys, Treasury Department and other Justice Department components, as well as the Federal courts.

Attached at the Appendix of this Bulletin as Exhibit A is a summary of the significant provisions of the bill.

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International Drug Trafficking

On August 8, 1994, Attorney General Janet Reno and Secretary of the Treasury Lloyd Bentsen announced that eleven hundred U.S. Customs agents who work for the Treasury Department will receive ongoing authorization from the Department of Justice to conduct international drug smuggling investigations. Previously, Customs agents who came upon drug law violations were authorized to conduct investigations on an intermittent and individual basis for fixed periods of time.

An agreement was signed at the U.S. Customs Service Headquarters by the Administrator of the Drug Enforcement Administration, Thomas A. Constantine, and U.S. Customs Commissioner George Weise. The agreement, which will resolve ambiguities in earlier agreements, defines the circumstances, conditions and authority under which Customs agents will use their cross-designation. The agreement sets out detailed understandings for notification, coordination, decision-making and accountability. The Customs agents, who work at borders and ports of entry, will work more closely with DEA in a coordinated and comprehensive strategy against drug trafficking. The authority for DEA to cross-designate Customs agents to conduct international drug smuggling investigations in order to expand the resources of federal law enforcement is found in Title 21, United States Code, Section 873(b).

Attorney General Reno said the agreement would allow both agencies to work side by side on a regular basis, and added, "The American people deserve to know that all the resources of law enforcement are being used. I am pleased that both agencies worked together and are committed to giving Americans the most effective law enforcement possible."

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Professional Responsibility Advisory Board

On August 24, 1994, Attorney General Janet Reno issued a memorandum to all Assistant Attorneys General and United States Attorneys concerning an important new initiative to provide the attorneys with consistent training and guidance about professional responsibility issues. The initiative involves the formation of a Professional Responsibility Advisory Board in Washington, D.C., and the designation of at least one Professional Responsibility Officer in every District and litigating Division.

As a result of the outstanding caliber of the Department's attorneys, most professional misconduct allegations prove to be unfounded. However, many Department attorneys have expressed concern about the absence of any central, organized process to provide advice and guidance about professional responsibility issues. While experienced attorneys often provide informal advice and many districts provide regular ethical training, the Department has not offered enough in centralized training and guidance. In addition, the Department has suffered in its relationships with some bar associations because attorneys have not been given official responsibility to deal with these issues on a continuing basis.

Associate Deputy Attorney General David Margolis will serve as the initial chairperson of the Advisory Board. The Board will include the Assistant Attorneys General for the Criminal and Civil Divisions and the Office of Legal Counsel, a representative of the Attorney General's Advisory Committee of United States Attorneys, the Inspector General, the Counsel for the Office of Professional Responsibility, the Director of the Executive Office for United States Attorneys, and the Department's Designated Agency Ethics Officer.

The Office of Legal Counsel and the Civil and Criminal Divisions will provide career staff for the Advisory Board. The staff will research controversial ethical issues, review and recommend revisions to Department policies, and work with the Professional Responsibility Officers (PROs) and state and local ethics boards to explain, promote, and defend the Department's policies. The staff also will review proposed Bar Association ethical rules, to provide the Department's perspective. Finally, the staff will answer ethical questions from PROs throughout the country and assist attorneys who are targets of unjustified charges of ethical misconduct.

Each United States Attorney has been asked to designate at least one Assistant United States Attorney to serve as the District's Professional Responsibility Officer. Each year, the Board and the PROs will meet with the Attorney General to discuss Department policies and ethical issues. The first such conference is scheduled for October 18 and 19 in Washington, D.C.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Communications With Represented Persons

Attached at the Appendix of this Bulletin as Exhibit B is a memorandum issued by Deputy Attorney General Jamie S. Gorelick to all Department of Justice attorneys on August 26, 1994, concerning the new regulation on contacts with represented persons which was published in the Federal Register on August 4, 1994. See, 59 Fed. Reg. 39910 (to be codified at 28 C.F.R. Part 77). Also attached is a copy of the additions to the United States Attorneys' Manual (USAM) which affect USAM 9-13.200 and USAM 9-8.1300, and a background information sheet issued by the Office of Public Affairs. (A copy of the regulation appearing in the Federal Register is not included.)

The new provisions govern contacts with represented individuals and organizations by any Department of Justice attorney, or individuals acting at his or her direction, involved in criminal or civil law enforcement investigations or proceedings. The new regulation and USAM provisions are intended to ensure that Department attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules that have chilled legitimate law enforcement activity. Ms. Gorelick stated that it is important that the regulation and USAM provisions be read together to understand the limitations on such contacts.

The Executive Office for United States Attorneys has also prepared and forwarded to all United States Attorneys a 30-minute videotape on the new regulation featuring Steven E. Zipperstein, Chief Assistant United States Attorney in the Central District of California.

If you have any questions concerning the new regulation or USAM guidelines, please call Charysse Alexander, Executive Office for United States Attorneys, (202) 514-4024; Rod Rosenstein, Criminal Division (202) 514-2601; or Joyce Branda, Commercial Litigation Section, Civil Division, (202) 307-0231.

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Unprecedented Settlement In A Lending Discrimination Suit

On August 22, 1994, the Department of Justice announced the settlement of an unprecedented case against a Washington, D.C. area bank for refusing to make its services available in predominantly African American neighborhoods. The case against Chevy Chase Federal Savings Bank and its wholly owned subsidiary, B. F. Saul Mortgage Company, is the first lending discrimination suit focussing solely on a bank's refusal to market its services in minority neighborhoods.

The Justice Department alleged that Chevy Chase violated the federal Fair Housing Act and the Equal Credit Opportunity Act declaring black areas off-limits for mortgage lending, a practice otherwise known as redlining. The complaint, filed together with a settlement in U.S. District Court in Washington, D.C., claimed that the bank underwrote approximately 97 percent of its loans from 1976 through 1992, in predominantly white areas. The Justice Department also claimed that the bank had a corporate policy of only soliciting financial transactions in the most heavily white populated parts of D.C.; failed to meet the needs of the entire community in violation of the Community Reinvestment Act; employed few African Americans as loan originators; and implemented a commission structure for loan originators which disproportionately and adversely affected residents of black neighborhoods. The Justice Department began investigating Chevy Chase in June 1993, after The Washington Post ran a series entitled "Separate and Unequal". The series cited widespread disparities in the number of mortgage loans made in white and black neighborhoods.

Chevy Chase, the largest savings and loan association in the D.C. metropolitan area and one of the nation's largest thrifts, operates 78 branches and 20 mortgage offices. Prior to the Justice Department's investigation, the bank had virtually all of its branches and mortgage offices in majority white areas -- delineated by census tracts. The bank opened no branches in any of D.C.'s majority black census tracts, which account for 90 percent of all African Americans in the city, nor had it opened branches in any of Prince George's County's majority black census tracts, accounting for 75 percent of that county's black population. Prince George's County has the nation's lowest disparity in income levels between black and white residents, with nearly 40 percent of all black households earning an income of over $50,000.

To settle the Justice Department's claim for monetary damages, the agreement requires Chevy Chase to pay $11 million to the redlined areas through a special loan program and the opening of bank branches and mortgage offices. The bank will pay at least $7 million by offering special home mortgage loans to all residents of majority black areas in Washington, D.C., and Prince George's County, Maryland, resulting in approximately $140 million in special financing for the communities. The offering will make home loan financing available at either 1 percent less than the prevailing rate of 1/2 percent below the market rate combined with a grant to be applied to the down payment requirement. Under the settlement, which is subject to court approval, the bank has agreed to:

- Open three mortgage offices in majority African American neighborhoods in D.C., and one bank branch in the Anacostia section of D.C.;

- Evaluate other sites for bank branches in the redlined communities;

- Take all reasonable steps to obtain a market share of mortgage loans in African American neighborhoods that is comparable to its market share in white neighborhoods;

- Extensively advertise its services and target sales calls to real estate professionals active in African American areas; and

• Continue efforts to recruit African Americans for loan-production positions and provide training to its loan staff in affirmative marketing programs.

Since the defendants were notified of the Justice Department's investigation, the lenders initiated an aggressive effort to serve African American neighborhoods of the Washington, D.C. metropolitan area. They have opened three bank branches and two B.F. Saul Mortgage Company offices in African American areas of D.C. and Prince George's County. The mortgage company has also launched an aggressive campaign to market its home financing products to real estate professionals serving D.C. area African American neighborhoods.

Attorney General Janet Reno stated, "To shun an entire community because of its racial makeup, is just as wrong as to reject an applicant because they are African American. Some neighborhood banks may turn away blacks because of their race, but other neighborhoods may not even have banks to which blacks can turn." Eric Holder, United States Attorney for the District of Columbia, added, "Curtailing marketing practices and neglecting whole segments of a neighborhood devastate not just the lives of individual citizens but the well being of an entire community."

If you would like a copy of the complaint, please contact the United States Attorneys' Bulletin staff at (202) 514-3572.

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Cuban Influx

The following is an excerpt from a statement issued by Attorney General Janet Reno on August 18, 1994:

> To divert the Cuban people from seeking democratic change, the government of Cuba has resorted to an unconscionable tactic of letting people risk their lives by leaving in flimsy vessels through the treacherous waters of the Florida Straits. Many people have lost their lives in such crossings. We urge the people of Cuba to remain home and not to fall for this callous maneuver. I want to work with all concerned including the Cuban American community to make sure the message goes out to Cubans that putting a boat or raft to sea means putting life and limb at risk.
>
> The Cuban government is not acting this way because of U.S. immigration policy. It is a desperate attempt to salvage a communist regime which has fallen victim to its own inherent rigidity and repression. An uncontrolled exodus from Cuba will do nothing to address Cuba's internal problems. The solution to Cuba's problems is rapid, fundamental and far reaching political and economic reform. . . .

[Note: The Community Relations Service of the Department of Justice has established an Information Center for obtaining information about Cuban migrants who are being detained at the Krome Service Processing Center in Miami, Florida. The Information Center is staffed by bilingual operators from local, county and state agencies, and is open from 8:00 a.m. to 6:00 p.m. seven days a week. The numbers for the Information Center are: (305) 536-4740; (305) 536-4742; (305) 536-4745; and (305) 536-4746.]

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INDEPENDENT COUNSEL MATTERS

Whitewater

Attached at the Appendix of this Bulletin as Exhibit C is a copy of an Order of the United States Court of Appeals for the District of Columbia Circuit dated August 5, 1994, appointing Kenneth W. Starr to serve as Independent Counsel in re Madison Guaranty Savings & Loan Association. The Order grants the Independent Counsel full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. Mr. Starr, formerly Solicitor General of the Department of Justice, replaces Robert B. Fiske, Jr.

Attorney General Janet Reno stated as follows:

> Earlier, I urged speedy reenactment of the Independent Counsel law so that no possible question could be raised about who appointed him. When that became impossible, I appointed Mr. Fiske under Justice Department regulations. Once the law was reenacted, I suggested that Mr. Fiske be retained in order to ensure that there would be no delays or loss of continuity in the investigation. Now the Special Division has appointed Kenneth Starr. We will provide full cooperation to him, just as we did to Mr. Fiske, who gave selfless and distinguished service to the task.

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Secretary Of Agriculture

On August 8, 1994, Attorney General Janet Reno filed an Application to the Court, pursuant to 28 U.S.C. §592(c)(1), for the appointment of an Independent Counsel to investigate whether any violations of federal criminal law were committed by Secretary of Agriculture Alphonso Michael (Mike) Espy, and to determine whether prosecution is warranted. A copy, together with an Order of the court authorizing disclosure of the Application, is attached at the Appendix of this Bulletin as Exhibit D.

The Attorney General stated, "In light of the strictures and procedures of the Act, I hereby apply for the appointment of an Independent Counsel because I conclude, under the Act, that 'there are reasonable grounds to believe that further investigation is warranted' of allocations that Secretary Espy violated a federal criminal law other than a Class B or C misdemeanor or an infraction. 28 U.S.C. 592(c)(1)(A)."

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WESTERN DISTRICT OF OKLAHOMA

Media Relations Exchange

In an unusual twist on the "Meet the Press" format, United States Attorney Vicki Miles-LaGrange invited members of the Oklahoma City media to meet with her and her senior staff and component field office chiefs on August 17 to talk informally about a variety of press issues. It was believed to be the first time that a United States Attorney's office has held such an exchange.

Nine television and print reporters attended the two-hour session. Justice Department participants included individuals from the FBI, DEA, INS, and the Marshals Service. Each representative gave general guidance about how their component handles media inquiries.

Dan Vogel, Media Coordinator at the FBI's Oklahoma City office, presented the Department's media policy. After Vogel's presentation, a lively discussion took place between reporters and Department representatives involving issues ranging from general procedure-type questions to the timeliness of notifying reporters of newsworthy events.

Reporters were most vocal about receiving notice of a Department action as quickly as possible. They stressed that matters received in a timely manner have a better chance of being reported. Reporters also want to see increased coordination between Main Justice in Washington, and the Oklahoma City U.S. Attorney's office so that all Main Justice press matters that may affect Oklahoma City are brought to their attention.

Arlene Joplin, Deputy Chief of the Criminal Division, and Roger Griffith, Chief of the Civil Division, discussed how criminal and civil cases were processed in the federal system. Dave Walling, Chief of the Criminal Division discussed the operation of the Western District's office. Other senior staff from the office attended the exchange so that reporters could interact and get to know the staff better. Gina Talamona, who handles U.S. Attorneys Offices' matters at the Public Affairs Office at Main Justice in Washington, also was present as an observer and to provide appropriate assistance.

The media exchange was a very useful means to educate and improve relations between the office and reporters. Vicki Miles-LaGrange should be recognized for her ingenuity in dealing with media relations.

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CIVIL RIGHTS DIVISION

Americans With Disabilities Act Settlement In The Rental Car Industry

On September 1, 1994, Attorney General Janet Reno announced that the nation's second largest rental car company will begin making cars with hand controls available nationwide for persons with disabilities. Under the settlement, Avis, Inc. will provide vehicles equipped with hand controls at no extra charge at all corporately-owned locations and urge its licensees to do the same. The hand controls, to be provided within less than eight hours' notice in some cases, will enable persons with disabilities to drive the vehicles.

Title III of the American with Disabilities Act (ADA) prohibits discrimination against persons with disabilities by public accommodations, such as rental car companies. It requires businesses to remove barriers to access where it is readily achievable, or can be accomplished with much difficulty or expense. ADA regulations specifically identify the installation of vehicle hand controls as an example of a readily achievable barrier removal.

Avis, Inc. became the subject of a Justice Department investigation in 1992 after complaints were made that it was violating the ADA by not making its service accessible to drivers with disabilities. Currently the Department is investigating about ten other rental car companies, and is attempting to reach agreements with them as well. Avis has agreed to permit those who do not drive -- such as persons with visual impairments or seizure disorders -- to be the financially responsible party under the rental agreement. They have also agreed to allow persons who are unemployed due to a disability, and who do not have credit cards, to rent cars on a cash basis. Previously, customers had to show proof of employment, but now, persons with disabilities may alternatively provide information about disability-related income instead.

The Attorney General stated, "The ADA has made it possible for people with disabilities to not only gain access to basic necessities of life, but also to enjoy the travel and leisure opportunities that others take for granted."

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More *Redress Payments Under The Civil Liberties Act Of 1988*

On August 3, 1994, the Department of Justice announced that fifty-six Japanese Americans whose business and personal activities in the Phoenix area were restricted during World War II may be potentially eligible for redress payments under the Civil Liberties Act of 1988. The Office of Redress Administration (ORA) of the Civil Rights Division concluded that those persons who lived around Phoenix may be eligible as a result of a mandatory exclusion program implemented in southern Arizona. Military proclamations created a restricted zone in the southern part of Arizona, as well as areas on the west coast. Although persons living in the northern half of Arizona were not evacuated or interned, ORA determined that a termination of significant pre-existing and on-going business and personal activities in their daily lives in the exclusion zone amounted to losses of liberty or property. Specifically, these claimants suffered deprivations in business and personal activities, such as transfers to other schools, or substantial disruption of business or working arrangements, which might make them entitled to payments under the law.

ORA will send letters to these claimants requesting that they submit documentation which tends to corroborate their claims. Documents, such as school records, property or business tax records, etc. will assist ORA in expediting these claims. If an individual has not included supporting documentation, then he or she should forward any supporting documentation to ORA as soon as possible. If ORA requires additional information, ORA will contact the claimant. ORA will also require documentation, including proof of their identities and current addresses, prior to payment. If the proper documentation is submitted on a timely basis, ORA expects to pay these individuals in October 1994. Since 1988, ORA has paid approximately $1.59 billion dollars to 79,943 Japanese Americans under the Civil Liberties Act.

Deval L. Patrick, Assistant Attorney General for the Civil Rights Division, stated, "I am very pleased that we were able to come to a positive resolution on these cases. Perhaps it will finally bring an end to this difficult chapter of American history for the former residents of Arizona."

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Six-Month Extension Period For Green Cards

In light of the Immigration and Naturalization's Service's announcement extending the period for replacement of I-151 green cards until March 20, 1995, the Civil Rights Division of the Department of Justice cautioned employers against discharging, refusing to hire or taking any other adverse action against permanent resident employees with I-151 green cards. The I-151 green cards issued prior to 1979 were due to expire on September 20, 1994, but the INS announced that it has extended the replacement period for six months because of a recent surge of applicants attempting to meet the original deadline. The extension will give thousands of lawful permanent residents additional time to apply for their new cards.

William Ho-Gonzalez, Special Counsel for Immigration Related Unfair Employment Practices, of the Civil Rights Division, advised employers that because of the extension they must continue to accept the old I-151 as proof of identity and work authorization until March 20, 1995. Under the antidiscrimination provisions of the Immigration and Nationality Act, employers have to accept any legally acceptable document or combination of documents presented by an employee to establish work authorization that appears to be genuine on its face. Mr. Ho-Gonzalez stated, "Employers who refuse to accept the I-151 cards as proof of identity and work authorization will be subject to prosecution by this Office for violating the antidiscrimination provisions of the Immigration and Nationality Act."

In order to assist employers in complying with the statute, the Civil Rights Division operates an "Employer Hotline" which gives callers accurate, and up-to-date information on completing the Form I-9, the list of documents acceptable for Form I-9 purposes, the penalties for discrimination, and guidelines for fair hiring practices. The number is 1-800-255-8155 or (TDD) 1-800-362-2735. The hotline also offers a "fax-back" feature which allows callers to receive a hard-copy of the list of acceptable documents as well as information on the antidiscrimination provisions. For further information, write: Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, Department of Justice, P.O. Box 27728, Washington, D.C. 20038-7728.

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CRIMINAL DIVISION

Criminal Division Seeks Bilingual Attorneys

The Office of Professional Development and Training (OPDAT) of the Criminal Division is looking for attorneys in the Department who are fluent in Russian and languages of the New Independent States (NIS). There is an increased demand for attorneys who could train and make presentations to Russian and NIS language speaking audiences.

If any attorneys on your staff speak any of these languages, or other foreign languages, and are interested in teaching and making presentations to international law enforcement colleagues, please contact Audrey Hong at (202) 514-1323. Fax: (202) 616-8429.

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Office Of International Affairs

The Office of International Affairs (OIA) has implemented an ambitious customer service program designed to put more information resources at the disposal of its principal clients (including state and local prosecutors) and simplify the process of securing and providing international legal assistance including extradition of fugitives and evidence gathering. The following are two electronic newsletters published periodically by OIA:

OIA Connections

"OIA Connections" is an indexed desk reference on international criminal matters that is distributed to United States Attorneys' Offices through the designated International and National Security Coordinators. It contains useful exemplars, highlights of recent court decisions impacting international practice, and other useful information for prosecutors and investigators. This newsletter is also distributed to federal law enforcement agencies, to state and local prosecutors through the National Association of Attorneys General, and is available on a law enforcement restricted computer bulletin board system (BBS) created and operated by Glynco staff attorney Kevin Manson (SysOp, The INFONET). To register on this system, please contact Mr. Manson at (912) 267-3249, or via Internet at kfarrand@well.sf.ca.us or, or via Compuserve # 70521.2003.

An Index of all items published to date in "OIA Connections" is attached at the Appendix of this Bulletin as Exhibit E.

Special Connection

The "Special Connection" is transmitted exclusively to the International and National Security Coordinators in each United States Attorneys' office, and primarily addresses issues that concern their interface with OIA. The tremendous growth of the Department's international activities puts a high premium on close and active coordination among all involved. The International and National Security Coordinator Program, now in its third year, is a critical part of that important process.

OIA has created an electronic data base (called OIABANK) on EAGLE, which contains the texts of law enforcement treaties and agreements, briefs that have been filed in connection with extradition and mutual legal assistance cases, exemplar pleadings and motions, and useful guides to virtually all forms of assistance provided by OIA. A version of OIABANK has been installed in several U.S. Attorneys' offices that handle large international caseloads. One example from OIABANK: a paper detailing the application of U.S. evidence rules to documents secured from foreign countries for use in proving relevant matters at federal criminal trials.

If you would like a copy of the document listed above, or any of the documents listed in the attached Index, please contact the International or National Security Officer in your District, or E-mail Matt Bristol, Office of International Affairs (CRM03BRISTOL). Telephone: (202) 514-0000.

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OIA Assistance

In a continuing effort to aid in the orderly development of U.S. law in the areas of international extradition and mutual legal assistance, OIA encourages AUSAs who are handling international cases to work in close partnership with OIA's staff, particularly on appellate briefs. Sara Criscitelli, Assistant Director in OIA, has been especially active in this area and welcomes requests for assistance. Her telephone number is: (202) 514-0000.

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ANTITRUST DIVISION

New Individual Leniency Policy Initiated

The Antitrust Division of the Department of Justice has instituted a new policy designed to encourage individuals to come forward with information regarding criminal antitrust violations. Dubbed the "Individual Leniency Policy," the initiative expands the Corporate Leniency Policy established in August 1993, which expanded the prior 1978 program to include companies which come to the Division to offer cooperation after an investigation has begun. (See, United States Attorneys' Bulletin, Vol. 41, No. 9, dated September 15, 1993, at p. 305.)

Prior to the policy change, corporations that disclosed their involvement in antitrust violations before the government's investigation while satisfying other requirements might, at the discretion of the Division, not be prosecuted. The policy change makes leniency available at the Division's discretion, to corporations that come forward after the government investigation begins or to those that otherwise have failed to qualify for assured leniency.

Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, stated, "We undertook this change to expedite our investigations and to use our resources in the most efficient manner possible. Since announcement of the new corporate policy, twelve companies have offered to cooperate -- one per month as compared to one per year under the previous policy."

If you would like a copy of the "Individual Leniency Policy," please call the United States Attorneys' Bulletin staff, at (202) 514-3572.

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New Draft Intellectual Property Guidelines

On August 8, 1994, the Department of Justice proposed new antitrust guidelines for the licensing and acquisition of intellectual property. The guidelines, which will be adopted in final form after a 60-day public comment period, cover the licensing and acquisition of intellectual property protected by patent, copyright and trade secret law. They would replace the intellectual property portions of the 1988 Antitrust Enforcement Guidelines for International Operations. The draft guidelines were prepared by an Antitrust Division Task Force chaired by Deputy Assistant Attorney General Richard Gilbert, and are being published in the Federal Register for public comment. The guidelines include:

- An antitrust "safety zone" in which the Department will not challenge most restraints in licensing arrangements where the licensor and its licensees account for no more than 20 percent of each relevant market affected by the restraints.

- Methods by which the Department, under certain circumstances, will evaluate the impact of a licensing arrangement or acquisition on research and development.

Several basic principles of antitrust enforcement for intellectual property are unchanged. They include:

- The antitrust laws apply to intellectual property as they apply to other forms of property, with appropriate recognition of the distinguishing characteristics of intellectual property.

- Antitrust enforcement should not unnecessarily interfere with the licensing and transfer of intellectual property rights.

- The existence of an intellectual property right does not, by itself, give rise to a presumption of market power.

Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, stated, "The antitrust laws and the intellectual property laws share the common purpose of promoting innovation and enhancing consumer welfare. Our intellectual property enforcement policy is about keeping American companies strong and innovative. The draft guidelines will ensure that sound antitrust enforcement will continue to serve as a catalyst to technological innovation and promote U.S. competition here and abroad by preventing arrangements that inhibit innovation or restrain competition without promoting the development of intellectual property."

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Pre-Merger Filing Fees

On August 31, 1994, the Federal Trade Commission (FTC) announced that the filing fee that companies contemplating certain large mergers must pay to the federal antitrust agencies is now $45,000. The new fee, raised from $25,000, was established by appropriations legislation signed into law on August 26, 1994. The filing fee stems from the federal Hart-Scott-Rodino Act, which requires entities planning a merger or acquisition that meets certain thresholds, to file documents describing the proposed transaction with both the FTC and the Department of Justice, and then to wait a specified period of time before consummating the transaction. During this waiting period, one of the two agencies can examine the transaction for possible antitrust violations.

Persons who have submitted filings with the $25,000 filing fee on or after August 29 must remit the additional $20,000 within forty-eight hours after receiving notice from the Premerger Notification Office. Upon prompt payment of the full fee, the waiting period for those filings will begin on the date that the Premerger Notification Office initially received the filings, assuming the filings otherwise met the reporting requirements. Further official notice of the change will appear in the Federal Register in an amended Commission statement on Hart-Scott-Rodino filing fees.

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CIVIL DIVISION

Major Settlement In The Aerospace Industry

On August 12, 1994, the Department of Justice announced that Martin Marietta Corporation will pay the United States $6.3 million to settle the last group of civil claims arising from a long standing investigation of General Electric's Aerospace Division in Valley Forge, Pennsylvania. The settlement brings to $40 million the total amount the government has received to settle civil and criminal matters against GE arising out of its Philadelphia area operations. Martin Marietta acquired the Division in 1993.

The government's investigation resulted, in part, from disclosures GE made to the government pursuant to an agreement reached in 1985 following a criminal conviction of GE in Philadelphia for mischarges on other government contracts. One practice involved in the settlement were allegations GE inflated its proposals for government contracts by including what the company called "management reserves" and "contingencies." These additions to the proposals were for fictitious labor hours to protect GE from unforeseen developments such as labor shortages, rate increases or production difficulties. They also provided a monetary reserve that could be given up during negotiations. GE paid the government $20 million in September, 1990 to resolve civil claims on other contracts and proposals similar to those included in this settlement. That payment, plus an additional $3.7 million GE paid during the investigation, was part of a larger matter settling eleven fraud investigations against the company. As part of that settlement, GE paid a $10 million criminal fine following its conviction on 282 counts of submitting false claims on an Army battlefield computer contract.

Frank W. Hunger, Assistant Attorney General for the Civil Division, stated that there were no allegations of wrongdoing by Martin Marietta, and that its potential liability resulted from the purchase of GE's Aerospace Division. The civil cases were handled jointly by the Civil Division, and the United States Attorney's office in Philadelphia with the assistance of the Defense Criminal Investigative Service and the Defense Contract Audit Agency.

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Contract Fraud In The Military Aircraft Industry

On August 3, 1994, the Department of Justice joined a lawsuit that accuses a San Diego defense contractor of defrauding the Defense Department on contracts totalling more than $10 million to develop state-of-the-art cockpit instruments for military aircraft. The qui tam lawsuit, originally filed in March 1993 and unsealed on August 3, charged Science Applications International Technology, San Diego's largest defense contractor, with misrepresenting progress on developing a liquid crystal display navigational instrument in order to continue receiving funding from the Air Force and secure new contracts.

The suit was brought initially by an electrical engineer at SAIT under a federal law that allows private individuals to sue on behalf of the government. The suit alleged that, beginning around 1988, SAIT made false and misleading statements to the Air Force regarding its ability to produce a working LCD horizontal situation indicator, an aircraft navigational device that alerts pilots on their position with respect to the ground. The suit alleged that the government, after paying SAIT more than $10 million, never received a functioning product that met military specifications. According to the suit, SAIT knew in 1988 that its product design was not viable, but did not alert the government. Instead, SAIT made false statements to lead Air Force officials to believe production was progressing, according to the suit. The suit also alleged that SAIT persuaded the Air Force to pay it an additional $3 million to develop a more sophisticated color display unit. Furthermore, SAIT deceptively marketed the alleged success of its original design to obtain two additional contracts, including a contract to build LCD panel instruments for the Comanche attack helicopters.

The suit was brought under the False Claims Act, which provides for recovery of treble the amount of damages suffered by the government and penalties for each false claim submitted.

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Contract Fraud In The Military Explosives Industry

On August 11, 1994, the Department of Justice announced it is intervening in a qui tam lawsuit accusing a Wisconsin company of failing to properly test land mine detonators under a $34 million military contract. The Department said up to 40 percent of the devices failed when field-tested by the Army.

Named as defendants were Accudyne Corp. of Janesville, Wisconsin, and Alliant TechSystems Inc. of Edina, Minnesota. Accudyne, acquired by Alliant about October 8, 1993, manufactures mechanical and electrical devices for military explosives. According to the complaint, Accudyne was awarded a $34,153,592 contract by the Army Armament Research and Development Command in New Jersey on August 31, 1989, to manufacture electronic parts for a mine system. The contract required testing at various stages of production and certification that the tests met contract specifications before the devices were given to the Army. Accudyne, using equipment the suit says was defective, unreliable and out of calibration, certified to the Army the devices were tested as required under the contracts when in fact they were not. In addition, the people doing the testing were not qualified to perform the tests nor interpret their results. According to the suit, Army field tests of the equipment in February 1993 showed the devices manufactured by Accudyne had a failure rate as high as 40 percent.

Under the qui tam provisions of the False Claims act, private parties may bring certain fraud actions on behalf of the government, which may then decide whether or not to take over responsibility for the litigation.

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Contract Fraud In The Computer Industry

On August 3, 1994, the Department of Justice announced that Novell Inc. of Provo, Utah, one of the country's largest manufacturers of software that unifies numerous office computers into one system, will pay the government $1.725 million to settle allegations it overcharged the United States for computer equipment.

The complaint alleges that Novell failed to inform government negotiators fully about its pricing policies and to advise them that companies that sold Novell products to federal agencies under separate contracts received rebates. Novell was required by the contract solicitations and federal law to provide accurate information to the General Services Administration contract negotiators. Novell, one of the largest manufacturers of LANS (local area networks) in the country, won four one-year GSA contracts for automated data processing equipment and software between 1985 and 1989. The contracts set the prices, terms and conditions under which federal agencies could purchase products from Novell.

The settlement resolves charges brought against Novell by a former employee under the qui tam provisions of the False Claims act in U.S. District Court in Alexandria, Virginia. Under the settlement the former employe will receive $310,500 for bringing the matter to the attention of the government. Under the qui tam amendments of the False Claims Act, a private party can file an action on behalf of the United States and receive a portion of the settlement if the government takes over the case and prosecutes it successfully.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

New Protective Measures In Place For Desert Tortoises In Southwestern Utah

On August 18, 1994, the Department of Justice announced an agreement with Heritage Arts Foundation that will ensure that, in the future, the construction and operation of the Tuacahan School and Performing Arts Center and access road near St. George, Utah, does not adversely impact the desert tortoise. The Foundation will pay $20,000 in restitution for the two desert tortoises killed accidentally by vehicles using an access road that runs through desert tortoise habitat to the construction site.

The desert tortoise was listed as a threatened species in 1989 under the Federal Endangered Species Act. It is illegal to "take" animals on the list, but there are provisions that allow for incidental take if a permit which includes a habitat conservation plan has been granted by the U.S. Fish and Wildlife Service. Washington County, where the Heritage Arts Foundation project is located, has been working on a habitat conservation plan which would qualify the county for an incidental take permit. However, the process is not complete and the county has not yet received a permit. Generally, an approved habitat conservation plan strikes a balance between the needs of the listed species for survival and the desires of a community to develop an area. Since the Foundation did not have a permit of its own and chose to begin construction prior to Washington County obtaining a Section 10 permit, the killing of the two desert tortoises violated the Endangered Species Act. The settlement filed by the Department of Justice on behalf of the U.S. Fish and Wildlife Service resolves these claims, which were raised in a complaint filed simultaneously in the U.S. District Court in Salt Lake City.

Lois Schiffer, Acting Assistant Attorney General for the Environment and Natural Resources Division, stated, "We are pleased to have worked out an agreement with the Foundation that advances both national goals of building a cultural center in southwestern Utah and protecting endangered species."

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POINTS TO REMEMBER

Public Access To Court Rulings

On September 2, 1994, the Department of Justice announced that it is exploring ways to improve public access to federal court opinions, especially by computer, to make legal research more affordable for scholars, public interest groups and users of electronic information. Currently, most electronic research is done by leasing access to privately owned systems, such as WESTLAW and LEXIS, that electronically search through data bases of federal cases and other materials. Attorney General Janet Reno said that the Department had received considerable correspondence from members of the legal community concerned about the high cost of electronic access to judicial opinions and the present proprietary system most often used to cite federal cases.

The Attorney General stated that the Department is evaluating various existing non-proprietary methods of citing cases to develop a unified, comprehensive approach acceptable to federal and state courts, attorneys and legal researchers. The Department is also exploring the possibility of a public-domain data base of federal and state judicial opinions. Comments and suggestions from the public are invited, and should be directed to Kent Walker, Counsel to the Deputy Attorney General, Department of Justice, Washington, D.C. 20530.

At the same time, the Department said it would shortly solicit bids for a computerized legal research system for its own lawyers. The prospective contract would last one year, with four annual options to renew the contract. Because of the relatively short contract periods, the Department expects that the prospective contract would not delay a decision on a new public citation system.

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Hatch Act Reform Amendments

On August 15, 1994, Carol DiBattiste, Director, Executive Office for United States Attorneys, forwarded guidance to all United States Attorneys from Stephen R. Colgate, Assistant Attorney General for Administration, Justice Management Division, and James B. King, Director of the Office of Personnel Management, concerning Title 5, United States Code, Section 3303, of the Hatch Act Reform Amendments of 1993. The statute bars Executive branch agencies from accepting or considering certain recommendations concerning non-political appointments or other personnel action from Members of Congress; Congressional employees; elected State or local government officials; political party officials; or individuals or organizations making a recommendation based on party affiliation.

If you have any questions, or would like a copy of the memoranda, please contact the Legal Counsel's office of the Executive Office for United States Attorneys, at (202) 514-4024.

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Litigation Support Assistance

On August 30, 1994, Carol DiBattiste, Director, Executive Office for United States Attorneys (EOUSA), forwarded a memorandum to all United States Attorneys concerning litigation support services that are available to the United States Attorneys' offices. The support services available include: document reproduction; document imaging; location of industry specialists; access to specialized personnel such as systems analysts, paralegals, and data entry clerks; acquisition of space, furniture, and equipment; as well as many other services. Services can be performed at your site or at a contractor facility. All contractor personnel have security clearances. Some examples of support services recently provided were:

American Honda (District of New Hampshire): The support provided included scanning, coding and imaging of documents. Also equipment, software and furniture for the off-site space were obtained, and contractor personnel (paralegal, user assistant) is anticipated.

District of Columbia v. U.S. (District of Columbia): Forty thousand discovery documents located at St. Elizabeth's hospital needed to be copied. Due to the short turnaround requirements, the documents were microfilmed. Blowbacks (paper copies) of the documents were produced, using high speed microfilm blowback machines.

U.S. v. Wainsworth Hall, et al. (Eastern District of Virginia): A senior paralegal for trial assistance was provided, who performed legal research, prepared and tracked exhibits; digested witness statements, and other related services.

Medical Fraud Investigation (Southern District of California): This project included leasing space for a task force consisting of U.S. Attorney personnel and client agencies, with furniture, personal computers, printers, copiers, telephones, supplies and contractor personnel (paralegals). Databases have been created to organize and track the document collection, which exceeds one million pages.

U.S. v. Crown Equipment Corporation (Western District of Washington): Office automation staff assisted in locating an animation expert to develop a re-enactment of a fire scene. Assistance in obtaining information as to the admissibility of animation as evidence was provided as well.

If you would like assistance in a particular case or group of cases, please call Gale Deutsch or Victor Painter, Office Automation Staff, Executive Office for United States Attorneys, at (202) 616-6969. E-Mail: AEX02(GDEUTSCH) or AEX02(VPAINTER).

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Secure Communications Equipment

On August 15, 1994, Carol DiBattiste, Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys requesting their support in encouraging all employees to make the widest possible use of the secure communications equipment installed in their offices. Rapidly advancing technology and the ease with which communication systems can be monitored and exploited presents a serious challenge to the legal and law enforcement community. All United States Attorneys' offices have been provided secure telephone and facsimile equipment. This equipment provides the capability to exchange with other United States Attorneys' offices, Department components, and law enforcement entities, classified and sensitive unclassified information concerning ongoing cases, without fear of interception by hostile intelligence or criminal elements.

All employees should be reminded that the secure telephone and/or secure facsimile must be used to discuss or transmit classified information. The equipment should also be used whenever possible to protect sensitive unclassified information, particularly investigative and informant or witness information.

The Security Programs Staff, Executive Office for United States Attorneys, recently conducted two Communications Security training courses attended by representatives from most districts. The course included instruction in, and demonstration of, the use of secure telephone and facsimile equipment. All employees would benefit from a brief refresher in the proper use of, and safeguarding requirements for, secure telephone and facsimile equipment.

* * * * *

Security Manager's Handbook And Security Videos

On August 10, 1994, Paula Nasca, Director, Security Programs Staff, Executive Office for United States Attorneys, forwarded the following material to all District Office Security Managers:

- District Office Security Manager's Handbook, Volume II, which contains various Departmental and Executive Office for United States Attorneys memoranda, guidance, and orders setting forth policies and procedures for security-related functions and activities.

- Video entitled "Mail Bombs," which provides important information on identification of mail bombs and procedures for reporting suspicious letters and packages.

- Video entitled "McKnight Courthouse Rampage," produced by Randall Rathbun, United States Attorney for the District of Kansas, depicting the entrance of Jack Gary McKnight in the federal courthouse in Topeka, Kansas, armed with four handguns and several explosives.

For further information, please call the Security Programs Staff, at (202) 616-6878.

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SENTENCING REFORM

Guideline Sentencing Updates

Copies of the Guideline Sentencing Update, Volume 6, No. 16, dated August 4, 1994, and Volume 6, No. 17, dated August 19, 1994, are attached as Exhibit F at the Appendix of this Bulletin. The Guideline Sentencing Update is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

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CASE NOTES

CIVIL DIVISION

Sixth Circuit Upholds HHS' Interpretation Of The "Reliable Information Exception" In The Social Security Act

The Sixth Circuit (Guy and Merritt; Boggs dissenting) has just reversed the district court and upheld the interpretation by the Secretary of HHS of the "reliable information exception" in the Social Security Act, 42 U.S.C. 1382(c)(4). In determining initial eligibility for Supplemental Security Income benefits, the statute authorizes the Secretary to use the income received by the claimant in the first month of eligibility, in establishing the amount of his income in the second and third months as well. Section 1382(c)(4), however, allows the Secretary to exclude certain income from the calculations for any of those months, if she determines that there is "reliable information [which is] currently available" that such income was not received in those months. If the Secretary determines that such information does exist, the statute further provides that Secretary "shall prescribe by regulation the circumstances in which" such information can be used in determining a claimant's income. The claimants in this case had been receiving AFDC benefits just prior to their eligibility for SSI, and contended that the Secretary should have issued a regulation excluding AFDC benefits from the income calculations for any month in which such benefits were not in fact received. (The Secretary had not found AFDC payment information, or any other payment information both reliable and current, and had not therefore issued any regulation.)

The court of appeals, applying a Chevron analysis, accepted our argument that the Secretary reasonably construed the statute as requiring a regulation only if the Secretary first determines that "reliable information" is currently available. The court therefore vacated the district court injunction that had required the Secretary to promulgate a "reliable information" regulation, and to apply it retroactively to an Ohio class spanning the years 1982-1988.

Gould v. Shalala, No. 92-4338 (July 27, 1994) [6th Cir.; S.D. Ohio]. DJ # 137-58-1886

Attorneys: William Kanter - (202) 514-45757
Malcolm Stewart - (202) 514-1633
Patricia Millett - (202) 514-3688

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Ninth Circuit Holds That The Federal Tort Claims Act (FTCA) Provides Plaintiff's Exclusive Remedy Because The FBI Agent, Who Allegedly Defamed Plaintiff, Was Acting Within The Scope Of His Employment

Meridian sued an FBI agent for libel and slander for statements made in the course of an investigation, and the district court substituted the United States as a defendant pursuant to 28 U.S.C. 2679(d)(2). Meridian appealed, arguing that the agent may not have been acting within the scope of his employment when he allegedly defamed Meridian. The Federal Tort Claims Act provides a cause of action against the United States for persons injured by the tortious activity of its employees. If the agent was acting within the scope of his employment, then the FTCA provides Meridian's exclusive remedy. However, the FTCA expressly bars causes of action for libel and slander. As a jurisdictional limitation, the FTCA also requires claimants to first file their claims with the appropriate federal agency, which Meridian did not do. Thus, if Gates was acting within the scope of his employment, 28 U.S.C. 2675 & 2680 requires the dismissal of the suit. Based on the in camera declarations which the government filed, the court of appeals agreed that the agent was acting within the scope of his employment and affirmed the dismissal of the suit.

Meridian Logistics Inc. v. United States of America, No. 93-55082 (July 28, 1994) [9th Cir.; C. Cal.]. DJ # 157-12c-4012

Attorneys: Barbara L. Herwig - (202) 514-5425
Marleigh D. Dover - (202) 514-3511

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

The following is an update of recently decided cases worked on jointly by the Environmental Crimes Section of the Environment and Natural Resources Division and the United States Attorneys' offices:

U.S. v. Attique Amahd (S.D. Tex.) (CWA) (8/17/94)

A three-count Clean Water Act indictment was returned against Attique Amahd charging him with discharge of pollutants without a permit and violations of the National Pretreatment Standards. The defendant is accused of discharging up to 6,000 gallons of gasoline in Conroe, Texas, in a low income neighborhood.

Attorneys: AUSAs Gordon Young; Claude Shippard; and Michael Shelby - (713) 567-9000

U.S. v. Peter Gannon (E.D. Cal.) (CWA) (8/12/94)

Peter Gannon was charged in a three-count indictment with violations of the Clean Water Act and the Resource Conservation and Recovery Act (RCRA). Gannon is accused of dumping two 55-gallon drums of paint into Salt Creek, disposing of other hazardous waste, including beryllium and magnesium metal powders, on land adjacent to the creek in the vicinity of the Whiskeytown-Shasta-Trinity National Recreation Area, and disposing four 55-gallon drums of paint on public land which is under the jurisdiction of the Bureau of Land Management. The charges carry a maximum penalty of five years imprisonment and a fine of $50,000 per day for each day of violation. The case was investigated by the National Park Service, the Bureau of Land Management, the Environmental Protection Agency, and the FBI.

Attorneys: Anna Matheson - (202) 272-4472
AUSA Donald Searles - (916) 551-2310

U.S. v. William Kirkpatrick (D. Kan.) (TSCA/CERCLA) (8/23/94)

A two-count indictment was returned against William Kirkpatrick, a utility officer of the City of Stafford, who is alleged to have ordered the burial of PCB capacitors. Kirkpatrick was charged with one count each under the Toxic Substances Control Act and the Comprehensive Environmental Response, Compensation and Liability Act.

Attorneys: Marty Woelfle - (202) 272-9891
United States Attorney Randall K. Rathbun- (316) 269-6481

U.S. v. James Alan Ferrin (S.D. Cal.) (RCRA) (8/15/94)

The defendant was sentenced to time served in home detention, pursuant to his previous plea agreement, plus a $2,000 fine. On May 18, 1994, James Alan Ferrin, a federal civilian employee/supervisor of the 32d Street Consolidation, Storage and Transfer Facility at the Naval Station in San Diego entered a guilty plea to one RCRA felony count for illegal treatment and disposal of hazardous waste. Ferrin was charged on October 22, 1991 in a three-count indictment with two RCRA counts of illegal treatment and disposal of hazardous waste and one false statement, 18 USC §1001. The hazardous waste involved in the violations was lead dioxide, methyl isocyanate and trichloroethylene. The 32d Street facility had an "interim status" permit for the storage of hazardous waste for a period of not more than one year. There was no permit, however, for the disposal and treatment of hazardous waste.

Attorney: AUSA Melanie Pierson - (619) 557-5685

U.S. v. Wesley Eugene Ray and Sheila Putnam (E.D.Tex.) (7/15/94)

As the result of a guilty plea a year ago to conspiracy to violate hazardous waste laws, Wesley Eugene Ray, operator of a battery reclamation facility known as Poly-Cycle industries, was sentenced to the maximum 60-month prison term, to be followed by three years of supervised release. His codefendant, Sheila Putnam, on a guilty plea to one count of illegal disposal under RCRA, was sentenced to 30 months in prison and two years of supervised release. Ray entered his guilty plea on July 15, 1993, and admitted to illegally and intentionally disposing of sulfuric acid, lead and cadmium during the operation of his battery reclamation facility. Putnam entered her guilty plea on March 4, 1994. An indictment filed on June 18, 1993 stated that the waste that was illegally disposed of contaminated both the Poly-Cycle facility and the adjacent property.

Attorney: AUSA Tom Kiehnhoff - (409) 839-2538

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TAX DIVISION

Geisinger Health Plan v. Commissioner (3rd Cir.) (7/27/94)

On July 27, 1994, the Third Circuit issued a published opinion in Geisinger Health Plan v. Commissioner, affirming the Tax Court's determination that the taxpayer, an HMO, does not qualify for tax-exempt status as a "charitable" organization described in Section 501(c)(3) on the theory that its activities constitute an "integral part" of the charitable mission of its tax-exempt affiliates.

The court held that, even though it was affiliated with a number of exempt entities, the HMO here could qualify for a derivative exemption only if: (i) it was not carrying on a trade or business unrelated to its parent's exempt purpose and (ii) "its relationship to its parent somehow enhance[d] the subsidiary's own exempt character to the point that, when the boost provided by the parent is added to the contribution made by the subsidiary itself, the subsidiary would be entitled to § 501(c)(3) status." The Third Circuit stated, "we do not think that [taxpayer] receives any 'boost' from its association with the Geisinger System" because its activities do not benefit a significant enough portion of the community. The court considered it "apparent that [taxpayer] merely seeks to 'piggyback' off the other entities in the System, taking on their charitable characteristics in an effort to gain exemption without demonstrating that it is rendered 'more charitable' by virtue of its association with them." In light of its conclusion, the court did not find it necessary to consider whether taxpayer's HMO would generate unrelated business income if merged into the Geisinger System.

* * * * *

National Association of Life Underwriters, Inc. v. Commissioner (D.C. Cir.) (8/12/94)

On August 12, 1994, the D.C. Circuit Court of Appeals reversed the favorable decision of the Tax Court in National Association of Life Underwriters, Inc. v. Commissioner, and remanded the case for further trial proceedings. The principal issue was whether a portion of the membership dues paid by local associations to a tax-exempt organization must be included in determining the organization's circulation income from the sale of its periodical to the local associations. Under the Internal Revenue Code, tax-exempt organizations must pay income taxes on unrelated business income such as that realized from the sale of advertising in periodicals. The Treasury Regulations further provide that a "circulation" loss may be used to offset such income. In order to maximize its circulation loss, the organization here urged that virtually none of the dues it received should be treated as income attributable to its distribution of the periodical. The Tax Court rejected that claim and ruled that a portion of the membership dues was includable in circulation income.

The court of appeals reversed the Tax Court's holding on the basis that the IRS raised its winning argument for the first time in its post-trial brief. Thus, the court remanded the case to the Tax Court to determine whether to permit the IRS to amend its pleadings to assert the new theory, stating that an amendment would be permissible so long as prejudice to the taxpayer was averted. Approximately $800,000 is directly at stake in this case, but the issue affects many tax-exempt organizations that publish periodicals containing paid advertisements.

* * * * *

Brooks v. United States (10th Cir.) (8/3/94)

On August 3, 1994, the Tenth Circuit issued an unpublished decision in Brooks v. United States, reversing the adverse judgment of the District Court in this tax refund suit which involved $800,000 directly, but which will control refund claims in other cases involving approximately $1.8 million in revenues. At issue is whether certain stock options exercised by taxpayers were qualified stock options within the meaning of former Internal Revenue Code Section 422(b)(1), which required the shareholders of a company to approve a stock option plan within twelve months of its adoption by the board of directors. In this case, the board of directors of Clinton Oil Company adopted an employee stock option plan, but there was no shareholder approval, as such, within twelve months of that action. The district court had "found" that a district court judge, acting in his capacity of judicial supervisor of the company's settlement of litigation with the Securities and Exchange Commission, had approved the plan on behalf of the shareholders. The Tenth Circuit reversed that finding as clearly erroneous. The Tenth Circuit based its conclusion on evidence that showed, inter alia, that the judge would not have taken an action to qualify the plan for tax purposes and the plan itself contained a clause requiring a shareholder vote within twelve months in order to make the plan qualified for tax purposes.

* * * * *

National Commodity and Barter Ass'n, National Commodity Exchange v. Glenn L. Archer, et al (10th Cir) (8/4/94)

On August 4, 1994, the Tentn Circuit issued an opinion in National Commodity and Barter Ass'n, National Commodity exchange v. Glenn L. Archer, et al., affirming, in part, and reversing, in part, the district judge's dismissal of a Bivens complaint for failure to state a cause of action, and remanding the case for further trial court proceedings as to some of the defendants with regard to counts asserted under the First and Fourth Amendments. The National Commodity and Barter Association (NCBA), a tax protestor organization, alleged among other things that the seizure of membership lists by IRS agents, acting pursuant to a search warrant, violated the members' free speech and associational rights. The Tenth Circuit held that the complaint here stated a Bivens cause of action for violation of First and Fourth Amendment rights. The court, in remanding, noted that if the defendants could show that there was a "compelling need to obtain the records," such a showing might warrant dismissal of the complaint. The court further recognized that the defendants might be entitled to claim qualified immunity, based on a more fully developed record.

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OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Acting Director David W. Downs and the members of the OLE staff thank the following Assistant United States Attorneys (AUSAs) and Department of Justice officials and personnel for their outstanding teaching assistance and support during courses conducted from July 15 - August 15, 1994. Persons listed below are AUSAs unless otherwise indicated:

Environmental Crimes (Milwaukee, Wisconsin)

Randall Rathbun, United States Attorney, District of Kansas; ***Jane Barrett,*** District of Maryland; ***Micki Brunner,*** Western District of Washington; ***Ben Hagood,*** District of South Carolina; ***Thomas Kiehnhof,*** Eastern District of Texas; ***Roslyn Moore-Silver*** and ***Frederick Petti,*** District of Arizona; ***David Nissman,*** District of the Virgin Islands; ***Melanie Pierson,*** Southern District of California; ***Ron Sarachan,*** Eastern District of Pennsylvania; ***Gordon Young,*** Southern District of Texas. From the Environment and Natural Resources Division: ***Lois J. Schiffer,*** Assistant Attorney General Designate; ***James F. Simon,*** Counsel to the Assistant Attorney General; ***Walker B. Smith,*** Assistant Chief, Environmental Enforcement Section; ***Charles W. Brooks,*** Senior Trial Attorney, Wildlife and Marine Resources Section; ***Charles DeMonaco,*** Assistant Chief, ***Herbert Johnson, Jeromy Korzenik, W. Bruce Pasfield, Marty Woelfle,*** and ***Deborah K. Woitte,*** Trial Attorneys, Environmental Crimes Section. From the Federal Bureau of Investigation: Special Agents ***Paul Lazzari, Larry Fon, Pat Dietz, Greg Groves, Alfred Johnson, Larry Owens,*** and ***Norman I. Wight.***

Discovery Skills (Washington, D.C.)

Richard Parker, Deputy Chief, Civil Division, Eastern District of Virginia; ***David Deutsch,*** Senior Trial Attorney, Special Litigation Section, Civil Rights Division; ***Kirk C. Lusty,*** Trial Attorney, Tax Division; ***Michael W. Reed,*** Assisant Chief, General Litigation Section, Environment and Natural Resources Division. From the Civil Division: ***Stephen M. Doyle, Leura Garrett, Gail K. Johnson, Jill Martindell, Michael T. McCaul, Collette Winston,*** Trial Attorneys, Torts Branch; ***Vincent M. Garvey,*** Deputy Director, and ***Arthur R. Goldberg, Thomas Millet,*** and ***Elizabeth Pugh,*** Assistant Directors, Federal Programs Branch.

In-House Criminal Asset Forfeiture Training, (Milwaukee, Wisconsin)

Robert E. Mydans, District of Colorado; ***Mary Smith,*** Western District of Oklahoma; ***Gail Hoffman,*** Eastern District of Wisconsin.

Ethics and Professional Conduct (Washington, D.C.)

Michael Robinson, Attorney, Civil Division, Appellate Staff; ***Marcus Williams,*** Assistant General Counsel, Administrative Complaints and Ethics, Federal Bureau of Prisons; ***Gretchen M. Wolfinger,*** Attorney, Conflicts of Interest Crimes Branch, Public Integrity Section, Criminal Division.

Affirmative Civil Litigation (West) (Salt Lake City, Utah)

Sidney Alexander, Western District of Tennessee; ***James Bickett,*** Northern District of Ohio; ***Gerald M. Burke,*** Southern District of Illinois; ***Susan Cassell,*** Deputy Chief, Civil Division, ***Susan Steele,*** and ***Suzanne Dyer,*** District of New Jersey; ***Kenneth Dodd,*** Western District of Texas; ***Suzanne Durrell,*** Chief, Civil Division, District of Massachusetts; ***Paul Johns,*** District of Colorado; ***James Sheehan,*** Chief, Civil Division, ***Catherine Votaw,*** Deputy Chief, Civil Division, and ***John Joseph,*** Eastern District of Pennsylvania; ***Joseph Maloney,*** Deputy Chief, Civil Division, Eastern District of California; ***Mark Nagle,*** District of Columbia; ***Linda Wawzenski,*** Deputy Chief, Civil Division, Northern District of Illinois; ***Eugene Seidel,*** Southern District of Alabama; ***Claire Schenk,*** Eastern District of Missouri; ***Deborah A Solove,*** Southern District of Ohio; ***Joanne Swanson,*** Northern District of California. From the Civil Division, Commercial Litigation Branch: ***Michael Hertz,*** Director; ***Stephen Altman,*** Assistant Director; ***Ronald Clark*** and ***Vincent Terlep,*** Senior Trial Counsels; ***David Long,*** Trial Attorney; and ***Marie O'Connell,*** Attorney.

Money Laundering/Financial Issues/Asset Forfeiture (Portland, Oregon)

Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General; ***Joan Safford,*** Deputy United States Attorney, Northern District of Illinois; ***Virginia Covington,*** Asset Forfeiture Chief, Middle District of Florida; ***Sonia C. Jaipaul,*** Eastern District of Pennsylvania; ***John Podliska,*** Northern District of Illinois; ***Roger Powell,*** Southern District of Florida; ***Stewart Robinson,*** Northern District of Texas; ***David Schindler,*** Central District of California; ***John Seibert,*** Chief, Organized Crime Strike Force Unit, District of Hawaii; ***G. Wingate Grant,*** Eastern District of Virginia. From the Criminal Division: ***Harry Harbin,*** Assistant Director, Asset Forfeiture Office; ***Lester Joseph,*** Deputy Director, and ***Jay Lerner,*** Attorney, Money Laundering Section. From the Drug Enforcement Administration: ***Al Gillum,*** Inspector, Major Investigations Section, and ***George Harkin,*** Acting Chief, Strategic Intelligence.

Basic Narcotics (San Diego, California)

Kent Walker, Counsel to the Deputy Attorney General; ***Michael G. Shaheen, Jr.,*** Counsel, Office of Professional Responsibility; ***Linda Candler,*** Associate Director, Office of International Affairs, Criminal Division; ***Alan G. Burrow,*** Executive Assistant United States Attorney, Northern District of Florida; ***Larry A. Burns,*** Deputy United States Attorney, ***Laura J. Birkmeyer,*** Assistant Chief, Criminal Division, ***Chuck Labella*** and ***D. Thomas Ferraro,*** Southern District of California; ***Robert Chesnut,*** Chief, General Crimes Section, Eastern District of Virginia; ***Julie A. Werner-Simon,*** Deputy Chief, Strike Force, ***Miriam Krinsky,*** Chief, Appellate Section, and ***Jackie Chooljian,*** Chief, Training Section, Central District of California; ***Robyn R. Jones,*** Chief, Criminal Division, Southern District of Ohio; ***Roslyn O. Moore-Silver,*** Chief, Criminal Division, and ***Peter M. Jarosz,*** District of Arizona; ***Kenneth S. McHargh,*** Lead OCDETF Attorney and Deputy Chief, Criminal Division, and ***Linda M. Betzer,*** Northern District of Ohio; **Mark L. Rotert**, Associate Chief, Criminal Division, and **Ross O. Silverman**, Northern District of Illinois; ***Judith A. Whetstine,*** Senior Litigation Counsel, Northern District of Iowa; ***D. Blair Watson,*** District of Kansas.

Financial Crimes (San Diego, California)

Kent Walker, Counsel to the Deputy Attorney General; ***Michael G. Shaheen,*** Counsel, Office of Professional Responsibility; ***Julia K. Craig*** and ***Mitchell Dembin,*** Southern District of California; ***William M. Flynn,*** Western District of New York; ***Debra Herzog,*** Southern District of Florida; ***Art Leach*** and ***Robert Schroeder,*** Northern District of Georgia; ***Lisa E. Leschuck,*** District of Wyoming; ***Roslyn O. Moore-Silver,*** District of Arizona; **Vickie Peters**, **Mark L. Rotert**, **Matt Bettenhausen**, and **Ross O. Silverman**, Northern District of Illinois; ***Stephen C. Schroeder*** and ***Robert Westinghouse,*** Western District of Washington; ***Maureen A. Tighe*** and ***Julie A. Werner-Simon,*** Central District of California; ***Judith A. Whetstine,*** Northern District of Iowa. From the Criminal Division: ***Linda Candler,*** Associate Director, Office of International Affairs; ***Jonathan J. Rusch,*** Senior Litigation Counsel, Fraud Section; ***Theresa Van Vliet,*** Chief, Narcotic and Dangerous Drug Section. From the Federal Bureau of Investigation: ***Richard Ress,*** Supervisory Special Agent; ***Kevin Deery*** and ***Gary F. Rossi,*** Special Agents.

Advanced Criminal Trial Advocacy (Washington, D.C.)

Teresa Davenport, Southern District of Florida; ***Mike Emmick,*** Central District of California; ***Rhonda Fields,*** District of Columbia; ***Ginny Granade,*** Southern District of Alabama; ***Mike Johnson,*** Eastern District of Arkansas; ***Miriam Krinsky,*** Central District of California; ***Lynne Lamprecht*** and ***Eileen O'Connor,*** Southern District of Florida; ***Leslie Osborne,*** District of Hawaii; ***Mike Ringer,*** Western District of Oklahoma; ***Nancy Simpson,*** Eastern District of California. From the Criminal Division: ***Laurie Barsella,*** Senior Legal Advisor, Office of International Affairs; and ***Marie Incontro,*** Deputy Chief for Violent Crime, Terrorism and Violent Crime Section. From the Federal Bureau of Investigation: ***Robert Beard*** and ***Jack Quill,*** Supervisory Special Agents, and ***John Sylvester,*** Special Agent.

Legal Support Staff Training (Cincinnati, Ohio)

From the Southern District of Ohio: ***Anthony Nyktas,*** Senior Assistant United States Attorney, ***Kathleen Brinkman, Gerald Kaminiski, Tina Kraus,*** Administrative Officer, ***Judy Cron,*** Supervisory Paralegal Specialist, ***Judy Staubach,*** Paralegal Specialist, ***Gale Smith,*** Paralegal Assistant, and ***Ellen Weston*** and ***Jeanette Hargreaves,*** Law Clerks.

Evidence for Experienced Criminal Litigators (Phoenix, Arizona)

Denise O'Donnell, First Assistant United States Attorney, Western District of New York; ***Judy Lombardino,*** Section B Chief, Drug Task Force, Southern District of Texas; ***Michael MacDonald,*** Chief, Criminal Division, Western District of Michigan; ***Gregory Miller,*** Chief, Criminal Division, Northern District of Florida; ***Stewart Walz,*** Chief, Criminal Division, District of Utah; ***Donald Davis,*** Western District of Michigan; ***Michael Fagan,*** Eastern District of Missouri; ***Marcia Harris,*** Southern District of Ohio; ***Stephen Peterson,*** Southern District of California; ***William Richards,*** Eastern District of Michigan; ***Eric Sitarchuk,*** Eastern District of Pennsylvania; ***John Vaudreuil,*** Western District of Wisconsin; ***Craig Weier,*** Eastern District of Michigan; ***Michael Whisonant,*** Northern District of Alabama.

Appellate Advocacy (Washington, D.C.)

Drew S. Days, Solicitor General; ***Richard Shiffrin,*** Deputy Assistant Attorney General, Office of Legal Counsel. ***Edna Axelrod,*** District of New Jersey; ***Richard Durbin, Joseph Gay, Robert Pitman,*** Western District of Texas; ***Barbara A. Grewe,*** District of Columbia; ***Nancy Koenig,*** Northern District of Texas; ***Sheldon Light,*** Eastern District of Michigan; ***Tamra Phipps,*** Middle District of Florida; ***Mary Sedgwick,*** Central District of California; ***Jim Turner,*** Southern District of Texas; ***David Williams,*** District of New Mexico. From the Civil Division: ***Mark Stern,*** Senior Appellate Litigation Counsel, ***Matt Collette, Mary Doyle, Roy Hawkens, Patricia Millet,*** and ***Jon Siegel,*** Attorneys, Appellate Staff; and ***Charles E. Pazar,*** Attorney, Office of Immigration Litigation. ***Robert Seasonwein,*** Senior Trial Attorney, Office of Special Investigations, and ***J. Douglas Wilson,*** Attorney, Appellate Staff, Criminal Division.

Ethics for Litigators (Washington, D.C.)

Larry Gregg, Eastern District of Virginia. From the Civil Division: ***Charles R. Gross,*** Assistant Director, and ***Lawrence Klinger,*** Assistant to the Director, Torts Branch; ***Anne L. Weismann,*** Assistant Director, Federal Programs Branch.

AGAI Courses

The courses listed below are tentative only. OLE will send an announcement via Email approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ divisions officially announcing each course and requesting nominations.

October 1994

Date	***Course***	***Participants***
18-19	Ethics	USAO and DOJ Ethics Representatives
18-21	Asset Forfeiture Multi-Level Training	AUSAs, Paralegals
25-28	Complex Prosecutions	AUSAs, DOJ Attorneys

November 1994

Date	***Course***	***Participants***
1-3	Appellate Chiefs	USAO Appellate Chiefs
1-4	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
14-16	Native American Issues	AUSAs, DOJ Attorneys
14-18	Appellate Advocacy	AUSAs, DOJ Attorneys
15-16	Environmental Law\ Military Base Closures	AUSAs, DOJ Attorneys
29-Dec. 1	Attorney Supervisors	USAO Supervisors

December 1994

5-16	Civil Trial Advocacy	AUSAs, DOJ Attorneys
6-8	Basic Financial Institution Fraud	AUSAs, DOJ Attorneys
12-16	Criminal Federal Practice	AUSAs, DOJ Attorneys
13-15	Asset Forfeiture for Criminal Prosecutors	AUSAs, DOJ Attorneys

January 1995

9-13	Advanced Criminal Trial Advocacy	AUSAs, DOJ Attorneys
10-13	Medical Malpractice	AUSAs, DOJ Attorneys
18-20	Attorney Supervisors	AUSAs
23-27	Civil Federal Practice	AUSAs, DOJ Attorneys
24-27	Child Sexual Abuse	AUSAs, DOJ Attorneys
31-2/3	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys

LEI Courses

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices **(indicated by an * below).** Approximately eight weeks prior to each course, OLE will send an Email to all United States Attorneys' offices announcing the course and requesting nominations. The nominations are sent to OLE via FAX, and student selections are made. OLE funds all costs for paralegals and support staff personnel from United States Attorneys' offices who attend LEI courses.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. A nomination form for LEI courses listed below (except those marked by an *) is attached at the Appendix of this Bulletin as Exhibit G. Local reproduction is authorized and encouraged. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form approximately three weeks before the course begins. **Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *).**

October 1994

Date	***Course***	***Participants***
6	Annual Freedom of Information Act Update	Attorneys, Paralegals
6-7	Alternative Dispute Resolution	Attorneys
12-13	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
14	Privacy Act	Attorneys, Paralegals
17	Ethics for Litigators	Attorneys
17-21*	Criminal Paralegal	USAO Paralegals
19-21	Attorney Supervisors	Attorneys
25	Introduction to the Freedom of Information Act	Attorneys, Paralegals
25-27	Discovery	Attorneys
31-Nov. 4	Basic Paralegal	Agency Paralegals

November 1994

1-3	Basic Bankruptcy	Attorneys
8-9	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
14-18*	Experienced Paralegal	USAO, DOJ Paralegals
21	Legal Writing	Attorneys

November 1994 (Cont'd.)

Date	***Course***	***Participants***
29-Dec. 1	Agency Civil Practice	Attorneys
29-Dec. 1	Bankruptcy Fraud	Attorneys
	December 1994	
5-9	Research and Writing Refresher for Paralegals	USAO and DOJ Paralegals
7	Advanced Freedom of Information Act	Attorneys and Paralegals
12	Appellate Skills	Attorneys
13-16	Examination Techniques	Attorneys
	January 1995	
4-6	Environmental Law	Attorneys
9-13*	Legal Support Staff	USAO Support Staff
9-13*	Basic Financial Litigation Support Staff	USAO FLU Support Staff
17	Legal Writing	Attorneys
17	Ethics for Litigators	Attorneys
18-19	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
20	Privacy Act	Attorneys, Paralegals
23-27*	Civil Paralegal	USAO Paralegals
30-31	Federal Adminsitrative Process	Attorneys
30-2/1	Negotiation Skills	Attorneys

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

Address: Room 7600, Bicentennial Bldg.
600 E Street, N.W., Washington, D.C. 20530

Telephone: (202) 208-7574
FAX: (202) 208-7235

Director	David W. Downs
Assistant Director (AGAI-Criminal)	Amy Lederer
Assistant Director (AGAI-Civil & Appellate)	Tom Majors
Assistant Director (AGAI-Asset Forfeiture and Financial Litigation)	Nancy Rider
Assistant Director (LEI)	Donna Preston
Assistant Director (LEI-Paralegal & Support)	Donna Kennedy
Assistant Director (LEI)	Chris Roe

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ADMINISTRATIVE ISSUES

Career Opportunities

Immigration And Naturalization Service

The Office of Attorney Personnel Management, U.S. Department of Justice, is seeking experienced attorneys for the position of General Attorney with the Immigration and Naturalization Service (INS). The positions are located in district offices or detention facilities in the following cities: Arlington, Virginia; Atlanta, Georgia; Baltimore, Maryland; Detroit, Michigan; Newark, New Jersey; Hartford, Connecticut; Miami, Florida; New York, New York; Oakdale, Louisiana; Chicago, Illinois; Dallas, Texas; Denver, Colorado; El Paso, Texas; Houston, Texas; El Centro, California; Eloy, Arizona; Florence, Arizona; Los Angeles, California; Phoenix, Arizona; San Diego, California; San Francisco, California; and Seattle, Washington.

Responsibilities include representing the INS in exclusion, deportation, and rescission proceedings before immigration judges (often involving detained aliens, most of whom have committed criminal offenses), representing the INS before administrative law judges in employer sanctions and civil document fraud cases, providing legal advice to the INS operating units, and providing litigation support to U.S. Attorney's Offices on immigration-related cases.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. legal experience. Applicants must submit a resume, a law school transcript (if the J.D. degree was received within the past five years), a writing sample, and an indication of preferred location(s), to: Robert S. Finkelstein, Chief, Management Division, Office of the General Counsel, U.S. Immigration and Naturalization Service, 425 I St., N.W., Room 6100, Washington, D.C. 20536

The positions are at the GS-11 through GS-14 level, with a salary range between $34,662 and $75,894. (The salary range is slightly higher in some cities.) The positions are open until filled. No telephone calls, please.

[Note: The INS is committed to diversity in hiring. It is the policy of the Department to achieve a drug-free workplace and persons selected may be required to pass a urinalysis test to screen for illegal drug use prior to final appointment.]

* * * * *

United States Attorney's Office
District Of Connecticut

The United States Attorney's Office for the District of Connecticut is seeking experienced attorneys for positions as Assistant United States Attorneys. Assistant United States Attorneys serve as criminal prosecutors and as the representatives of the United States in civil cases against, and on behalf of, the United States of America. These positions provide an opportunity for frequent trial experience in United States District Court.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year litigation experience. Federal trial experience is highly desirable. Current salary and years of experience will determine the appropriate salary level. Approximate range is $33,500 to $87,900 plus cost of living allowance.

Appointment is subject to the successful completion of a background investigation and applicants will be subject to drug testing by urinalysis to screen for illegal drug use prior to appointment.

For confidential consideration, please send a resume and letter of interest by October 14, 1994 to: Christopher F. Droney, United States Attorney, P.O. Box 1824, New Haven, Connecticut 06508. No telephone calls, please.

* * * * *

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	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	05-04-90	8.70%	11-15-91	4.98%	05-28-93	3.54%
11-18-88	8.55%	06-01-90	8.24%	12-13-91	4.41%	06-25-93	3.54%
12-16-88	9.20%	06-29-90	8.09%	01-10-92	4.02%	07-23-93	3.58%
01-13-89	9.16%	07-27-90	7.88%	02-07-92	4.21%	08-19-93	3.43%
02-15-89	9.32%	08-24-90	7.95%	03-06-92	4.58%	09-17-93	3.40%
03-10-89	9.43%	09-21-90	7.78%	04-03-92	4.55%	10-15-93	3.38%
04-07-89	9.51%	10-27-90	7.51%	05-01-92	4.40%	11-17-93	3.57%
05-05-89	9.15%	11-16-90	7.28%	05-29-92	4.26%	12-10-93	3.61%
06-02-89	8.85%	12-14-90	7.02%	06-26-92	4.11%	01-07-94	3.67%
06-30-89	8.16%	01-11-91	6.62%	07-24-92	3.51%	02-04-94	3.74%
07-28-89	7.75%	02-13-91	6.21%	08-21-92	3.41%	03-04-94	4.22%
08-25-89	8.27%	03-08-91	6.46%	09-18-92	3.13%	04-01-94	4.51%
09-22-89	8.19%	04-05-91	6.26%	10-16-92	3.24%	04-29-94	5.02%
10-20-89	7.90%	05-03-91	6.07%	11-18-92	3.76%	05-27-94	5.28%
11-17-89	7.69%	05-31-91	6.09%	12-11-92	3.72%	06-24-94	5.31%
12-15-89	7.66%	06-28-91	6.39%	01-08-93	3.67%	07-22-94	5.49%
01-12-90	7.74%	07-26-91	6.26%	02-05-93	3.45%	08-19-94	5.67%
02-14-90	7.97%	08-23-91	5.68%	03-05-93	3.21%	09-16-94	5.69%
03-09-90	8.36%	09-20-91	5.57%	04-07-93	3.37%		
04-06-90	8.32%	10-18-91	5.42%	04-30-93	3.25%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October I, 1982 through December 19, 1985, see, Vol. 34, No. 1, p. 25, of the United States Attorneys' Bulletin, dated January 16, 1986. For a cumulative list from January 17, 1986 to September 23, 1988, see, Vol. 37, No. 2, p. 65, of the United States Attorneys' Bulletin, dated February 15, 1989.

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Claude Harris, Jr.
Alabama, M	Redding Pitt
Alabama, S	Edward Vulevich, Jr.
Alaska	Robert C. Bundy
Arizona	Janet Ann Napolitano
Arkansas, E	Paula Jean Casey
Arkansas, W	Paul K. Holmes, III
California, N	Michael J. Yamaguchi
California, E	Charles J. Stevens
California, C	Nora M. Manella
California, S	Alan D. Bersin
Colorado	Henry L. Solano
Connecticut	Christopher Droney
Delaware	Gregory M. Sleet
District of Columbia	Eric H. Holder, Jr.
Florida, N	Patrick M. Patterson
Florida, M	Donna A. Bucella
Florida, S	Kendall B. Coffey
Georgia, N	Kent B. Alexander
Georgia, M	James L. Wiggins
Georgia, S	Harry D. Dixon, Jr.
Guam	Frederick A. Black
Hawaii	Elliot Enoki
Idaho	Betty H. Richardson
Illinois, N	James B. Burns
Illinois, S	Walter C. Grace
Illinois, C	Frances C. Hulin
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Indiana, S	Judith A. Stewart
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Iowa, S	Don Carlos Nickerson
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Louisiana, M	L. J. Hymel
Louisiana, W	Michael D. Skinner
Maine	Jay P. McCloskey
Maryland	Lynn Ann Battaglia
Massachusetts	Donald K. Stern
Michigan, E	Saul A. Green
Michigan, W	Michael H. Dettmer
Minnesota	David Lee Lillehaug
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Mississippi, S	George L. Phillips
Missouri, E	Edward L. Dowd, Jr.
Missouri, W	Stephen L. Hill, Jr.

DISTRICT	U.S. ATTORNEY
Montana	Sherry S. Matteucci
Nebraska	Thomas J. Monaghan
Nevada	Kathryn E. Landreth
New Hampshire	Paul M. Gagnon
New Jersey	Faith S. Hochberg
New Mexico	John J. Kelly
New York, N	Thomas J. Maroney
New York, S	Mary Jo White
New York, E	Zachary W. Carter
New York, W	Patrick H. NeMoyer
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North Carolina, M	Walter C. Holton, Jr.
North Carolina, W	Mark T. Calloway
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Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Vicki Miles-LaGrange
Oregon	Kristine Olson Rogers
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Pennsylvania, M	David M. Barasch
Pennsylvania, W	Frederick W. Thieman
Puerto Rico	Guillermo Gil
Rhode Island	Sheldon Whitehouse
South Carolina	J. Preston Strom, Jr.
South Dakota	Karen E. Schreier
Tennessee, E	Carl K. Kirkpatrick
Tennessee, M	John M. Roberts
Tennessee, W	Veronica F. Coleman
Texas, N	Paul E. Coggins
Texas, S	Gaynelle Griffin Jones
Texas, E	J. Michael Bradford
Texas, W	James H. DeAtley
Utah	Scott M. Matheson, Jr.
Vermont	Charles R. Tetzlaff
Virgin Islands	W. Ronald Jennings
Virginia, E	Helen F. Fahey
Virginia, W	Robert P. Crouch, Jr.
Washington, E	James P. Connelly
Washington, W	Katrina C. Pflaumer
West Virginia, N	William D. Wilmoth
West Virginia, S	Rebecca A. Betts
Wisconsin, E	Thomas P. Schneider
Wisconsin, W	Peggy Ann Lautenschlager
Wyoming	David D. Freudenthal
North Mariana Islands	Frederick Black

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EXHIBIT
A

VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

The Violent Crime Control and Law Enforcement Act of 1994 represents the bi-partisan product of six years of hard work. It is the largest crime bill in the history of the country and will provide for 100,000 new police officers, $9.7 billion in funding for prisons and $6.1 billion in funding for prevention programs which were designed by experienced police officers. The Act also significantly expands the government's ability to deal with problems caused by criminal aliens. The Crime Bill provides $2.6 billion in additional funding for the FBI, DEA, INS, United States Attorneys, Treasury Department and other Justice Department components, as well as the Federal courts. The significant provisions of the bill are summarized below:

I. Substantive Criminal Provisions

- **Assault Weapons** - Bans the manufacture of 19 military-style assault weapons, assault weapons with specific combat features, "copy-cat" models, and certain high-capacity ammunition magazines of more than ten rounds.

- **Death Penalty** - Expands the Federal death penalty to cover about 60 offenses, including terrorism, murder of a Federal law enforcement officer, large-scale drug trafficking, drive-by-shootings resulting in death and carjackings resulting in death.

- **Domestic Abusers and Firearms** - Prohibits firearms sales to and possession by, persons subject to family violence restraining orders.

- **Firearms Licensing** - Strengthens Federal licensing standards for firearms dealers.

- **Fraud** - Creates new insurance and telemarketing fraud categories, eliminates requirement that Federal prosecutor prove that the mail was used to commit a fraud and provides special sentencing enhancements for fraud crimes committed against the elderly.

- **Gang Crimes** - Provides new and stiffer penalties for violent and drug trafficking crimes committed by gang members.

- **Immigration** - Provides for enhanced penalties for alien smuggling, illegal reentry after deportation and other immigration-related crimes. (See Part II).

- **Juveniles as Adults** - Authorizes adult prosecution of those 13 and older charged with the most serious violent crimes.

- **Juveniles and Drugs** - Triples the maximum penalties for using children to distribute drugs near schools and playgrounds. Enhances penalties for all crimes using children or recruiting or encouraging children to commit crimes. Increases penalties for drug distribution in drug-free zones, i.e., schools, playgrounds, video arcades and youth centers.

- **Juveniles and Firearms** - Prohibits the sale or transfer of a firearm to a juvenile as well as possession of certain firearms by juveniles.

- **Repeat Sex Offenders** - Doubles the maximum term of imprisonment for repeat sex offenders convicted of Federal sex crimes.

- **Three Strikes** - Mandatory life imprisonment without possibility of parole for Federal offenders with three or more prior convictions for violent felonies or drug trafficking crimes.

- o **Victims of Crime** - Allows victims of Federal violent and sex crimes to speak at the sentencing of their assailants; Requires sex offenders and child molesters to pay restitution to their victims; ensures that Federal Crime Victims' Fund is spent only on victim-related programs.

- o **Other** - Creates new crimes or enhances penalties for: drive-by-shootings, use of semi-automatic weapons, sex offenses, crimes against the elderly, interstate firearms trafficking, firearms smuggling, arson, hate crimes and interstate violence against women.

II. Immigration Initiatives

The Crime Bill contains specialized enforcement provisions respecting immigration and criminal aliens. Those programs are highlighted here:

- o $1.2 billion for border control, criminal alien deportations, asylum reform and a criminal alien tracking center.

- o $1.8 billion to reimburse states for incarceration of illegal criminal aliens. (See SCAAP Grants in Section III).

- o Enhanced penalties for failure to depart the United States after a deportation order or reentry after deportation.

- o Expedited deportation for aliens who are not lawful permanent residents and who are convicted of aggravated felonies.

- o Statutory authority for abused spouses and spouses with abused children to petition for permanent residency or suspension of deportation.

III. Grant Programs For 1995

Most of these programs are authorized for six years beginning October 1, 1994. Some are formula grants, awarded to states or localities based on population, crime rate or some other variable. Others are competitive grants. All grants will require an application process. All grants are administered by the Department of Justice unless otherwise noted. As always, all funds for the years 1996-2000 are subject to appropriation by the Congress.

- o **Boot Camps For Young Offenders**- Funds for state corrections agencies to build and operate boot camps for non-violent younger offenders with limited criminal histories. $24.5 million available in Fiscal Year 1995. $300 million available in 1996-2000. (COMPETITIVE).

- o **Brady Implementation** - Funds for state and local government to upgrade criminal records keeping so as to permit compliance with the Brady Bill. $100 million available in Fiscal Year 1995. An additional $50 million available in 1996-2000. (COMPETITIVE)

- o **Byrne Grants** - A formula grant to the states for use in more than 20 law enforcement purposes, including state and local drug task force efforts. $450 million available in Fiscal Year 1995. $550 million available for 1996-2000. (COMPETITIVE)

- o **Community Economic Partnership** - Program administered by the Department of Health and Human Services. $270 million for lines of credit to community development corporations to stimulate business and employment opportunities for low-income, unemployed and underemployed individuals. (COMPETITIVE).

- o **Community Policing** - Competitive grants (COPS) to put 100,000 police officers on the streets in community policing programs. $1.3 billion available in Fiscal Year 1995. An additional $7.5 billion available in for 1996-2000. (COMPETITIVE).

- o **Community Schools** - Program administered by the Department of Health and Human Services to provide grants to localities to pay for programs which improve academic and social development for at-risk-youth by training and coordinating services provided by teachers, administrators, social workers, parents and volunteers. This program is for activities outside of schools. Grants totalling $37 million in 1995. $530 million available in 1996-2000. (FORMULA).

- o **Drug Courts** - Competitive grants to support state and local drug courts which provide specialized services to first offenders with rehabilitation potential. $29 million available in Fiscal Year 1995. An additional $171 million available in 1996-2000. (COMPETITIVE).

- o **Hotline** - Program administered by the Department of Health and Human Services. National Domestic Violence Hotline - $1 million available in 1995. $2 million available in 1996-2000. (COMPETITIVE).

- o **Local Partnership Act** - Department of Treasury program consisting of $1.6 billion for grants to localities to enhance education, provide substance abuse treatment to prevent crime and to fund job programs to prevent crimes.. (FORMULA).

- o **Ounce of Prevention** - Funding for a council to coordinate new and existing crime prevention programs to assure that the government's effort is coordinated. $1.5 million available in Fiscal Year 1995. An additional $88.5 million to fund grants available for 1996-2000. (COMPETITIVE).

- o **SCAAP Grants** - Funds to reimburse states for the cost of incarcerating criminal aliens. $130 million available in Fiscal Year 1995. $1.67 billion to fund grants available for 1996-2000. (FORMULA).

- o **Violence Against Women** - Both formula and competitive grants to domestic abuse shelters and other programs which provide services to the victims of domestic abuse. $26 million in 1995. $954 million to fund grants available for 1996-2000. (FORMULA and COMPETITIVE).

IV. Grant Programs For 1996-2000

All programs available in 1995 are continued and funded. All programs are administered by the Department of Justice unless otherwise noted. Funding for 1996-2000 is, as always, subject to appropriation by the Congress.

- o **Battered Womens' Shelters** - Program administered by the Department of Health and Human Services. $325 million for battered womens' shelters. (COMPETITIVE).

- o **Capital Improvements to Prevent Crime in National and Public Parks** - Department of Interior program consisting of $25 million in grants to states and localities, funds for National Park Service. (COMPETITIVE).

- o **Crime Prevention Block Grants** - $377 million for a new Local Crime Prevention Block Grant program to be distributed to local governments to be used as local needs dictates. Programs include, among other things: anti-gang programs, sports leagues, boys and girls clubs, partnerships (triads) between the elderly and law enforcement, police partnerships and youth skills programs. (COMPETITIVE)

- o **Delinquent and At-Risk-Youth** - $363 million to fund grants to public or private non-profit organizations to support the development and operation of projects to provide residential services to youth, aged 11 to 19, who have dropped out of school, have come into contact with the juvenile justice system or are at risk of either. (COMPETITIVE).

- o **DNA** - $40 million for grants to states and localities to conduct DNA testing research and programs. (COMPETITIVE). An additional $25 million to the FBI to conduct research.

- o **Drug Treatment** - $383 million for drug treatment programs for state and Federal prisoners. (COMPETITIVE).

- o **Education and Prevention to Reduce Sexual Assaults Against Women** - Program administered by the Department of Health and Human Services to fund rape prevention and education programs in the form of educational seminars, hotlines, training programs for professionals and the preparation of informational materials. $205 million for grants to states and localities (COMPETITIVE).

- o **Family and Community Endeavor Schools** - Department of Education program to provide funding to localities and community-based organizations which provide supervised academic, sports and extracurricular programs to school children. $243 million for grants to localities and community organizations. This program is for in-school activities. (COMPETITIVE).

- o **Model Intensive Grants** - $625 million for model crime prevention programs targeted at high-crime neighborhoods. (COMPETITIVE).

- o **Police Corps** - $200 million for police corps and college scholarships for students who agree to serve as police officers. (COMPETITIVE and FORMULA).

- o **Prison Grants** - $7.9 billion to states to build, complete and operate prisons and incarcerative alternatives such as boot camps to insure that additional prison cells will be available to put - and keep - violent offenders incarcerated. Fifty percent of money to be set aside for those states which adopt truth-in-sentencing laws (defendants must serve at least 85% of their sentence, enhanced penalties for repeat offenders).(FORMULA)

- o **Prosecutors** - $200 million to provide for more state and local courts, prosecutors and public defenders. (COMPETITIVE).

- o **Rural Law Enforcement** - $240 million for rural anti-crime and drug efforts. (FORMULA).

- o **Technical Automation** - $130 million for technical automation grants to provide enhanced computerization and other automation for law enforcement agencies. (COMPETITIVE).

- o **Urban Recreation For At-Risk-Youth** - Department of Interior program consisting of $4.5 million to localities to provide recreation facilities and services in areas with high crime rates and to provide such services in other areas to at-risk-youth. (COMPETITIVE).

EXHIBIT B

Office of the Deputy Attorney General

Washington, D.C. 20530

August 26, 1994

MEMORANDUM FOR ALL DEPARTMENT OF JUSTICE ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Jamie S. Gorelick

SUBJECT: Contacts with Represented Persons
28 C.F.R. Part 77, USAM 9-13.200 and USAM 4-8.1300

Attached is a copy of the new regulation governing contacts with represented persons. 59 Fed. Reg. 39910 (Aug. 4, 1994). The regulation will be codified at 28 C.F.R. Part 77. Also attached is a copy of the additions to the United States Attorneys' Manual (USAM) governing the same subject. The new regulation and USAM provisions are intended to ensure that Department attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules that have chilled legitimate law enforcement activity. Both the regulation and the USAM provisions will become effective on September 6, 1994.

The new provisions govern contacts with represented individuals and organizations by any Department of Justice attorney, or individuals acting at his or her direction, involved in criminal or civil law enforcement investigations or proceedings. It is important that the regulation and USAM provisions be read together to understand the limitations on such contacts.

Following is a brief overview of the regulations and USAM provisions. This summary is not exhaustive and is not intended to substitute for a careful reading of the actual documents. Moreover, please note that Department attorneys engaged in the representation of the United States in civil suits in which the United States is not acting under its police or regulatory powers are generally not subject to these provisions. Thus, the applicable state bar rules -- not these provisions -- will ordinarily apply to Department attorneys representing the government in civil suits in which the government is a defendant or claimant.

The Regulation -- 28 C.F.R. Part 77

The regulation generally addresses communications with "represented parties" and "represented persons".

An individual is considered a "represented party" under the regulation if: (1) that person has retained or accepted counsel; (2) the representation is ongoing and concerns the subject matter in question; and (3) the person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation (§ 77.3). The regulation generally prohibits a Department attorney from communicating with a represented party who the attorney knows is represented concerning the subject matter of the representation without the attorney's consent (§ 77.5). The regulation does, however, provide several exceptions to that general rule -- e.g., initiation of communication by a represented party with court approval, post-arrest statement, investigation of additional, different, or ongoing crimes, and threat to safety or life (§ 77.6).

"Represented persons" are individuals that have retained or accepted counsel whose representation is ongoing and concerns the subject matter in question but who have not been arrested or charged in a criminal proceeding or named as a defendant in a civil law enforcement proceeding (i.e., persons for whom #1 and #2 above apply, but not #3). The regulation permits overt and undercover contacts with represented persons unless such contacts involve the negotiation of a plea agreement, settlement or similar legal arrangement (§ 77.8) or would unduly infringe the individual's attorney-client relationship (§ 77.9).

The regulation also addresses represented organizations and employees (§ 77.10). In short, the regulation provides that communication with a "controlling individual" of a represented organization shall be treated as communication with the organization itself. A controlling individual is a current high-level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the pertinent proceeding or investigation (§ 77.10(a)). The regulation addresses former employees (§ 77.10(b)), employees' individual representation (§ 77.10(c)), separately represented controlling individuals (§ 77.10(d)), communication initiated by an unrepresented controlling individual (§ 77.10(e)), and multiple representation situations (§ 77.10(f)).

United States Attorneys' Manual -- 9-13.200 & 4-8.1300

The United States Attorneys' Manual provisions provide additional guidance to Department attorneys in contacting individuals and organizations represented by counsel during law enforcement investigations and proceedings. The Manual restricts many overt contacts with "targets" of criminal or civil law enforcement proceedings (§ 9-13.240); however, Department attorneys may communicate with represented persons, including targets, in the course of undercover investigations, to the extent such communication is permitted by 28 C.F.R. Part 77 (§ 9-13.220).

A "target" is defined as a person as to whom the Department attorney presently has substantial evidence linking that person to the commission of a crime and anticipates seeking an indictment or filing a complaint (§ 9-13.240). The Manual generally prohibits overt contacts with represented targets except in specifically enumerated circumstances (§ 9-13.241). It provides that prior to communicating overtly with a target pursuant to all but one of these enumerated circumstances, the Department attorney should write a memorandum and obtain the approval of the United States Attorney (for AUSAs) or the appropriate Division supervisor (for Main Justice attorneys). If approval prior to the communication is not feasible, a memorandum should be submitted as soon thereafter as practicable (§ 9-13.250).

The Manual further provides that Department attorneys personally conducting overt communications with represented persons should have at least one witness present (§ 9-13.231) and should respect the person's attorney-client relationship (§ 9-13.232). It states that, absent compelling reasons, a Department attorney should not initiate overt communication with a represented person outside the presence of counsel if the Department attorney has explicitly assured private counsel that no such communication will be attempted (§ 9-13.233).

Adherence to the new regulation and Manual provisions is important. Questions concerning their application should be directed to Charysse Alexander, Executive Office for United States Attorneys, at 202-514-4024; Rod Rosenstein, Criminal Division at 202-514-2601; or Joyce Branda, Commercial Litigation Section, Civil Division at 202-307-0231.

Attachments

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

August 25, 1994

TO: Holders of United States Attorneys' Manual Title 9 and/or Title 4

FROM: Janet Reno
Attorney General

United States Attorneys' Manual Staff
Executive Office for United States Attorneys

RE: Contacts by Department of Justice Attorneys with Represented Individuals and Organizations

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9 and Title 4.
3. Insert in front of affected section.

AFFECTS: USAM 9-13.200
USAM 4-8.1300

The following new section is added to Title 9, Chapter 13.

9-13.200 COMMUNICATIONS WITH REPRESENTED PERSONS

9-13.210 Generally

28 C.F.R. Part 77 generally governs communications with represented persons in law enforcement investigations and proceedings. This section sets forth several additional departmental policies and procedures with regard to such communications. Both this section and 28 C.F.R. Part 77 should be consulted by Department attorneys before engaging in any communications with represented individuals or represented organizations.

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect bona fide attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

The rules set forth in 28 C.F.R. Part 77 are intended, among other things, to clarify the circumstances under which government attorneys may communicate with represented persons. They are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his or her discretion, based on the specific circumstances of the individual case.

Furthermore, the application of this section, like the application of 28 C.F.R. Part 77, is limited to communications between Department of Justice attorneys and persons known to be represented by counsel during criminal investigations and proceedings or civil law enforcement investigations and proceedings. These provisions do not apply to Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers. Thus, state

bar rules and not these provisions will generally apply in civil suits when the government is a defendant or a claimant.

Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain. The primary points of contact at the Department of Justice on questions regarding 28 C.F.R. Part 77 and this section are the Assistant Attorneys General of the Criminal and Civil Divisions, or their designees.

9-13.220 Communications During Investigative Stage

Section 77.7 of Title 28, Code of Federal Regulations, generally permits communications with represented persons outside the presence of counsel that are intended to obtain factual information in the course of criminal or civil law enforcement investigations before the person is a defendant or is arrested in a federal criminal case, or is a defendant in a federal civil enforcement proceeding. Such communications must, however, have a valid investigative purpose and comply with the procedures and considerations set forth below.

During the investigative stage of a case, an attorney for the government may communicate, or cause another to communicate, with any represented person, including a "target" as defined in section 9-13.240, concerning the subject matter of the representation if the communication is made in the course of an undercover investigation of possible criminal or wrongful activity. Undercover communications during the investigative

stage must be conducted in accordance with 28 C.F.R. Part 77, and relevant policies and procedures of the Department of Justice, as well as the guidelines for undercover operations of the federal law enforcement agency conducting the investigation (e.g., the Attorney General's Guidelines on FBI Undercover Operations).

Overt communications during the investigative stage are subject to the procedures and considerations set forth in sections 9-13.230 - 9-13.233, 9-13.240 - 9-13.242, and 9-13.250 below.

9-13.230 Overt Communications with Represented Persons

During the investigative stage of a criminal or civil enforcement matter, an attorney for the government as a general rule should communicate overtly with represented persons outside the presence of counsel only after careful consideration of whether the communication would be handled more appropriately by others. Attorneys for the government may not, however, cause law enforcement agents to make communications that the attorney would be prohibited from making personally.

28 C.F.R. § 77.8 prohibits an attorney for the government from initiating or engaging in negotiations of a plea agreement, immunity agreement, settlement, sentence, penalty or other disposition of actual or potential civil or criminal charges with a represented person without the consent of counsel. However, the attorney for the government is not prohibited from responding to questions regarding the general nature of such agreements, potential charges, potential penalties, or other subjects related

to such agreements. In such situations, an attorney for the government should take care not to go beyond providing information on these and similar subjects, and generally should refer the represented person to his or her counsel for further discussion of these issues, as well as make clear that the attorney for the government will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges or claims or immunity without the presence or consent of counsel.

9-13.231 Overt Communications with Represented Persons -- Presence of Witness

An attorney for the government should not meet with a represented person without at least one witness present. To the extent feasible, a contemporaneous written memorandum should be made of all communications with the represented person.

9-13.232 Overt Communications with Represented Persons -- Restrictions

When an attorney for the government communicates, or causes a law enforcement agent or other agent to communicate, with a represented person without the consent of counsel, the restrictions set forth in 28 C.F.R. §§ 77.8 and 77.9 must be observed.

9-13.233 Overt Communications - Assurances Not to Contact Client

During the investigative stage, and absent compelling law enforcement reasons, an attorney for the government should not deliberately initiate an overt communication with a represented

person outside the presence of counsel if the attorney for the government has provided explicit assurances to counsel for the represented person that no such communication will be attempted and no intervening change in circumstances justifying such communications has arisen.

9-13.240 Overt Communications with Represented Targets

Except as provided in section 9-13.241 or as otherwise authorized by law, an attorney for the government should not overtly communicate, or cause another to communicate overtly, with a represented person who the attorney for the government knows is a target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such person. A "target" is a person as to whom the attorney for the government: (a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding. An officer or employee of an organization that is a target is not to be considered a target automatically even if such officer's or employee's conduct contributed to the commission of the crime or wrongful conduct by the target organization; likewise, an organization that employs, or employed, an officer or employee who is a target is not necessarily a target itself.

9-13.241 Overt Communications with Represented Targets -- Permissible Circumstances

An attorney for the government may communicate overtly, or cause another to communicate overtly, with a represented person who is a target of a criminal or civil law enforcement investigation concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) Determination if Representation Exists. The communication is to determine if the target is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) Discovery or Judicial Administrative Process. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.

(c) Initiation of Communication by Represented Person. The represented person initiates the communication directly with the attorney for the government or through an intermediary and, prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the represented person's right to

speak through his or her attorney and/or to have the attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(d) Waivers at the Time of Arrest. The communication is made at the time of the arrest of the represented person, and he or she is advised of his or her rights under Miranda v. Arizona, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) Investigation of Additional, Different, or Ongoing Crimes or Wrongful Conduct. The communication is made in the course of an investigation of additional, different or ongoing criminal or wrongful conduct. See 28 C.F.R. § 77.6(e).

(f) Threat to Safety or Life. The attorney for the government believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of harm; and the attorney for the government believes that the communication is reasonably necessary to protect against such risk.

(g) Effective Performance of Law Enforcement Functions. The Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney: (i) determines that exceptional circumstances exist such that, after giving due regard to the importance -- as reflected in 28 C.F.R. Part 77 and this section -- of avoiding any undue interference with the attorney-client relationship, the

direct communication with a represented party is necessary for effective law enforcement; and (ii) authorizes the communication. Communications with represented parties pursuant to this exception shall be limited in scope consistent with the exceptional circumstances of the case and the need for effective law enforcement.

9-13.242 Overt Communications with Represented Targets -- Organizations and Employees

Overt communication with current high-level employees of represented organizations should be made in accordance with the procedures and considerations set forth in section 9-13.241 above, in the following circumstances:

(a) the current high-level employee is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter of the communication; and

(b) the organization is a target.

Whether a person is to be considered a high-level employee "known by the government to be participating as a decision maker in the determination of the organization's legal position" is a fact-specific, case-by-case question.

9-13.250 Overt Communications During Investigative Stage -- Office Approval Procedure

Before communicating, or causing another to communicate, overtly with a target the attorney for the government knows is

represented by counsel regarding the subject matter of the communication, the attorney for the government should write a memorandum describing the facts of the case and the nature of the intended communication. The memorandum should be sent to and approved by the appropriate supervisor before the communication occurs. In United States Attorney's Offices, the memorandum should be reviewed and approved by the United States Attorney. If the circumstances of the communication are such that prior approval is not feasible, the attorney for the government should write a memorandum as soon after the communication as practicable and provide a copy of the memorandum to the appropriate supervisor. This memorandum should also set forth why it was not feasible to obtain prior approval. The provisions of this section do not apply if the communication with the represented target is made at the time of arrest pursuant to section 9-13.241(d).

9-13.260 Enforcement of the Policies

Appropriate administrative action may be initiated by Department officials against government attorneys who violate the policies regarding communication with represented persons.

* * * * *

The following new section is added to Title 4, Chapter 8.

4-8.1300 COMMUNICATIONS WITH REPRESENTED PERSONS

Communications with represented persons in civil law enforcement investigations and proceedings are governed generally by the rules set forth in 28 C.F.R. Part 77 and by USAM 9-13.200 et seq.

U.S. Department of Justice
Office of Public Affairs

BACKGROUND SHEET ON CONTACTS WITH REPRESENTED PERSONS

All of the states have adopted some form of the long-standing professional rule (now ABA Model Rule 4.2) that prohibits lawyers from communicating with a person who has a lawyer without the knowledge and consent of the lawyer who represents him in the matter. The requirement is enforced by state disciplinary proceedings.

But what happens when a Justice Department prosecutor or investigator who has a law license is approached by someone who doesn't want his lawyer to know about the conversation? Let's say, a low-level participant in a criminal enterprise whose lawyer is paid for by superiors to whom the lawyer owes his true loyalty. Or the employee of a corporation whose general counsel claims to represent all of its workers, although his real purpose is to keep them in line? Should the Justice Department lawyer risk losing his license by secretly interviewing such nominally "represented" persons?

What about undercover operations, run by prosecutors, into whose ambit persons come who have a lawyer advising them in such matters? Would the retention of counsel effectively immunize individuals from undercover operations run by government lawyers? When there is evidence that an individual and his lawyer are obstructing justice, could the person be talked to without his co-conspirator's knowledge and consent?

So long as the investigation of crimes was treated as the nearly exclusive province of police, the traditional ethical rules forbidding lawyers from directly contacting represented persons did not come into conflict with legitimate law enforcement activities. However, in recent years, federal prosecutors have been encouraged -- and in some instances mandated -- to play a larger role in preindictment, prearrest investigations. This hands-on role has been regarded by most as beneficial to the rights of potential defendants and helpful in assuring that investigations by the police and other law enforcement agents comply with high legal and ethical standards.

That is why Attorney General Richard Thornburgh in 1989 sought to place Justice Department lawyers beyond the reach of the ABA Rule. Three years later, Attorney General William Barr proposed regulations to do the same thing. Since then, Attorney General Janet Reno created a group of Justice Department lawyers and U.S. Attorneys who met last year in a series of meetings with representatives of the ABA, the National Association of Criminal Defense Lawyers, state and federal judges, experts on legal ethics, scholars, bar counsel and other interested parties. The group produced a draft regulation which was published for notice and comment in March 1994, and issued in final form today.

The regulation generally permits a Department attorney to contact a represented individual or organization who has not yet been named as a defendant in a criminal or civil law enforcement proceeding or arrested.

However, even in that situation, a represented person may not be contacted without the consent of his counsel in order to negotiate plea, immunity or settlement agreements or other legal arrangements in which a person would normally want the advice of his lawyer, or to inquire about lawful defense strategy, or to disparage counsel for the represented person.

Once a person or organization has been named as a civil or criminal defendant, or arrested, contact is generally prohibited without the consent of counsel, except in limited circumstances, such as when someone's safety or life is at risk, or the defendant initiates the contact and the government attorney obtains a determination from a district judge or magistrate that there has been a knowing waiver.

A blanket claim by an attorney that he or she represents all of a large number of employees of an organization does not prove that all of the employees are individually represented. A contact with a current employee is treated as a communication with a represented organization only if the person is a high-level employee whom the government knows to be participating as a decision-maker in the matter at issue.

The regulation gives the Attorney General exclusive enforcement authority over alleged infractions, except when she finds that there has been a willful violation of the regulation. In such instances, the appropriate state disciplinary authority may apply sanctions. All alleged violations are to be investigated exclusively by the Justice Department's Office of Professional Responsibility which will consider complaints from state or federal judges or Bar ethics committees or anyone else.

The regulation recognizes that state courts and disciplinary bodies continue to play the primary role in regulating the conduct of attorneys, including those who work for the federal government. It is not designed to diminish the ethical responsibilities of government attorneys. Rather, it is intended to clarify those duties by eliminating the uncertainty and confusion arising from varying interpretations of state rules by different state courts, and to permit the federal government to continue to conduct legitimate criminal and civil investigations without undue and unintended constraints.

8/4/94

Carl Stern
(202) 616-2777

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association

Division No. 94-1

Order Appointing Independent Counsel

Before: SENTELLE, *Presiding*, and BUTZNER and SNEED, *Senior Circuit Judges*.

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC, 20005, be and he is hereby appointed Independent Counsel with full power, independent authority and jurisdiction to investigate to the

EXHIBIT C

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG 05 1994

RON GARVIN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appointing Independent Counsels

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maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any

federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the

Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the incumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam
For the Court:

Ron Garvin, Clerk

EXHIBIT
D

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG 09 1994

RON GARVIN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, as Amended

In re: Alphonso Michael (Mike) Espy,
Secretary of Agriculture

Order Authorizing
Attorney General to
Disclose Application for
Appointment of
Independent Counsel

Before: Sentelle, *Presiding*, Butzner and Sneed, *Senior Circuit Judges*

ORDER

Upon consideration of the request of the Attorney General pursuant to 28 U.S.C. § 592(e) for authorization to disclose the Application for the appointment of an independent counsel in this matter, which concerns allegations that have been widely reported by the news media, it is hereby

ORDERED, in the public interest that leave is granted to the Attorney General pursuant to 28 U.S.C. § 592(e) to publicly disclose the Application.

Per Curiam
For the Court:
Ron Garvin
Ron Garvin
Clerk

EXHIBIT D

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG 09 1994

RON GARVIN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

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Per Curiam
For the Court:
Ron Garvin
Ron Garvin
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

In re ALPHONSO MICHAEL (MIKE) ESPY) No. PN-94-2

APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(c)(1) FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL

In accordance with the Independent Counsel Reauthorization Act of 1994 ("the Act"), I hereby apply for the appointment of an Independent Counsel to investigate whether any violations of federal criminal law were committed by Secretary of Agriculture Alphonso Michael (Mike) Espy, and to determine whether prosecution is warranted.

Background. On March 17, 1994, there was a press report that Tyson Foods, Inc., a major poultry processing corporation headquartered in Arkansas, was receiving lenient treatment from the Department of Agriculture on a number of pending regulatory issues. The article also described a number of alleged gratuities received by Secretary Espy. Based on the article, the Department of Agriculture Office of Inspector General conducted an inquiry into the alleged gratuities, and subsequently, on April 19, 1994, referred to the Department of Justice allegations that Secretary Espy may have violated 21 U.S.C. § 622, the anti-gratuity provision of the Meat Inspection Act, by accepting gifts from Tyson Foods.

At the time of the Department's receipt of these allegations, the Independent Counsel Act had not yet been reauthorized, following its lapse in December 1992. The

Department's Public Integrity Section investigated the allegations. I have reviewed the investigative findings in light of the strictures and procedures of the Act, as signed into law on June 30, 1994, and I conclude, within the meaning of the Act, that "there are reasonable grounds to believe that further investigation is warranted" of allegations that Secretary Espy violated a federal criminal law other than a Class B or C misdemeanor or an infraction.[1] 28 U.S.C. § 592(c)(1)(A).

Gifts Accepted by Secretary Espy. Investigation developed evidence that Secretary Espy accepted gifts from Tyson Foods in the course of two separate trips, one to Arkansas in May 1993 and one to Texas in January 1994. The gifts fall into the categories of entertainment, transportation, lodging and meals. In total, the gifts amount to at least several hundred dollars in value.

In addition to the alleged gifts from Tyson Foods, the Department's investigation also included preliminary reviews of other instances in which Secretary Espy allegedly received gifts from organizations and individuals with business pending before the Department of Agriculture.

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[1] The Act permits the Department to take up to 30 days before commencing a preliminary investigation, 28 U.S.C. § 591(d)(2), and to conduct a preliminary investigation for up to 90 additional days before determining whether the appointment of an Independent Counsel is required, id. § 592(a)(1). However, the Act does not require the Department to wait until the end of the 90-day preliminary investigation period before seeking the appointment of an Independent Counsel. In this case, based upon the current status of the Department's investigation, the Department has concluded that the matter requires "further investigation," within the meaning of the Act, by an Independent Counsel.

Applicable Statutes. The facts established by the Department's investigation represent potential violations by Secretary Espy of 21 U.S.C. § 622 and 18 U.S.C. § 201(c).

Title 21, United States Code, Section 622 is a strict anti-gratuity statute which prohibits any Department of Agriculture employee or officer with responsibilities under the Meat Inspection Act from accepting any gift from any person engaged in commerce, without regard to the intent of the donor or the donee. Subsequent judicial interpretation of this law, and a Memorandum of Understanding reached between the Department of Justice and the Department of Agriculture in July 1976, have limited somewhat the broad sweep of the law. It is now clear that a gift does not violate the statute if it is motivated by a personal or family relationship, or if it is trivial in value, such as soft drinks, coffee, pencils and coffee cups. However, the acceptance of non-trivial gifts of entertainment, transportation, lodging and meals by a Department of Agriculture official who has responsibilities under the Meat Inspection Act, from an entity that is subject to regulation by the Department of Agriculture, falls within the purview of the statute.

The other statute at issue is Title 18, United States Code, Section 201(c), the general gratuity statute. Section 201(c) requires proof that a gift was given for or because of official acts. No evidence has been developed during the investigation suggesting that Secretary Espy accepted the gifts as a reward for, or in expectation of, his performance of official acts.

However, under the Independent Counsel Act, the Department of Justice may not decline to seek the appointment of an independent counsel on the ground of a lack of evidence of the requisite state of mind "unless there is clear and convincing evidence that the person lacked such state of mind." 28 U.S.C. § 592(a)(2)(B)(ii).

Strictures of the Act. In order to ensure that prosecutive decisions are made without any possible appearance of conflict of interest, the Act places significant constraints on the Department's ability to exercise its customary prosecutorial discretion when investigating a person under the Act. The Department must apply for the appointment of an Independent Counsel whenever information in the Department's possession presents a potential violation of federal criminal law other than a Class B or Class C misdemeanor or an infraction, and "there are reasonable grounds to believe that further investigation is warranted." 28 U.S.C. § 592(c). The Act removes from the Department the power to use traditional investigative tools such as the grand jury to further develop the facts. See 28 U.S.C. § 592(a)(2)(A). It should be left to the Independent Counsel to exercise prosecutorial discretion and to determine whether additional investigation and/or prosecution is warranted in this matter.

Attorney General's Finding. In light of the strictures and procedures of the Act, I hereby apply for the appointment of an Independent Counsel because I conclude, under the Act, that

"there are reasonable grounds to believe that further investigation is warranted" of allegations that Secretary Espy violated a federal criminal law other than a Class B or C misdemeanor or an infraction. 28 U.S.C. § 592(c)(1)(A).

The Department of Justice is in possession of investigative materials and relevant documentation which it will make available to the Independent Counsel.

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593 (b)(3), I recommend and request that the Special Division of the Court grant the Independent Counsel jurisdiction to investigate Secretary Espy's possible violation of federal criminal laws such as 21 U.S.C. § 622 and 18 U.S.C. § 201, by accepting gifts from organizations or individuals regulated by the Department of Agriculture, and to determine whether prosecution is warranted. The Independent Counsel should be given all the power, authority and obligations outlined in 28 U.S.C. § 594. In this connection, I have appended hereto a recommended statement of the scope of prosecutorial jurisdiction for the Independent Counsel.

Respectfully submitted,

Janet Reno
Attorney General of the United States

DATED: Aug. 8, 1994

RECOMMENDED STATEMENT OF JURISDICTION OF INDEPENDENT COUNSEL

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Alphonso Michael (Mike) Espy, Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 18 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

EXHIBIT E

Appendix 1

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Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT F

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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VOLUME 6 • NUMBER 16 • AUGUST 4, 1994

General Application Principles

RELEVANT CONDUCT—DOUBLE JEOPARDY

Fifth Circuit holds defendant may be tried for offense that was used as relevant conduct in prior sentencing. Defendant was part of a conspiracy that attempted to import 591 kilograms of cocaine in Aug. 1990. He was not arrested then, but was arrested later for the conspiracy's Feb. 1991 possession of 375 pounds of marijuana with intent to distribute. When defendant was sentenced for the marijuana offense the cocaine was included as relevant conduct, increasing his guideline range from 63–78 months to 292–365 months, but he was sentenced to 144 months after a § 5K1.1 departure. Defendant was then indicted for the cocaine offense, but the district court dismissed the indictment, holding that punishment for that offense would violate the multiple punishments prong of the Double Jeopardy Clause of the Fifth Amendment. *See also U.S. v. Koonce*, 945 F.2d 1145, 1149–54 (10th Cir. 1991) (double jeopardy violated by punishing same conduct that was previously included as relevant conduct); *U.S. v. McCormick*, 992 F.2d 437, 439–41 (2d Cir. 1993) (following *Koonce*, affirmed dismissal of charges).

The appellate court remanded, finding that Congress had authorized multiple punishments through the Guidelines. Section 5G1.3(b) (added after the *Koonce* decision), requires concurrent sentences when a prior offense has "been fully taken into account in the determination of the offense level for the instant offense," and thus "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him again for all relevant conduct. . . . [W]e are satisfied that § 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings—and that Congress accomplishes this intent—not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction in a single proceeding. Section 5G1.3(b), therefore, accomplishes in successive proceedings what grouping of counts pursuant to § 3D1.2 accomplishes in a single proceeding." The court held there is "no basis for distinguishing the situation described by § 5G1.3(b)"—in which an earlier offense is fully taken into account in sentencing for the instant offense—from the reverse situation presented here.

The court also rejected defendant's claim that, because the § 5K1.1 motion from the first case will not apply to the second, it is unfair to allow the government to seek what will actually be a longer (although concurrent) sentence than if both offenses had been tried together and sentenced under § 3D1.2(d). *See* § 1B1.1(d) & (i) (indicating § 5K departures are considered after offenses have been grouped). If defendant is convicted, the court noted, "the base offense level will necessarily be the same as that for the marijuana offense because relevant conduct is the same for both the marijuana and cocaine offenses," and he may be subject to a concurrent sentence of 292–365 months, depending on adjustments.

U.S. v. Wittie, 25 F.3d 250 (5th Cir. 1994). *See also U.S. v. Cruce*, 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: not a double jeopardy violation to indict defendants in Texas on bank fraud conspiracy charges that include loan transaction that was used as relevant conduct when defendants were sentenced in Kansas on other bank fraud charges; Kansas and Texas conspiracies are separate offenses, and "we hold that Congress has not (in the Sentencing Guidelines) evinced the clear intent necessary to preclude punishment for a separate and distinct offense, even though the underlying conduct has been used previously to enhance another sentence. . . . [I]t chose only to *limit* punishments in the second proceeding [through § 5G1.3(b)]—not to preclude that proceeding and the consequent punishment altogether").
Outline at I.A.4.

Offense Conduct

Loss

U.S. v. Goodchild, 25 F.3d 55 (1st Cir. 1994) (Affirmed: Inclusion of late fees and finance charges in credit card fraud loss is not prohibited by § 2F1.1, comment. (n.7). "We hold that in a case involving the fraudulent use of unauthorized credit cards, finance charges and late fees do not come within the meaning of the Commentary phrase 'interest the victim could have earned on such funds had the offense not occurred.' This phrase, we think, refers to opportunity cost interest. In a credit card case there is an agreement between the company and the cardholder to the effect that when payments are made late, or not at all, the cardholder is subject to late fees and finance charges. This is part of the price of using credit cards. The credit card company has a right to expect that such fees and charges will be paid. This is not 'interest that the victim could have earned on such funds had the offense not occurred.'"). *See also U.S. v. Henderson*, 19 F.3d 917, 928–29 (5th Cir. 1994) (Interest on fraudulently obtained loans was properly included: "Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction." Note 7 "sweeps too broadly and, if applied in this case would be inconsistent with the purpose of § 2F1.1.").
Outline at II.D.

ESTIMATING DRUG QUANTITY

U.S. v. Hendrickson, No. 92-1386 (2d Cir. June 13, 1994) (Sotomayor, Dist. J.) (Remanded: Where defendant produced only 77 grams of heroin over a two-year period, his initial expression of intent to import 50–60 kilograms of heroin was not sufficient to show he intended and was able to produce that amount. Under former § 2D1.4, comment. (n.1), "where the

Government asserts that a defendant negotiated to produce a contested amount, we hold that the Government bears the burden of proving the defendant's intent to produce such an amount, a task necessarily informed, although not determined, by the defendant's ability to produce the amount alleged to have been agreed upon. . . . [W]e do not, at least in a conspiracy case, require sentencing courts to exclude from consideration only those drug amounts which the defendant neither intended to produce nor was reasonably capable of producing. Instead, we shift the sentencing guideline § 2D1.4 analysis back to its proper focus—the 'object of the conspiracy.' In other words, courts must consider the amount of drugs the conspirators agreed to produce. . . . [D]efendant's ability, which includes that of his coconspirators, to produce specific amounts of narcotics, is highly relevant in determining whether the conspirators agreed to produce these amounts." The court added that this analysis would apply to § 2D1.1, comment. (n.12).) (Winter, J., dissented.).
Outline at II.B.4.a.

U.S. v. Pion, 25 F.3d 18 (1st Cir. 1994) (Affirmed: Despite district court's finding that defendant was not "reasonably capable of producing" additional three kilograms he negotiated, that amount was properly included as relevant conduct under § 2D1.1, comment. (n.12), because "he was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective. . . . [N]either conjunctive clause in note 12 can be ignored." Also, defendant's "inability to produce the additional three kilograms was no impediment to its imposition of the ten-year minimum sentence mandated by statute. . . . Absent a statutory alternative, . . . we think application note 12 provides the threshold drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. § 841(b)(1)(A)(ii)."). *But cf. U.S. v. Legarda*, 17 F.3d 496, 500 (1st Cir. 1994) ("Our case law has followed the language of this Commentary Note in a rather faithful fashion, requiring a showing of both intent and ability to deliver in order to allow the inclusion of negotiated amounts to be delivered at a future time.").
Outline at II.B.4.a.

Determining the Sentence

Restitution

U.S. v. Gibbens, 25 F.3d 28 (1st Cir. 1994) (Remanded: It was error to order restitution to cover loss to government involved in defendant's illegal purchase of food stamps from undercover agent at one quarter their face value. Although the government can be a "victim" under the Victim and Witness Protection Act, its application in this situation is unclear and "nothing in the legislative history of either the organic Act or it amendments indicates that losses incurred in government sting operations should be subject to recoupment under the VWPA." Thus the appellate court invoked the rule of lenity to hold that "a government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA. . . . [However,] other methods of recovery remain open to the government, notably fines or voluntary agreements for restitution incident to plea bargains.").
See *Outline* at V.D.2 and summary of *Meacham* in 6 *GSU* #15.

Adjustments

Obstruction—Reckless Endangerment

U.S. v. Young, No. 93-50186 (9th Cir. June 7, 1994) (Hug, J.) (Remanded: Reckless endangerment enhancements for defendants who did not drive during high-speed chase were improper without specific findings that, pursuant to § 3C1.2, comment. (n.5), defendants "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the driver's reckless conduct. "[T]he government must establish that the defendants did more than just willfully participate in the getaway chase. It must prove that each defendant was responsible for or brought about the driver's conduct in some way. Such conduct may be inferred from the circumstances of the getaway, . . . and the enhancement may be based on conduct occurring before, during, or after the high-speed chase. . . . Thus, enhancement under section 3C1.2 requires the district court to engage in a fact-specific inquiry.").
Outline at III.C.3.

Role in the Offense

U.S. v. Smaw, 22 F.3d 330 (D.C. Cir. 1994) (Remanded: A "GS-7 time and attendance clerk" did not occupy a position of trust within the meaning of § 3B1.3's amended commentary. Although defendant clearly abused her position, it was not "a position of public or private trust characterized by professional or managerial discretion" and she was not "subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature," as is now required under Application Note 1. Although defendant was sentenced before Nov. 1, 1993, the amended Note should be applied because it is clarifying, rather than substantive.).
Outline at III.B.8.a.

Criminal History

Consolidated or Related Cases

U.S. v. Hallman, 23 F.3d 821 (3d Cir. 1994) (Remanded: Defendant's prior sentence for forgery should not have been counted in the criminal history score for the instant conviction for possession of stolen mail because the two offenses were related as "part of a single common scheme or plan," § 4A1.2(a)(2), comment. (n.3). "[A]ll of the stolen mail . . . was in the form of checks or credit cards and [the check in the prior forgery offense] was from a sequence of blank checks found within the stolen mail. Therefore, it is reasonable to infer that the mail was stolen to find checks or other instruments that could be converted to use through forgery." Noting that "intent of the defendant is a crucial part of the analysis," the court distinguished *U.S. v. Ali*, 951 F.2d 827, 828 (7th Cir. 1992), because there the defendant had no prior intent to forge a money order he obtained in the robbery of a supermarket.).
Outline at IV.A.1.b.

Sentencing Procedure

Unlawfully Seized Evidence

U.S. v. Kim, 25 F.3d 1426 (9th Cir. 1994) (Affirmed: Drugs seized during an illegal search may be included as relevant conduct where the search was not carried out for the purpose of increasing defendant's offense level. The appellate court left open the question whether suppression "would be necessary and proper" if evidence was illegally obtained for the purpose of increasing a defendant's guideline sentence.).
Outline at IX.D.4.

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Departures

CRIMINAL HISTORY

U.S. v. Hines, No. 92-30441 (9th Cir. June 20, 1994) (Trott, J.) (Remanded: It was proper to depart upward under §§ 5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state"—evidenced by serious and repeated threats of future violence—and the resulting "significant likelihood that he will commit additional serious crimes." The case is distinguishable from *U.S. v. Doering*, 909 F.2d 392 (9th Cir. 1990), because the court did not base the departure on defendant's need for psychiatric treatment but on the "extraordinary danger to the community" he represented. And, because it was an extraordinary circumstance under § 5K2.0, the prohibition in § 5H1.3 did not preclude departure. However, although the district court may depart by offense levels since the departure was based on both §§ 5K2.0 and 4A1.3, it must explain why it chose three levels instead of one or two.).
Outline generally at VI.A.3.a and VI.B.1.i.

MITIGATING CIRCUMSTANCES

U.S. v. Walker, No. 93-50621 (9th Cir. June 21, 1994) (Farris, J.) (Affirmed: Agreeing with reasoning of *U.S. v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (Guidelines do not authorize downward departure on basis of suicidal tendencies), and holding that "post-arrest emotional trauma, or, what [defendant] refers to as 'self-inflicted punishment,' does not constitute a valid basis for departure.").
Outline at VI.C.1.b and i.

U.S. v. Amor, 24 F.3d 432 (2d Cir. 1994) (Affirmed: Downward departure for duress, § 5K2.12, was permissible for defendant convicted of three counts related to an illegal weapon and one count of retaliating against a witness. Defendant obtained the weapon after damage to his car and threats related to a labor dispute. The retaliation count arose from his repeated threats against a coworker who had informed police that defendant had the illegal weapon. The retaliation count had the highest offense level and thus controlled the guideline range under § 3D1.2's grouping rules. The government argued "(a) that 'offense' as used in § 5K2.12 should be interpreted as referring only to the offense that controlled a defendant's offense level for his entire group of offenses, (b) that Amor's controlling offense was the retaliation offense, and (c) that such duress as existed related only to the firearm offenses, not to the retaliation offense," thus making departure improper. The appellate court held that this was "too narrow a view of what it means for an offense to be committed 'because of' duress for the purposes of § 5K2.12. . . . The evidence was sufficient to support the finding that Amor had received a clear threat of physical injury and substantial property damage from the unlawful actions of unidentified parties. . . . [T]he relationship between the gun acquisition and the threats was close enough that it was fair for the court to conclude that there was a causal nexus between the original duress and the eventual threats of retaliation.").
Outline at VI.C.1.g.

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Valentine, 21 F.3d 395 (11th Cir. 1994) (Remanded: Basing upward departure on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns v. U.S.*, 111 S.Ct. 2182 (1991). "Contemporaneous—as opposed to advance—notice of a departure, at least in this case, is 'more a formality than a substantive benefit,' . . . and therefore is inherently unreasonable." Notice is required "to warn the defendant to marshal facts by which he may contest the evidence that ostensibly supports the proposed upward departure." Here, for example, the departure was "premised on several unsupported factual assumptions" that defendant was unaware of until the sentencing hearing. "If Valentine had been given notice that the district court was contemplating a departure on these 'facts,' he would have had notice and opportunity to argue against the court's mistaken factual conclusions; without such notice, this opportunity was lost.").
Outline at VI.G.

Offense Conduct

DRUG QUANTITY

U.S. v. de Velasquez, No. 93-1674 (2d Cir. June 22, 1994) (McLaughlin, J.) (Affirmed: For defendant who imported heroin by carrying it internally, it was proper to also include heroin hidden in her shoes that she claimed she did not know was there. "[I]n a possession case the sentence should be based on the total amount of drugs in the defendant's possession, without regard to foreseeability. . . . [A] defendant who knows she is carrying some quantity of illegal drugs should be sentenced for the full amount on her person."). See also *U.S. v. Imariagbe*, 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; and, while "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," that is not the case here); U.S.S.G. § 1B1.3, comment. (n.2) ("defendant is accountable for all quantities of contraband with which he was directly involved," and reasonable foreseeability "does not apply to conduct that the defendant personally undertakes").
Outline at II.A.1.

CALCULATING WEIGHT OF DRUGS—MARIJUANA

U.S. v. Stevens, 25 F.3d 318 (6th Cir. 1994) (Remanded: It was error to calculate marijuana distributor's offense level by using the number of plants his supplier grew rather than the weight of the marijuana distributed. The "equivalency provision" in § 2D1.1(c) at n.*, which treats each plant as the equivalent of one kilogram of marijuana when more than

one hundred plants are involved, should be applied "only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute 'relevant conduct' that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived.").
Outline at II.B.2.

More Than Minimal Planning

U.S. v. Kim, 23 F.3d 513 (D.C. Cir. 1994) (Affirmed: Section 2B1.1(b)(5) enhancement could not be applied to defendant's two acts of obtaining blank power of attorney forms—"'repeated acts' in the description of more than minimal planning contemplates at least three acts." *Accord U.S. v. Bridges*, – F.3d – (10th Cir. Mar. 17, 1994) ("repeated" means "more than two") [6 *GSU* #16]; *U.S. v. Maciaga*, 965 F.2d 404, 407 (7th Cir. 1992) (dicta indicating same). However, the enhancement was proper here because defendant twice obtained falsely notarized documentation, which may be considered as "significant affirmative steps . . . taken to conceal" his false bank loan applications.).
Outline at II.E.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Quinones, 26 F.3d 213 (1st Cir. 1994) (Remanded: "[W]e hold that a sentencing court possesses the power to impose either concurrent or consecutive sentences in a multiple-count case. We also hold, however, that . . . a sentencing court's decision to abjure the standard concurrent sentence paradigm should be classified as, and must therefore meet the requirements of, a departure. It follows that a district court only possesses the power to deviate from the concurrent sentencing regime prescribed by section 5G1.2 if, and to the extent that, circumstances exist that warrant a departure.").
Outline at V.A.1.

Fines

U.S. v. Gomez, 24 F.3d 924 (7th Cir. 1994) (Affirmed: Although defendants "appeared to be penniless at the time of sentencing," fines could be imposed based on defendants' likely future wages in prison. Bureau of Prisons regulations "permit prisoners to keep half of their wages no matter what their obligations; the other half, however, is available for alimony, civil debts—and fines. 28 C.F.R. sec. 545.11(a)(3). Neither the text of the regulations nor any of defendants' arguments suggests that funds available to pay civil debts should be unavailable to pay criminal debts."). *Accord U.S. v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994) (indigent defendant "can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program").
Outline at V.E.1.

Adjustments

Obstruction of Justice

U.S. v. Johns, No. 92-1775 (2d Cir. June 13, 1994) (Jacobs, J.) (Remanded: During his presentence interview defendant denied involvement in any drug transactions other than those charged in his indictment. The district court held the denials were false and imposed a § 3C1.1 enhancement. "The government contends that these are not simply denials of guilt, but affirmative statements of materially false information. We conclude, however, that they do constitute 'denials of guilt' and therefore may not be deemed obstruction of justice . . . . There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. It is indisputable that [Application] Note 1 limits retribution for denials of guilt that are false; therefore, there can be no moral dimension to the matter of how that false denial may be framed. . . . Within the context of § 3C1.1, every denial of guilt will be materially false. Note 1 removes this sort of false statement from the ambit of the Guidelines provision. . . . The language of Note 1 is clear—absent perjury, a defendant may not suffer an increase in his sentence solely for refusing to implicate himself in illegal activity, irrespective of whether that refusal takes the form of silence or some affirmative statement denying his guilt.") (Altimari, J., dissented).
Outline at III.C.2.c and 5.

U.S. v. Vegaz, No. 93-1375 (2d Cir. June 13, 1994) (Leval, J.) (Affirmed: Where jury apparently rejected defendant's "innocent explanation" by finding him guilty, the government argued that *U.S. v. Dunnigan*, 113 S.Ct. 1111 (1993), required the district court to make a finding as to whether defendant committed perjury and thereby merited a § 3C1.1 enhancement. The appellate court disagreed: "*Dunnigan* does not say that every time a defendant is found guilty despite his exculpatory testimony, the court must hold a hearing to determine whether or not the defendant committed perjury. On the contrary, that opinion clearly states that when the court wishes to impose the enhancement over the defendant's objection, the court 'must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.' . . . *Dunnigan* does not suggest that the court make findings to support its decision against the enhancement.").
Outline at III.C.2.a and 5.

U.S. v. Woods, 24 F.3d 514 (3d Cir. 1994) (Remanded: Because § 3C1.1 "applies only when the defendant has made efforts to obstruct the investigation, prosecution, or sentencing of the offense of conviction," it may not be given to defendant who lied to FBI and grand jury about whether two friends participated in robbery that he was not convicted of. There was evidence defendant participated in that robbery, but he was not indicted for it and pled guilty to two other robberies. Departure is not proper either, because the Sentencing Commission "appears to have considered false statements like those involved here, and elected not to punish them as part of the conviction for the instant offense." The court added: "The result we reach is regrettable . . . [b]ut we are bound by the language of § 3C1.1 and its application notes.").
Outline at III.C.4.

Role in the Offense

U.S. v. Okoli, 20 F.3d 615 (5th Cir. 1994) (Affirmed: Nov. 1993 amendment clarifies that defendant need not personally lead five or more participants to receive § 3B1.1(a) enhancement; leading at least one of the five is sufficient. *See* § 3B1.1, comment. (n.2) ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.").
Outline at III.B.2.c.

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