

**Civil Division**  
**United States Department of Justice**

**FY 2011 Performance Budget**  
**Congressional Submission**

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## Civil Division: Overview

**MISSION: The Civil Division represents the United States in any civil or criminal matter within its scope of responsibility – protecting the public fisc, ensuring that the Federal Government speaks with one voice in its view of the law, preserving the intent of Congress, and advancing the credibility of the Government before the courts.**

The Civil Division's role is two-fold in that it must represent some 200 Federal agencies and Congress while maintaining uniformity in Government policy. For any particular case, the Division must provide the best possible representation to the client agency involved. This responsibility must be balanced with the need to represent the Government as a whole and to ensure lasting precedents favorable to the United States.<sup>1</sup>

Generally, the Division's litigation falls into one of the following categories:

- **Cases that involve national policies:**
  - Numerous lawsuits challenge the constitutionality of the Foreign Intelligence Surveillance Act, which establishes procedures for requesting judicial authorization for surveillance and search of persons suspected of espionage.
- **Cases that are so massive and span so many years that they would overwhelm the resources and infrastructure of any individual U.S. Attorney's field office:**
  - The bailout of the savings and loan industry in the 1980s resulted in extensive litigation that continues to this day. The plaintiffs sought \$30 billion in breach of contract damages resulting from the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. At present, 110 of the 122 original cases have been resolved.
- **Cases filed in national or foreign courts:**
  - Nuclear utilities filed 72 claims against the Department of Energy (DOE) in the United States Court of Federal Claims alleging breach of contract for DOE's failure to begin accepting spent nuclear fuel in 1998.
- **Cases that cross multiple jurisdictions:**
  - Pharmaceutical and procurement fraud cases often involve overlapping claims, defendants, and witnesses. The Civil Division plays a critical role in ensuring that investigations and litigation are properly coordinated among Federal and state entities.

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<sup>1</sup> Electronic copies of the Department of Justice's Congressional Budget Justifications and Capital Asset Plan and Business Case exhibits can be viewed or downloaded from the Internet using the Internet address: <http://www.usdoj.gov/jmd/2011justification/>.

- **Cases to remove illegal aliens:**

- Every year, the Department of Homeland Security apprehends thousands of aliens deemed removable. Many of these aliens appeal their enforcement decisions through administrative mechanisms. They may further appeal adverse opinions in circuit courts of appeals. These appellate cases are handled by the Division.

In the course of the Civil Division's role in representing the Government, the Division must handle thousands of lawsuits that are filed against the United States each year. These suits are filed as a result of the Government's policies, laws, and involvement in commercial activities, domestic and foreign operations, and entitlement programs, as well as law enforcement initiatives, military actions, and counterterrorism efforts. The Division saves the U.S. treasury billions of dollars by defeating unmeritorious claims every year. It also brings suits on behalf of the United States, primarily to recoup money lost through fraud, loan defaults, and the abuse of Federal funds. Annually, hundreds of millions, and often billions, of dollars are returned to the treasury, Medicare, and other entitlement programs as a result of the Division's affirmative litigation efforts.

While the Civil Division is primarily devoted to the conduct of litigation, it also works to maintain coordination with the Department, the Judiciary, and the Division's client agencies. For example, the Division works with the courts to establish case management and scheduling orders for its largest cases. It also works with agency general counsels to avoid potential litigation and prevent unfavorable outcomes should cases proceed. A prime example is the time it has spent consulting with the Department of the Treasury concerning the legal issues related to the Troubled Asset Relief Program.

The Civil Division seeks to successfully resolve its cases in a timely manner, when possible. While much of the Division's workload involves cases resolved through trial, nearly half are resolved through settlements and voluntary dismissals. It also administers two streamlined compensation programs. The first is the Vaccine Injury Compensation Program, which relies upon Special Masters to resolve its cases. The second is the Radiation Exposure Compensation Program, which resolves its claims through administrative adjudications.

## **Full Program Costs**

Funds for the Legal Representation Decision Unit, the Civil Division's only decision unit, are devoted almost entirely to front-line litigation in observance of the management initiatives contained in the DOJ Strategic Plan (2007-2012). Of the Division's 1,475 authorized positions, the vast majority are assigned to the six litigating branches.

In FY 2009, \$455,300,000 was available to the Division, exclusive of the RECA Trust Fund (see Civil's RECA Trust Fund Budget). Fifty-nine percent of this funding came from the General Legal Activities appropriation, while forty-one percent was provided through DOJ allotments and reimbursements. The following table displays the Civil Division's funding sources, including appropriations and reimbursements.

<b>Civil Division Funding Sources (Dollars in Millions)</b>							
<b>Appropriations</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
<b>Legal Representation (GLA)</b>	167.5	174.4	174.9	192.2	208.3	250.1	270.4
Immigration & Katrina Emergency Supplemental	0	0	0	9.6	0	0	0
<b>Subtotal</b>	<b>167.5</b>	<b>174.4</b>	<b>174.9</b>	<b>201.8</b>	<b>208.3</b>	<b>250.1</b>	<b>270.4</b>
<b>Reimbursements:</b>							
FDIC - Winstar	32.3	38.5	30.2	18.3	17.5	11.4	4.3
Vaccine Compensation Program	4.0	4.0	6.3	6.3	6.3	6.8	7.8
Three Percent - Debt Collection	15.7	34.8	31.7	10.0	16.2	12.5	23.1
Health Care Fraud Abuse Control	14.4	14.5	15.5	15.3	15.9	15.9	16.1
HHS HCF Discretionary	0	0	0	0	0	0	8.2
Other Reimbursements	59.0	36.9	75.4	36.3	44.2	57.4	51.7
<b>Subtotal</b>	<b>125.4</b>	<b>128.7</b>	<b>159.1</b>	<b>86.2</b>	<b>100.1</b>	<b>104.0</b>	<b>111.2</b>
<b>DOJ Accounts:</b>							
Working Capital Fund	23.4	0	0	0	0	0	0
AFF & Super Surplus	0	0	0	.8	.8	.8	.8
Expert Witnesses (FEW)	38.0	46.6	45.1	49.1	54.0	53.2	52.7
Private Counsel (FEW)	7.2	9.0	12.3	15.3	13.0	11.0	12.3
Foreign Counsel	0	0	0	0	0	3.4	3.4
ALS No Year	0	2.5	3.3	15.6	7.0	2.1	4.3
VCR Carry Forward	2.0	0.2	0.2	0.2	0.2	0.2	0.2
<b>Subtotal</b>	<b>70.6</b>	<b>58.3</b>	<b>60.9</b>	<b>81.0</b>	<b>75.0</b>	<b>70.7</b>	<b>73.7</b>
<b>TOTAL - ALL SOURCES</b>	<b>363.5</b>	<b>361.4</b>	<b>394.9</b>	<b>369.0</b>	<b>383.4</b>	<b>424.8</b>	<b>455.3</b>

The FY 2010 appropriation provided 1,475 positions (1,059 attorneys), 1,350 FTE and \$287,758,000 for the Civil Division to meet its mission and performance goals. For FY 2011, the Division requests 1,500 positions (1,072 attorneys), 1,469 FTE, and \$334,944,000.

### **Issues, Strategies, and Outcomes**

With a workforce of approximately 990 attorneys, the Civil Division expects to handle a workload of 56,191 cases in FY 2011. However, this number belies the true extent of the workload, as the Division is also handling nearly 500,000 administrative claims filed with the Army Corps of Engineers seeking damages associated with Hurricane Katrina. In addition, this total does not include approximately 100,000 administrative claims filed with FEMA seeking damages related to formaldehyde exposure from trailers supplied in response to Hurricanes Katrina and Rita.<sup>2</sup>

<sup>2</sup> These administrative claims are not included in the Division's total numbers because they are outliers that would significantly skew the data.

For handling the largest cases and families of cases, the Civil Division uses extensive litigation support services. Its contractors enable the Division to maintain paralegal, information technology, and consulting services to maintain discovery documents, perform fact research, and prepare for trials. Most of this large-scale support occurs in document centers. For medium and small-sized cases, the Division has developed self-help programs which provide a wide range of products and services for attorneys. Litigation support at all levels is a vital tool for ensuring success in many of the most critical matters handled by the Division.

### **External Challenges:**

Because nearly 90 percent of the Civil Division's workload is defensive, it cannot control the number of cases filed, the timing of discovery, the size of evidentiary collections, the time span of litigation, or the scheduling of trials. The type, volume, and size of the cases are determined by many exogenous factors:

**Military Actions**

**Economic Conditions**

**Immigration Enforcement**

**Natural Disasters**

**Statutory Enactments**

**Whistleblower & Inspector General Referrals**

**Counterterrorism Measures**

**FTCA's Discretionary Function Exception**

**Contract Disputes**

**Federal Procurement Actions**

At any given time cases resulting from one of these factors could cause an influx in the Division's workload and significantly affect resource requirements. There are hundreds such cases pending. For example:

**Hurricane Katrina** – In addition to the 400 lawsuits already filed, nearly 500,000 claims have been received by the Army Corps of Engineers (the Corps) in response to the devastation that resulted from the flooding of the New Orleans metropolitan area in 2005. On November 18, 2009, the district court concluded in the lead case that negligence by the Corps led to the massive flooding that damaged much of the area. This adverse ruling for the Government could lead to the activation of the hundreds of thousands of other pending claims.

**Guantanamo Bay** – In June 2008, the Supreme Court ruled in *Boumediene v. Bush* that the review process under the Detainee Treatment Act of 2005 did not provide an adequate substitute for habeas corpus review. Currently, there are approximately 180 to 190 habeas corpus cases pending on behalf of the detainees still being held at Guantanamo Bay.

### **Internal Challenges:**

External challenges create the Division's greatest internal challenge: the unpredictable volume and nature of the cases assigned to the Division. Specific internal challenges include:

- Critical legal and institutional knowledge is lost every year when experienced attorneys leave the Civil Division.
- Limited space in the Main Justice Building has resulted in the need to disperse staff across seven buildings in Washington, D.C. creating coordination issues.

### Outcomes:

Despite these challenges, the Division has achieved remarkable success in recovering monies lost through fraud and in defending the public fisc.<sup>3</sup> The following are examples of achievements in affirmative and defensive litigation:

- **Eli Lilly** In January 2009, the Civil Division, working with the U.S. Attorney's Office in Philadelphia, prosecuted Eli Lilly and Co. Eli Lilly pled guilty to violating the Food, Drug, and Cosmetic Act for its illegal marketing of the anti-psychotic drug Zyprexa for uses that were not approved by the Food and Drug Administration. The global settlement totaled more than \$1.4 billion, which included a \$515,000,000 criminal fine. Eli Lilly will also pay \$100,000,000 in forfeiture, and up to \$800,000,000 in civil settlements.
- **Pfizer** In September 2009, Pfizer agreed to pay \$2.3 billion, the largest health care fraud settlement in the history of the Department of Justice, to resolve criminal and civil liability arising from illegal promotion of certain pharmaceutical products. The company will pay a criminal fine of \$1.195 billion and forfeit \$105,000,000 for misbranding a drug with the intent to defraud or mislead. In addition, Pfizer agreed to pay \$1 billion to resolve allegations that the company illegally promoted four drugs and caused false claims to be submitted to Government health care programs for uses not covered by these programs. The civil settlement also resolved allegations that Pfizer paid kickbacks to health care providers to induce them to prescribe its drugs.
- **Cobell** In December 2009, the Department of Justice and the Department of the Interior announced a settlement in the long-running *Cobell v. Salazar* class-action lawsuit. This suit was filed in 1996, on behalf of approximately 300,000 Native Americans alleging mismanagement of their Individual Trust Accounts. The settlement provides \$1.4 billion as compensation for the alleged accounting and asset mismanagement claims. This amount is a small fraction of the \$67 billion previously sought by plaintiffs. In addition, \$2 billion will be used to purchase very small, fractionated land interests held by individual Indians. Congress must pass legislation to implement the settlement agreement and the U.S District Court for the District of Columbia must also approve it.

### Environmental Accountability

The Civil Division has implemented many initiatives to improve its environmental accountability. The Division will develop and put in place an organizational environmental system by the end of FY 2011 in accordance with the schedule established by the DOJ. Some

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<sup>3</sup> See the Performance and Resource Tables on page 20 for more information and page 25 for additional accomplishments.

environmentally sound practices already utilized by the Division include providing a monthly transit subsidy to approximately 900 staff in all its locations to promote the use of public transportation, encouraging a paperless environment through e-filing, and utilizing the conference call on phones to reduce travel.

The Civil Division currently emphasizes environmental accountability through the purchase and use of recycled equipment and products wherever possible and by facilitating and encouraging recycling within its offices. The Civil Division has purchased only recycled telephone units for the past nine years (over 1,500 units), and worn out telephone sets are traded in for refurbishment. The Division's recycling program was expanded in each of its seven buildings by adding large capacity plastic recycling containers for newspaper, glass, plastic, and aluminum. All restrooms use 100 percent recycled products. JCONext training will also instruct employees how to configure printers for double-sided printing in order to further minimize paper waste. In addition, the Division is undertaking new initiatives, which include placing centralized receptacles in all locations to make it easier to recycle spent toner cartridges and establishing a "Green Team" at one of its largest offices.

The Division emphasizes energy efficient practices in several ways. At its 1100 L Street location, where the Division is the primary tenant, motion detector light controls have been installed in all restrooms and the parking garage. This program will be expanded to conference rooms, server rooms, and corridors. The Civil Division has also ceased the purchase of incandescent light bulbs and now only purchases compact florescent replacement light bulbs. It is spending \$40,000 over the next two years to re-lamp all of the office space at the L Street location with 25 watt "green lighting."

Additionally, the Division is exploring options for making all computer systems more energy efficient and is almost in full compliance with the Department's Power Management Policy Recommendations and Executive Order 13423. More than half of the workstations have integrated speakers which provide automatic energy savings. The Division recently purchased next generation hardware for its email servers that utilize solid state technology which consumes one-tenth the amount of electricity that traditional hard drives require and create a fraction of the heat. Furthermore, the Division has invested in next generation virtualization technology that has reduced the number of physical servers required to run all of its applications. All Division servers are now energy-star compliant.



## Summary of Program Changes

<b>Proposed FY 2011 Program Changes GLA Appropriation</b>				
<b>Item Name</b>	<b>Pos.</b>	<b>FTE</b>	<b>Dollars (\$000)</b>	<b>Page</b>
Spent Nuclear Fuel Litigation	13	7	\$11,391	29
Response to Financial Crisis	0	0	\$3,500	35
E-Discovery	12	12	\$2,000	41
Adjust Travel Expenditures	0	0	(\$341)	43
<b>Total GLA Program Increases</b>	<b>25</b>	<b>19</b>	<b>\$16,550</b>	

### Spent Nuclear Fuel Litigation

- Nuclear power utilities filed 72 cases and seek in excess of \$50 billion in damages for the Government’s failure to begin accepting the utilities’ spent nuclear fuel (SNF) by January 1998, as mandated by the Nuclear Waste Policy Act of 1982. Currently, 13 trials are expected to be held in FY 2011. These cases are complex in terms of scope and financial stakes.
- Without a Federal repository nuclear utilities may seek even further damages for a full breach of contract. This type of lawsuit will vastly increase the litigation costs and the ultimate exposure of the U.S. treasury.<sup>4</sup>
- If the Government is to avoid excessive monetary losses, it is imperative that the SNF attorney team be staffed appropriately and have access to sufficient litigation support services. The Division requests 13 positions (10 attorneys), 7 FTE, and \$11,391,000, including \$10,000,000 for litigation support in FY 2011.

### Response to Financial Crisis

- Congress enacted two financial packages to jumpstart the economy, provide employment opportunities, and upgrade the Nation’s infrastructure – the Troubled Asset Relief Program (TARP) and the Economic Stimulus Plan. The Government is spending over \$1.4 trillion on these two plans.
- These programs are unprecedented in scope, size, and complexity and likely will result in litigation. Attorneys are expecting a flood of both defensive litigation, in the form of contract disputes, and affirmative litigation, in the form of fraud investigations. The Division is conducting nationwide investigations into potential fraud committed in connection with the recent financial crisis.

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<sup>4</sup> The U.S. treasury has an account called the Judgment Fund, which is available for court judgments and Department of Justice compromise settlements of actual or imminent litigation against the Government.

- The Division's efforts will protect the public fisc by representing the Government in a plethora of lawsuits seeking unfounded treasury payments and recovering defrauded funds in the form of civil penalties and awards. Potentially billions of dollars could be lost absent additional resources.
- Both defensive and affirmative litigation require extensive support services, including computerizing documents, processing and standardizing electronic files, creating and researching databases, and consulting industry experts. The FY 2010 appropriation included 118 positions (87 attorneys), 28 FTE, and \$10,000,000 (\$5,027,000 for litigation support). However, this litigation support funding will not be adequate to handle massive discovery and trial support requirements across potentially hundreds of complex and novel cases. The Civil Division requests \$3,500,000 for litigation support services in FY 2011.

### **E-Discovery**

- The Department has undertaken a thorough review of the Division's current means of handling document discovery in civil litigation and has advised a new approach, specifically in regards to electronic discovery (e-discovery).
- Based on the current model used by the private sector, the Department's first recommendation is that the Civil Division retain a group of attorneys with more sophisticated technical proficiency. To address the need for this expertise in e-discovery matters, the Civil Division requests 3 positions (3 attorneys), 3 FTE, and \$609,000.
- Additionally, the Department found that the civil litigation components have insufficient support staff which has resulted in a more than 20-to-1 attorney-to-support staff ratio. According to the findings of the Department's working group, such a ratio is too high to provide sufficient support staff services. To address this need, the Civil Division requests an additional 9 positions (9 FTE), and \$1,391,000 in FY 2011.

## Decision Unit Justification

### Civil Division: Legal Representation Decision Unit

Legal Representation – TOTAL	Perm. Pos.	FTE	Amount (\$000)
2009 Enacted with Rescissions	1,338	1,313	\$270,431
2010 Enacted	1,475	1,350	\$287,758
Adjustments to Base & Technical Adjustments	0	100	\$30,636
2011 Current Services	1,475	1,450	\$318,394
2011 Program Increases	25	19	\$16,891
2011 Program Offsets	0	0	(\$341)
2011 Request	1,500	1,469	\$334,944
<b>Total Change 2010-2011</b>	<b>25</b>	<b>119</b>	<b>\$47,186</b>

The Division is composed of six litigating branches and the Office of Management Programs as described throughout the following pages.

### Appellate Staff

Appellate Staff attorneys represent the United States at the highest levels of judicial review. When the Government receives an unfavorable decision, the Staff works closely with the Office of the Solicitor General to determine whether to seek further review, including review in the U.S. Supreme Court. The Appellate Staff docket includes challenges to Federal statutes, including the No Child Left Behind Act, the False Claims Act, and the Freedom of Information Act. Its work also concerns Federal programs, such as those under the Food, Drug and Cosmetic Act and health care matters. Recent Appellate Staff accomplishments include the successful appeal of the judgment finding tobacco manufacturers liable for conducting the affairs of their joint enterprise through a pattern of mail and wire fraud to deceive American consumers and the defense of constitutional challenges to provisions of the Bankruptcy Reform Law.

The Staff's workload has seen large increases in recent years in the area of counter-terrorism cases involving terrorist surveillance activities, the freezing of terrorist assets, and the designation of foreign terrorist organizations. These responsibilities have increased significantly in regard to the Guantanamo Bay detainee cases. The appeals in habeas cases brought by the Guantanamo detainees are handled by the Appellate Staff. These cases involve classified materials and present serious issues of law and fact.

### Federal Programs

While most of the other branches handle cases that directly involve monetary claims, the majority of the Federal Programs Branch's (FP) cases are non-monetary. The attorneys handle

hundreds of defensive cases that are of unparalleled importance because of their far-reaching repercussions for Government programs and policies. The Branch defends Federal agency officials and actions in challenges to executive orders, Federal statutes, and Federal regulations. Another handful of cases protect the public fisc by defending entitlement programs such as Medicare and Social Security. Attorneys also handle certain specialized affirmative litigation and assert the interests of the government in litigation in which the United States is not a named party.

The diversity of the FP workload can be seen in the following examples. The Branch handles cases involving separation of powers and core executive privileges, such as litigation concerning the Terrorist Surveillance Program. FP attorneys are also responsible for handling litigation that affects the nation's foreign affairs and are handling the Guantanamo Bay detainees' habeas cases. In addition, the Branch handles challenges to provisions of the Troubled Asset Relief Program and the Economic Stimulus package. The Branch's work has also recently included litigation by ACORN and related organizations challenging language in the FY 2010 Appropriations Act barring them from new contracts and a series of cases challenging Congressional and Executive requirements concerning reimbursement under the Medicare program. FP attorneys also defend against challenges to Federal programs and activities that allegedly discriminate against individuals in violation of the Rehabilitation Act.

## Torts Branch

### Environmental Torts (ET)

The Environmental Torts Section defends the Government against claims for monetary damages resulting from death, personal injury, or property damage allegedly caused by environmental or occupational exposure to toxic substances. The largest case currently being handled by ET, *Adams v. United States*, involves claims of more than \$800,000,000 stemming from the Department of the Interior's application of OUST, an herbicide, to wildfire burn areas in Southern Idaho in 1999 and 2000. More than 100 groups sued the United States and DuPont (OUST's manufacturer), alleging that the herbicide damaged their crops. The first trial concluded in August 2009 with a \$17,800,000 jury verdict, of which the United States is liable for \$5,300,000. It is up to the court now to determine the subsequent effect on the remaining claims.

ET is also representing the United States in *In re: FEMA Trailer Formaldehyde Product Liability Litigation*. Plaintiffs seek to recover damages for personal injuries allegedly resulting from exposure to formaldehyde in temporary emergency housing units provided by Federal Emergency Management Agency (FEMA) in response to Hurricanes Katrina and Rita. Potentially over \$1 billion is at issue. In December 2008, the district court rejected the plaintiffs' motion for class certification, which



<http://www.fema.gov/hazard/hurricane/2005katrina/slideshow/page3.fema?id=3>

would have covered all persons who resided in approximately 140,000 units issued by FEMA. About 100,000 administrative claims have already been filed. The court, having decided that the cases must be dealt with on an individualized basis, set a series of trials which began in September 2009. The United States was dismissed from the first case and the next case is scheduled for March 2010.

### **Federal Tort Claims Act (FTCA)**

The FTCA permits filing suit against the United States for injuries allegedly caused by the “negligent or wrongful act of any employee of the Government while acting within the scope of his office or employment.”<sup>5</sup> Prior to filing under the FTCA, the claimant must first file an administrative claim against the agency allegedly at fault and permit the agency at least six months to act on the claim.

One of the central responsibilities of the FTCA Staff is processing over 1,000 administrative tort claims each year, the majority of which are claims against DOJ components and the remaining are against outside agencies. The FTCA Staff directly handles and determines the outcome in nearly 300 of these claims each year. The rest are transferred to the appropriate agency if its identity can be determined from the claim submission. Additionally, support personnel processes hundreds of claims-related submissions or requests each year.

The largest group of cases currently being handled by the FTCA Staff is the 400 lawsuits that have been filed as a result of the flooding caused by Hurricane Katrina in New Orleans. Nearly 500,000 administrative claims are pending with the Army Corps of Engineers (the Corps). Claimants and plaintiffs seek compensation for personal injury, death, and property damage suffered as a result of the failure of the flood protection system. On November 18, 2009, the district court concluded in *Robinson v. United States*, the lead case in the litigation, that negligence on the part of the Corps in maintaining and operating the Mississippi River-Gulf Outlet led to the massive flooding that damaged much of the greater New Orleans area. Unless reversed on appeal, this ruling could result in the activation of hundreds of thousands of other cases from individuals, businesses, and Governmental entities with claims currently pending. The claims for damages would be heard individually, absent an alternate procedure.

### **Constitutional and Specialized Torts**

The Constitutional Torts, or *Bivens* component, handles cases which involve employees in the executive and legislative branches who are personally sued for actions taken within the scope of their employment. These suits can cover a wide variety of actions and levels of employees, including those involved in law enforcement and national security. They go to the heart of the many missions of the Federal public service. Effective representation of Federal employees allows public servants to carry out their duties without fear of personal liability for their actions.

The Constitutional Torts staff had several major accomplishments in cases of national importance the past couple of years. Most notable was *Moore v. Hartman*, which was a highly complex retaliatory prosecution case that engendered an opinion by the Supreme Court and

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<sup>5</sup> Federal Tort Claims Act, Pub. L. No. 79-601, § 403, 60 Stat. 812, 843 (1946).

several separate opinions by the Court of Appeals for the District of Columbia. The district court granted summary judgment dismissing the case on qualified immunity grounds.

## Aviation and Admiralty Torts

The Aviation and Admiralty Section handles aviation and maritime accident cases and claims. Clients include the Federal Aviation Administration (FAA), the Army Corps of Engineers, the Coast Guard, the Maritime Administration, the Transportation Security Administration, and the Departments of Transportation, Defense, and Commerce.

Aviation litigation arises from the Government's involvement in such activities as regulation of air commerce, air traffic control, aviation security, weather services, and aeronautical charting. When aircraft accidents occur, the Section handles high-dollar litigation involving the FAA's air traffic control and weather dissemination services, as well as its certification of airports, aircraft, and air personnel. The Section's most recent commercial airline matter was Comair flight 5191's crash on take-off from Lexington's Kentucky Bluegrass Airport in August 2006. The case is not yet fully resolved. The Continental crash on final approach to Buffalo Airport, which occurred in February 2009, is expected to spawn similar litigation.



[http://www.faa.gov/about/office\\_org/headquarters\\_offices/aba/budgets\\_brief/](http://www.faa.gov/about/office_org/headquarters_offices/aba/budgets_brief/)

The Section also represents the Government in its role as ship-owner, regulator, and protector of the nation's waterways. Litigation includes collisions involving U.S. vessels, grounding of vessels using U.S. produced charts, and challenges to the boarding of vessels on the high seas during national security and drug interdiction activities. Affirmative actions seek compensation for the loss of Government cargo, damage to locks, dams and natural resources, and the costs associated with maritime pollution cleanups.

## Commercial Litigation

### National Courts

Attorneys in National Courts handle cases in the Court of Federal Claims, the Court of International Trade, the Court of Appeals for the Federal Circuit, and other fora. This litigation involves a wide and varied range of substantive law, including Government procurement and contract disputes, Fifth Amendment takings, international trade, and claims brought by veterans and Federal employees. The Section routinely manages complex cases concerning significant legal issues and billions of taxpayer dollars.

The Division obtained a significant amount of institutional knowledge as a result of the *Winstar* claims. National Courts attorneys are putting that knowledge to use by consulting with various Federal agencies and their components, including the Department of the Treasury, Freddie Mac,



and Fannie Mae, concerning the legal issues associated with the implementation of the Troubled Asset Relief Program. The attorneys expect that this intensive involvement with client agencies will continue into the foreseeable future.

The most complex litigation currently managed by National Courts stems from the Government's commitment to accept and store spent nuclear fuel as required by the Nuclear Waste Policy Act of 1982. To date, utilities have filed 72 cases in the Court of Federal Claims seeking damages that they estimate exceed \$50 billion. This litigation is enormously complex. As many as 12 trials are expected in FY 2010 and 13 in FY 2011. Litigation support services, which include collecting, organizing, and reviewing a substantial number of documents, continue to be critical to the Government's defense. See page 29 for further information.

### **Corporate/Financial**

The Corporate/Financial Section handles a wide variety of lawsuits involving claims for money and property. A significant portion of the Section's resources are devoted to representing the Government's financial, contractual, and regulatory interests in large and complex Chapter 11 bankruptcies, including those involving defense contractors, commercial airlines, health care providers, and other major corporations.

The Section is handling one of the largest cases ever filed against the Government: *Cobell v. Salazar*. The Government recently negotiated a settlement of \$3.4 billion, which must be approved by Congress and the court. The plaintiffs previously sought upwards of \$67 billion. See page 5 for further details.

### **Foreign Litigation**

The Office of Foreign Litigation attorneys retain and directly instruct foreign counsel to represent the United States in cases filed in foreign courts. Most of these cases are defensive and arise out of the wide range of international activities in which the United States is involved. These include commercial transactions, tort damages, and labor disputes arising from the many U.S. Government offices and facilities maintained overseas, as well as its extensive U.S. military overseas bases and deployments. The Office conducts affirmative litigation aimed at fighting cross-border fraud that targets American citizens, such as telemarketing fraud. Affirmative litigation also includes representing the interests of the United States in foreign cases involving terrorism or other criminal activities directed against the United States, its officers, and its employees.

The diversity of the Office can be seen in its recent litigation activities. In Paris, France, the Office appeared to oppose the parole application of Georges Ibrahim Abdallah, who was convicted of the murder of U.S. military attaché Charles Ray, and the attempted murder of U.S. diplomat Robert Homme. In Italy, it filed briefs before the Italian Court of Cassation asserting sovereign immunity in a case seeking an order to require the removal of nuclear weapons allegedly stored at the U.S. Air Force base in Aviano, Italy. In February 2009, the court adopted the United States' position, ruling that Italian courts lack jurisdiction to hear the matter.

## Intellectual Property

Intellectual Property handles a wide variety of litigation involving patents, trademarks, copyrights, trade secrets, and other related matters. For example, when patent infringement claims threatened a cessation of BlackBerry service, Intellectual Property attorneys worked to ensure that the Government would be exempt from an injunction against use of the service. The most significant defensive suits are brought by major corporations seeking substantial recoveries for the Government's use of patented inventions, such as night vision compatible displays used in military aircraft in *Honeywell International v. United States*. Affirmative litigation enforces Government-owned patents, trademarks, copyrights, and patent indemnity agreements.

## Fraud

A critical aspect of the affirmative litigation pursued by Commercial Litigation Branch attorneys involves suits to recover losses to the Government due to fraud. These efforts provide restitution to harmed Government programs and deter other fraudulent conduct. Since 1986, Branch attorneys and their colleagues in U.S. Attorneys' Offices have recovered more than \$24 billion on behalf of Government programs, including Federal health care programs, such as Medicare and Medicaid, and programs vital to the country's defense and national security. These efforts provide significant deterrence to those contemplating defrauding these programs, and have the added benefit of encouraging health care providers to use Government funds to provide much needed health care to the beneficiaries of such programs.

The majority of False Claims Act cases are filed initially by private citizens or "whistleblowers" under the *qui tam* provisions of the False Claims Act. The Government assesses the merits of these whistleblower suits and, where appropriate, intervenes to pursue the Government's interests. Of the money recovered under the False Claims Act amendments through FY 2009, \$15.6 billion was in *qui tam* actions.

The Division has seen a sharp growth in pharmaceutical (pharma) and medical device fraud cases. These cases are legally and factually complex. As of mid-December 2009, the Department was investigating or had intervened and was actively involved in more than 150 such cases. The cases were filed in dozens of judicial districts and involve hundreds of defendants and hundreds of drugs. Allegations include a wide range of illegal fraudulent schemes, such as promoting drugs and devices for purposes not approved by the Food and Drug Administration (FDA), submitting false or misleading data to doctors and the FDA to gain approval of new products, providing remuneration to pharmacies and doctors who prescribe pharmaceuticals, and establishing inflated drug costs that are then used by Government health care programs to reimburse health care providers. In FY 2009, the pharma cases resulted in \$750,000,000 in Federal recoveries and settlements.



[www4.uwm.edu/.../newsletters/JanFeb\\_2009.cfm](http://www4.uwm.edu/.../newsletters/JanFeb_2009.cfm)



Developments that will foster growth in the civil fraud workload include:

- On May 20, 2009, Attorney General Holder and HHS Secretary Sebelius announced the creation of a new interagency effort, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to combat Medicare fraud. AG Holder said,

“With this announcement, we raise the stakes on health care fraud by launching a new effort with increased tools, resources and a sustained focus by senior-level leadership.”

- A new statute, the Fraud Enforcement and Recovery Act, strengthens provisions in the False Claims Act by enhancing the ability of DOJ to pursue *qui tam* cases and other matters alleging financial fraud involving Government funds and is expected to generate an increase in the number of *qui tam* cases referred to the Division, as well as litigation over amended provisions of the False Claims Act.

In other areas of anti-fraud enforcement, FY 2009 saw significant civil Federal recoveries. For example, in the area of mortgage fraud, the United States recovered \$10,700,000 under the False Claims Act from RBC Mortgage Company for knowingly violating HUD underwriting and lending requirements and \$1,100,000 from Dolphin Mortgage Corporation, which was held vicariously liable for an employee who submitted forged documentation in support of applications for Department of Housing and Urban Development-insured loans. In the largest General Services Administration defective pricing case to date, NetApp Inc. paid the Government \$128,700,000.

## Consumer Litigation

The Office of Consumer Litigation (OCL) is at the forefront of the efforts of both the Civil Division and the Department to protect consumers through vigorous civil and criminal enforcement of Federal consumer protection laws. Its enforcement includes fraud perpetrated by manufacturers and distributors of misbranded, adulterated, or defective consumer goods. OCL safeguards consumers through the pursuit of cases regarding deceptive advertisements and sales through unfair credit practices that extract billions of dollars from consumers. OCL also defends legal and constitutional attacks on consumer protection laws and statutes.

OCL handles a growing number of health care fraud-related cases, the majority of which are criminal cases. OCL is actively involved in investigating and prosecuting major prescription drug and device manufacturers believed to be illegally promoting misbranded and adulterated drugs or devices and distributing their products for unapproved uses. The majority of these criminal investigations emerge from lawsuits filed by whistleblowers alleging fraudulent activity. OCL works with the Division’s Civil Fraud Section as well as U.S. Attorneys’ Offices on these complex matters.

Many of the other affirmative cases OCL handles deal with protecting the consumers from business opportunity scams and malicious financial fraud. Building on past successes, OCL

obtained 24 felony convictions and 17 defendants were sentenced in FY 2009. Defendants charged in these prosecutions were involved in approximately 21 different fraudulent schemes that bilked more than 5,000 Americans of more than \$118,000,000. The number of successful prosecutions, and the appropriate severity of the sentences, has produced real deterrence.

OCL successfully defended the FDA in a case challenging its authority to issue “Industry Guidance” under the new Tobacco Act. A Federal district court granted the Government’s motion to dismiss, finding that such “guidances” merely represent the agency’s current thinking and are not legally binding on either the agency or regulated industries.

## Office of Immigration Litigation

Established in 1983 to achieve central control over immigration litigation, the Office of Immigration Litigation (OIL) defends Government agencies such as the Department of Homeland Security (DHS), the Department of State, and the Department of Labor in immigration related litigation, and defends decisions of DOJ’s Executive Office for Immigration Review (EOIR) when aliens file petitions for review in the circuit courts of appeals. With its unique expertise in immigration law, OIL provides the Government with the best possible defense in district court cases and challenges to removal orders filed in circuit courts by illegal aliens, many of whom are criminals. OIL is divided into two sections: the Appellate Section, which handles petitions for review filed in circuit courts, and the District Court Section, which handles all other litigation in both the trial and appellate stages.

The Appellate Section’s caseload is directly tied to DHS’s immigration efforts and to the immigration adjudication rates of the Board of Immigration Appeals in EOIR. As DHS’s enforcement activities become more aggressive, OIL receives a corresponding increase in petitions for review to defend in the circuit courts. For example, in FY 2008 Congress approved a new DHS immigration enforcement initiative, Secure Communities, which represents a new, comprehensive approach for expediting the removal of all criminal aliens held in U.S. prisons and jails.

The District Court Section (DCS) represents the United States in immigration cases which originate in Federal district courts nationwide. Most of DCS’s litigation responsibilities are defensive in nature. Immigration litigation defense consists of a wide range of individual and class action cases filed against subcomponents of DHS, including U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement and the Customs and Border Protection, as well as the Department of State and the Department of Labor. Typical cases include the defense of petitions for writs of habeas corpus, Administrative Procedure Act challenges to denials of immigration benefits, visa challenges, and constitutional challenges to immigration policies. DCS also affirmatively files and prosecutes denaturalization cases. In addition, DCS handles matters in the court of appeals that arise out of district court cases.

# Compensation Programs

## Vaccine Injury Compensation Program

Congress enacted the National Childhood Vaccine Injury Act of 1986 (the Act) to avert a crisis affecting the vaccination of children against infectious childhood diseases. There were two primary concerns: 1) individuals injured by vaccines faced an inconsistent, expensive, and unpredictable tort system for compensating claims; and 2) the risk of tort litigation threatened to reduce the number of vaccine manufacturers that could viably meet market demands.

The Act established the Vaccine Injury Compensation Program (VICP or the Program), a no-fault compensation system for persons suffering injury or death allegedly attributable to certain vaccines. The Program is intended to provide a more expeditious, less costly way for resolving claims. An individual claiming a vaccine-related injury or death must file a petition with the Court of Federal Claims (CFC) before pursuing any civil action. Claims are closely examined for legal and medical sufficiency, with the recognition that eligible claimants should be compensated fairly and expeditiously. Special Masters conduct hearings as necessary to determine whether a petitioner is entitled to compensation and, if so, how much.

*“Vaccination of children against deadly, disabling, but preventable infectious diseases has been one of the most spectacularly effective public health initiatives this country has ever undertaken...The Federal Government has the responsibility to ensure that all children in need of immunization have access to them and to ensure that all children who are injured by vaccines have access to sufficient compensation for their injuries.”*

- H.R. Rep. No. 99-908, 99<sup>th</sup> Cong., 2d Sess. 7 (1986),

The Act created a Vaccine Injury Compensation Trust Fund that is used to pay awards to individuals injured by vaccines, in addition to claimants’ attorneys’ fees. Trust Fund monies also pay the administrative costs of Health and Human Services, Office of the Special Masters, and the Civil Division’s VICP staff (the Division’s current reimbursement level is 41 FTE and \$7,833,000). The Trust Fund is funded by an excise tax imposed on each purchased dose of a covered vaccine. Since the inception of the Program, over \$1.9 billion in compensation has been awarded to nearly 2,400 claimants.

Since FY 2001, the Program has experienced a staggering increase in new claims. This increase can be partly attributed to the addition of new vaccines covered by the Program, including the widely administered influenza vaccine. However, the most significant reason is the approximately 5,000 claims asserting that certain vaccines, or a vaccine preservative, thimerosal, can cause autism. These cases comprise the Omnibus Autism Proceeding and account for approximately 85 percent of the Program’s caseload. The potential financial exposure has been estimated at \$10 billion, far exceeding the current Trust Fund balance of \$3.1 billion. The Government achieved an initial victory in February 2009, when the Special Masters ruled in the first three test cases that thimerosal-containing vaccines combined with the measles-mumps-

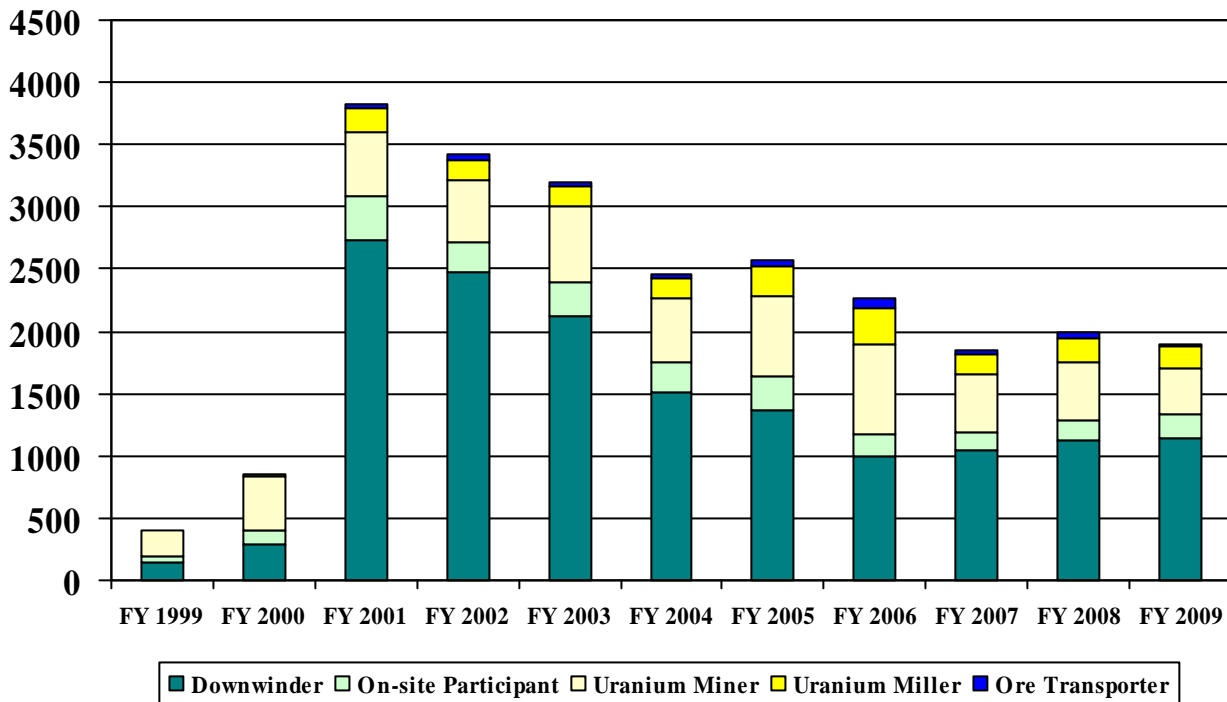
rubella vaccine do not cause autism. In July and August 2009, three judges of the CFC affirmed the Special Masters' denial of compensation in those three cases. However, the impact of these rulings on the remaining 5,000 cases is unclear because these cases are not bound by the ruling and two of the three cases are pending on appeal at the U.S. Court of Appeals for the Federal Circuit.

### Radiation Exposure Compensation Act

In passing the Radiation Exposure Compensation Act (RECA or the Act) in 1990, Congress offered an apology and monetary compensation to individuals who suffered disease or death as a result of exposure to radiation released during atmospheric nuclear weapons testing in the 1950s and 1960s, and underground uranium mining operations from the 1940s to the 1970s. This Program was designed as an alternative to litigation, in that the statutory criteria did not require claimants to establish causation. If claimants meet the criteria specified in the Act, compensation is awarded. RECA provides fixed payments in the following amounts: \$50,000 for individuals who lived “downwind” of the Nevada Test Site; \$75,000 for individuals present at test site locations; and \$100,000 for uranium miners, mill workers, and ore transporters.

Since the Program began receiving claims in 1992, 31,312 claims have been filed and over \$1.4 billion has been awarded to 21,992 claimants (as of January 1, 2010). The vast majority of claims are filed by people who live in the Four Corners region – Utah, Colorado, New Mexico, and Arizona. This area had the greatest concentration of uranium ore, and both the mining and production industries were centered there. The “downwind” regions, counties in Nevada, Utah, and Arizona, account for thousands of claims in connection with the fallout from above-ground nuclear weapons testing.

### Total RECA Receipts (including appeals) By Fiscal Year



In July 2000, RECA Amendments extended compensation to new categories of beneficiaries, added compensable diseases, expanded both the years and geographic areas covered, and lowered the exposure level that miners must demonstrate to receive compensation. These statutory changes caused an influx of new claim filings and a substantial increase in awards. Over the past decade, receipts have decreased and are now averaging approximately 2,000 claims a year.

## Office of Management Programs

The workload of the Civil Division is as broad and diverse as the activities of the 200-plus Federal agencies it represents. In addition to its role in defending and enforcing the laws, policies, and programs of the United States, the Division protects the public fisc. Key to ensuring the Division's continued success in these matters is responsive management capable of providing executive leadership and promoting performance and fiscal responsibility. The Office of Management Programs (OMP) serves this purpose. OMP is comprised of five administrative offices: the Office of Planning, Budget, and Evaluation; the Office of Litigation Support; the Office of Policy and Management Operations; the Office of Administration; and the Office of Management Information.

**PERFORMANCE AND RESOURCES TABLE**

**Decision Unit: Department of Justice – Civil Division – Legal Representation**

**DOJ Strategic Goal II: Prevent Crime, Enforce Federal Laws, and Represent the Rights and Interests of the American People.**

**Objective 2.7: Vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction.**

<b>WORKLOAD/ RESOURCES</b>		<b>Final Target</b>		<b>Actual</b>		<b>Projected</b>		<b>Changes</b>		<b>Requested (Total)</b>	
		<b>FY 2009</b>		<b>FY 2009</b>		<b>FY 2010 Enacted</b>		<b>Current Services Adjustments and FY 2011 Program Changes</b>		<b>FY 2011 Request</b>	
<b>Workload</b>	1. Number of cases pending beginning of year	37,030		35,388		36,177		N/A		38,626	
	2. Number of cases received n during the year	18,262		17,473		17,448		N/A		17,565	
	3. Total Workload	55,292		52,861		53,625		N/A		56,191	
<b>Total Costs and FTE</b>		<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>
(Reimbursable FTE are included, but reimbursable costs are bracketed and not included in the total)		1,354	270,431 (123,393)	1,354	270,431 (111,220)	1,391	287,758 (86,760)	119	47,186 (7,500)	1,510	334,944 (94,260)
<b>TYPE/ Strategic Objective</b>	<b>PERFORMANCE</b>	<b>FY 2009</b>		<b>FY 2009</b>		<b>FY 2010 Enacted</b>		<b>Current Services Adjustments and FY 2011 Program Changes</b>		<b>FY 2011 Request</b>	
<b>Output</b>	1. Number of cases terminated during the year	15,243		16,554		14,999		2,535		17,534	
<b>Civil Division Performance Measures (Excludes VICP and RECA)</b>											
<b>Outcome</b>	2. Percent of civil cases favorably resolved	80%		93%		80%		N/A		80%	
	3. Percent of defensive cases in which at least 85 percent of the claim is defeated	80%		88%		80%		N/A		80%	
	4. Percent of affirmative cases in which at least 85 percent of the claim is recovered	60%		63%		60%		N/A		60%	
	5. Percent of favorable resolutions in non-monetary trial cases	80%		90%		80%		N/A		80%	
	6. Percent of favorable resolutions in non-monetary appellate cases	85%		92%		85%		N/A		85%	
<b>Efficiency</b>	7. Ratio of dollars defeated and recovered to dollars obligated for litigation	\$43		\$70		\$44		N/A		\$45	

		Final Target	Actual	Projected	Changes	Requested (Total)
TYPE/ Strategic Objective	PERFORMANCE	FY 2009	FY 2009	FY 2010 Enacted	Current Services Adjustments and FY 2011 Program Changes	FY 2011 Request
<b>Vaccine Injury Compensation Program</b>						
<b>Output</b>	8. Percentage of cases where the deadline for filing the Government's response to Petitioner's complaint (the Rule (4b) report) is met once the case has been deemed complete	86%	94%	86%	N/A	86%
	9. Median time to process an award for damages (in days)	465	637	465	N/A	TBD
<b>Outcome</b>	10. Percentage of cases in which Judgment awarding compensation is rejected and an election to pursue a civil action is filed	0%	0%	0%	N/A	0%
	11. Average claim processing time (in days)	1,653	1,269	1,300	N/A	TBD
<b>Efficiency</b>	12. Percentage of cases in which settlements are completed within the court-ordered 15 weeks	92%	100%	92%	N/A	92%
<b>Radiation Exposure Compensation Program</b>						
<b>Output</b>	13. Reduce backlog of pending claims by 60% by FY 2011	606	558	404	N/A	350
	14. Reduce average claim processing time to 200 days by FY 2011	239	127	219	N/A	200
	15. Percentage of claims paid within six weeks of Program receipt of acceptance form	85%	94%	90%	N/A	TBD
	16. Percentage of claims appeals adjudicated within 90 days of filing administrative appeal	92%	100%	95%	N/A	TBD
<b>Efficiency</b>	17. Percentage of claims adjudicated within 12 months or less (RECA)	75%	96%	80%	N/A	TBD

#### **DATA DEFINITION, VALIDATION, VERIFICATION, AND LIMITATIONS**

- **All Workload and Performance Indicators:** The data source for all indicators is CASES, the Civil Division's fully automated case management system. Quality assurance efforts include: regular interviews with attorneys to review data listings for each case; input screens programmed to preclude the entry of incorrect data; exception reports which list data that are questionable or inconsistent; attorney manager review of numerous monthly reports for data completeness and accuracy; and verification of representative data samples by an independent contractor. Despite these measures, some data limitations do exist. Most significantly, incomplete data can cause the system to under-report case terminations and attorney time. Some performance successes can be attributed to litigation where the U.S. Attorneys' Offices were involved.
- **Performance Indicators 2, 5, and 6:** Favorable resolutions include court judgments in favor of the Government, as well as settlements.
- **All Workload and Performance Indicators:** All workload actuals and workload estimates exclude nearly 500,000 Hurricane Katrina administrative claims, which could all become individually active cases by FY 2011, and approximately 100,000 FEMA: Hurricane Katrina/Rita Trailer-related administrative claims. These claims have been removed to avoid skewing the data.

#### **ISSUES AFFECTING SELECTION OF FY 2010 AND FY 2011 ESTIMATES**

- **Performance Indicator 1:** The significant increase in terminations in FY 2011 is attributable to the projected termination of an estimated 1,000 cases associated with the FEMA trailer litigation, as well as the termination of an estimate 1,650 administrative claims associated with the currently pending Camp Lejeune litigation.
- **Performance Indicators 2 and 3:** Vaccine Injury Compensation Program cases are excluded from these measures.



Performance Report and Performance Plan Targets		FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009		FY 2010	FY 2011
		Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Target	Actual	Target
<b>Output</b>	1. Number of cases terminated during the year	12,231	12,154	15,101	15,727	15,435	17,147	22,939	15,243	16,554	14,999	17,534
<b>Civil Division Performance Measures (Excludes VICP and RECA)</b>												
<b>Outcome</b>	2. Percent of civil cases favorably resolved	93%	94%	93%	90%	93%	89%	91%	80%	93%	80%	80%
	3. Percent of defensive cases in which at least 85 percent of the claim is defeated	86%	89%	90%	90%	91%	91%	90%	80%	88%	80%	80%
	4. Percent of affirmative cases in which at least 85 percent of the claim is recovered	64%	66%	65%	72%	72%	68%	64%	60%	63%	60%	60%
	5. Percent of favorable resolutions in non-monetary trial cases	85%	86%	84%	89%	92%	86%	90%	80%	90%	80%	80%
	6. Percent of favorable resolutions in non-monetary appellate cases	89%	92%	93%	91%	87%	87%	90%	85%	92%	85%	85%
<b>Efficiency</b>	7. Ratio of dollars defeated and recovered to dollars obligated for litigation	\$79	\$64	\$67	\$60	\$60	\$49	\$37	\$43	\$70	\$44	\$45
<b>Vaccine Injury Compensation Program</b>												
<b>Outcome</b>	8. Percentage of cases where the deadline for filing the Government's response to petitioner's complaint (the Rule (4b) report) is met once the case has been deemed complete	N/A	N/A	75%	84%	82%	83%	95%	86%	94%	86%	86%
	9. Median time to process an award for damages (in days)	533	564.5	529.5	484	335	483	445	465	637	465	TBD
	10. Percentage of cases in which judgment awarding compensation is rejected and an election to pursue a civil action is filed	0%	1.5%	0%	0%	0%	0%	0%	0%	0%	0%	0%

Performance Report and Performance Plan Targets		FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009		FY 2010	FY 2011
		Actual	Actual	Actual	Actual	Actual	Actual	Actual	Actual	Target	Actual	Target
	11. Average claim processing time (in days)	995	1,021	738	894	834	1,337	1,280	1,653	1,269	1,300	TBD
<b>Efficiency</b>	12. Percentage of cases in which settlements are completed within the court-ordered 15 weeks	80%	92%	80%	95%	98%	96%	100%	92%	100%	92%	92%
		<b>Radiation Exposure Compensation Program</b>										
<b>Efficiency</b>	13. Reduce backlog of pending claims by 60% by FY 2011	N/A	N/A	N/A	2,021	2,032	807	618	606	558	404	350
	14. Reduce average claim processing time to 200 days by FY 2011	N/A	N/A	N/A	316	339	298	156	239	127	219	200
	15. Percentage of claims paid within six weeks of Program receipt of acceptance form	N/A	37%	51%	63%	71%	91%	89%	85%	94%	90%	TBD
	17. Percentage of claims appeals adjudicated within 90 days of filing administrative appeal	N/A	N/A	77%	84%	100%	97%	100%	92%	100%	95%	TBD
	18. Percentage of claims adjudicated within 12 months or less (RECA)	64%	74%	55%	71%	66%	71%	93%	75%	96%	80%	TBD

# Performance, Resources, and Strategies

## Performance Plan and Report for Outcomes

The data presented in the Performance and Resources Table demonstrate the Civil Division's consistent success in meeting performance targets in support of the Department's Strategic Objective 2.7 to "vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction." The following cases highlight how the Division has recently worked to protect the public fisc, defend U.S. policies, and enforce civil statutes.

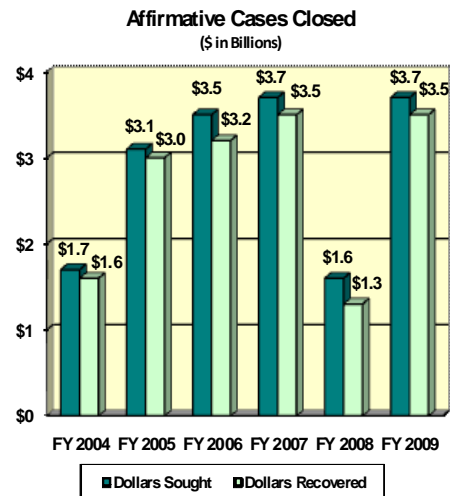
The following are representative of the Division's non-monetary work:

- **Guantanamo Bay (GTMO)** In January 2010, the D.C. Circuit affirmed a district court decision denying habeas corpus to a GTMO detainee who traveled to Afghanistan to engage in *jihād* against the United States. The court held that the Government's detention authority is defined by the Authorization for Use of Military Force and includes those who purposefully and materially support al Qaeda. The court also held that it would "defer to the Executive's opinion" as to whether hostilities have ended. This is the first appellate decision addressing the procedural standards governing habeas petitions filed by GTMO detainees and will serve as guidance for future appellate and district court cases.
- **Immigration** In September 2009, the Ninth Circuit Court of Appeals affirmed the Board of Immigration Appeals' decision in *Khan v. Holder*. The court ruled that an alien was ineligible for asylum because he engaged in terrorist activity by raising funds for a terrorist organization. Further, the court held that the definition of "terrorist activity" under the Immigration and Nationality Act was not overbroad and rejected Khan's argument that the terrorist rule conflicts with international agreements.
- **Foreign State Immunity** In June 2003, 3.5 tons of cocaine were discovered by the U.S. Coast Guard on a Lithuanian vessel. The sailors were detained by the Coast Guard, sent to the United States, and tried on drug smuggling charges. They were acquitted and removed to Lithuania. In April 2009, the sailors brought a claim in *Nikisin v. United States* alleging they suffered serious injury while awaiting the trial for these drug charges. The Vilnius District Court of Lithuania dismissed the claim on grounds of foreign state immunity.
- **FCC Regulation** In *Minority Television Project v. FCC*, plaintiffs challenged the constitutionality of a provision in the U.S. Communications Act of 1934. The Act forbids broadcast stations from airing paid advertisements that promote a for-profit product or service if the advertisements express views involving the public interest. The plaintiffs claimed that the provision violated their constitutional right to freedom of speech guaranteed by the Constitution. The court granted the Government's motion for summary judgment in August 2009. It held further that the Act promotes a substantial Government interest, primarily, the promotion of quality programming on public stations.

- **Constitutional Challenge** The 2007 amendments to the Lobbying Disclosure Act of 1995 require lobbyists to disclose the identity of any organization that both contributes more than \$5,000 in a quarter toward lobbying activities and actively participates in those activities. In September 2009, the D.C. Circuit affirmed the dismissal of a lawsuit challenging the constitutionality of a provision of the Act in *National Association of Manufacturers v. Taylor*. The D.C. Circuit held that the statute is specifically tailored to serve an important Government interest and that the plaintiff failed to demonstrate that the disclosure of the identities of its corporate members would impose a burden on any protected speech.
- **RECA** Even with a workload that continues to exceed 2,000 claims each year, the Radiation Exposure Compensation Program surpassed all its performance goals in FY 2009. The Program has reduced its claims processing time to well under 200 days and 100 percent of claims appeals are adjudicated within 90 days of filing. The Program also adjudicated an unprecedented 96 percent of claims within twelve months or less.

Over the last six years, the Division has made significant affirmative recoveries totaling \$16.1 billion. Most were the result of *qui tam* health care fraud and procurement matters. The following cases are particularly noteworthy:

- **Health Care Fraud** The state of New York and New York City have agreed to pay \$540,000,000 to settle allegations that they knowingly submitted false claims for reimbursement for school-based health care services provided to Medicaid eligible children. The settlement resolves allegations that for the period 1990 to 2001, the state of New York knowingly failed to provide proper guidance regarding Medicaid requirements to its districts and counties and failed to monitor them for compliance. It also resolved allegations that the state passed on claims to the Federal Government for services it knew were not covered or properly documented.



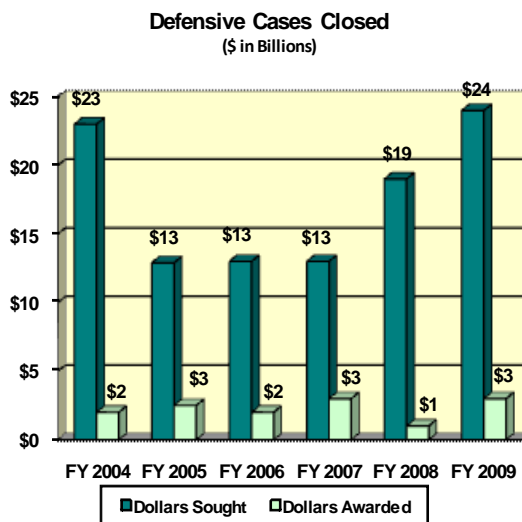
- **Procurement Fraud** In February 2009, APL Ltd. agreed to pay \$26,000,000 to resolve allegations that it submitted false claims to the United States in connection with contracts to transport cargo in shipping containers to support U.S. troops in Iraq and Afghanistan. The Government alleged that APL knowingly overcharged and double-billed the Department of Defense to transport thousands of containers from ports to inland delivery destinations in Iraq and Afghanistan.

- **Mortgage Fraud** In July 2009, Beazer Homes agreed to pay the United States \$5,000,000 to resolve allegations that it was involved in fraudulent mortgage activities in connection with federally insured mortgages. The Department of Housing and Urban

Development’s Federal Housing Administration (FHA) guarantees home mortgage loans for low income families. Allegations regarding these FHA-insured loans included 1) requiring purchasers to pay “interest discount points” at closing, but keeping the cash and failing to reduce interest rates, and 2) obscuring which of its branches made defaulting mortgage loans. As a consequence, unqualified home buyers were induced to enter into FHA insured mortgages and branches involved in fraudulent activity were hidden from the FHA. As part of the settlement, Beazer Homes also agreed to make contingent payments up to \$48,000,000 to be shared with victimized private homeowners.

Between FY 2004 and FY 2009, more than \$91 billion was saved as a result of the Civil Division’s successful defense against unmeritorious monetary claims. In FY 2009 alone, the Division defeated \$21 billion in unmeritorious claims. Significant victories include the following:

- Federal Torts Claims Act** In *Perry v. United States*, four employees of U.S. Army subcontractors filed a \$60,000,000 lawsuit against the United States alleging personal injuries resulting from exposure to toxic chemicals during construction work at Fort Wainwright, Alaska. Plaintiffs challenged the constitutionality of recent amendments to the Alaska Workers Compensation Act, which the United States held as evidence of its immunity. In November 2009, the Alaska Supreme Court found the amendments constitutional and, subsequently, the district court dismissed this case.



- Regulatory Takings** In February 2009, the Court of Federal Claims dismissed a \$15 billion regulatory takings claim in *Energy Security of America Corp. v. United States*. The plaintiffs were owners of patents relating to a process for the gasification of coal and alleged that the process would reduce coal plant emissions and allow the production of clean burning synthetic gasoline. They argued that the Department of Energy, by financing the development of competing technologies, rendered their patents worthless. The court granted the Government’s motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. In December 2009, the Federal Circuit affirmed the court’s dismissal.

## Strategies to Accomplish Outcomes

The Civil Division has achieved extraordinary success despite internal and external challenges. This is due in large part to the use of the following innovative strategies:

- Retain cases that require coordination at the seat of Government or subject matter expertise possessed by the Civil Division, as well as cases assigned to national and foreign courts.

- Improve information dissemination between the Civil Division and the U.S. Attorneys to promote and maintain uniform litigation positions.
- Work with client agencies, as well as law enforcement entities, such as the FBI, to ensure the best possible representation of the Government's interests.
- Recruit and retain a high-caliber legal staff with expertise that will best promote successful litigation. Structure support staff to take full advantage of new technologies that promote efficiency and productivity.
- Maximize resources by improving cash management and utilizing authority to obtain reimbursements. Develop new alternative funding sources.
- Invest in new technologies and litigation support services to maximize productivity, meet court mandates, and prevail on behalf of the Government.
- Adapt to the demands of electronic discovery by implementing a new structure of electronic support guided by attorneys and support staff with specialized technical expertise.

## Program Increase

**Item Name:** Spent Nuclear Fuel Litigation

Budget Decision Unit: Legal Representation

Strategic Goal & Objective: 2.7 - Vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction

Organizational Program: Commercial Branch

Ranking: 1 of 3

Program Increase: Positions 13 Attorneys 10 FTE 7 Dollars \$1,391,000  
Litigation Support \$10,000,000  
Total Dollars \$11,391,000

### Description of Item

The Spent Nuclear Fuel (SNF or spent fuel) cases, involving the nation's spent fuel storage policy, embody enormous financial stakes in which one unfavorable precedent can cost the Government billions of dollars in unwarranted awards. Filed by nuclear power utilities, these 72 cases seek potentially more than \$50 billion in damages for the Government's failure to begin accepting the utilities' SNF by January 1998, as mandated by the Nuclear Waste Policy Act of 1982. Civil Division attorneys are actively defending these cases to ensure, first, that only those claims with merit are paid, and second, that any damages paid are not exaggerated.

For the foreseeable future, the Government faces an increasingly accelerated trial schedule with the potential for additional litigation activities coming from appeals and new claims. Without proper funding, the Division will be unable to adequately perform the massive amount of work associated with SNF trials, comply with court-ordered deadlines and document productions, and manage the millions of pages of documents produced by the plaintiffs. In short, inadequate funding will severely hamper the ability of the SNF attorneys to litigate these cases successfully. To handle the pace of this litigation, the Civil Division requires an additional 13 positions (10 attorneys), 7 FTE, and \$11,391,000, which includes \$10,000,000 for litigation support.

### Justification

#### **Background**

"Spent nuclear fuel" is a byproduct of both commercial utilities and defense activities. As this fuel continues to emit radiation even after it can no longer produce energy, it must be safely stored until the level of radiation drops, which can take thousands of years. The Spent Nuclear Fuel litigation pertains to claims filed against the Government for breach of contract regarding the storage, disposal, and retention of SNF.

Twenty-seven years ago, Congress enacted the Nuclear Waste Policy Act of 1982 (the Act), 42 U.S.C. §§ 10101-10270, which requires the Department of Energy (DOE) to study and develop a deep geologic repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste. Subsequently, in 1987, Congress designated Yucca Mountain in Nevada as the sole site for continued evaluation as the site for this Federal repository. In accordance with



the Act, DOE entered into 76 standard contracts with nuclear utilities that were producing spent fuel. Pursuant to these contracts, DOE agreed to begin accepting the spent fuel generated by the utilities no later than January 31, 1998. As part of the agreement, the utilities agreed to begin payment of quarterly fees into the Nuclear Waste Fund, which was created by the Act to fund a permanent waste site.

For a variety of reasons, construction of Yucca Mountain never began and DOE was unable to begin SNF acceptance by the January 31, 1998 contract deadline. The Administration authorized the establishment of a Blue Ribbon Commission to evaluate alternatives for nuclear waste disposal.

### Status of the Litigation

Nuclear utility plaintiffs have filed 72 cases in the U.S. Court of Federal Claims (CFC), accusing DOE of breach of contract and of violating the Takings Clause of the Fifth Amendment of the U.S. Constitution. The utilities argue that they have had to build additional spent fuel storage facilities on site as a result of DOE's delay. The nuclear utility industry estimates that damages claims will exceed \$50 billion. DOE's estimates are *significantly* lower if acceptance begins in 2020. The primary factor affecting the potential total liability amount is the length of time that DOE's delay continues. Already, in the 26 cases that have reached final trial court judgment or have been settled, \$1.4 billion is owed to the plaintiff utilities. Most of the judgments are on appeal.



<http://www.ocrwm.doe.gov/factsheets/doeymp0338.shtml>

The most significant developments in this litigation are summarized below:

- In 1997, in *Northern States Power Co. v. U.S. Department of Energy*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) barred DOE from invoking the “unavoidable delays” contract clause, which could excuse the agency from liability for delays arising from causes beyond its control. This clause might constitute an absolute defense to the utilities’ damages claims.
- In 2000, in *Maine Yankee Atomic Power Co. v. United States*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) found the United States to be in partial breach of the standard contract. Since the utilities continue to pay fees into the Nuclear Waste Fund and DOE is expected to eventually collect the spent fuel, the delay does not constitute a full breach of contract.
- In 2004, in *Indiana Michigan Power Co. v. United States*, the utilities were limited to recovering only past damages but were informed that they could return to court for additional damages should the delay continue. Given the applicable statute of limitations, the Division’s attorneys expect each utility to re-submit claims for damages every six years until DOE begins SNF acceptance. Six utilities have already filed second claims.



- In October 2006, a CFC judge ruled in *Nebraska Public Power District v. United States* that the D.C. Circuit's original ban on the unavoidable delays defense in *Northern States* is void. On January 12, 2010, the Federal Circuit reversed the CFC judge's decision, ruling that the D.C. Circuit had jurisdiction, but holding that the CFC retains authority to determine contractual matters related to the remedies resulting from the delay. While the Department is still reviewing this ruling, the Government may still be able to assert the unavoidable delays defense in response to damages claims. It will still need to convince the CFC that the unavoidable delays defense applies to the facts surrounding DOE's delay in SNF acceptance before the trial court denies any damages to a utility plaintiff.

Raising an unavoidable delays defense would most likely take place at trial and could significantly extend the amount of time needed to try each case. Plaintiffs would be likely to seek a lot of additional discovery against the Government. Further, even if the Division were to be successful in establishing at trial that the unavoidable delays clause precluded an award of damages, the utilities would likely appeal, thereby extending the time needed to resolve these cases.

- In August 2008, the Federal Circuit issued three decisions defining the Government's post-1998 acceptance rate obligation. Notably, DOE intentionally decided not to include in the original contract any agreement to accept a minimum amount of spent fuel each month or year because it did not know in 1983 what its actual capabilities would be in 1998. In these three decisions, the Federal Circuit selected the rate, which is much higher than the rate advocated for by the Government. The cases have been remanded to the trial court for application of this rate, which is expected to significantly increase damages. In July 2009, the Federal Circuit issued a decision in *Carolina Power & Light Co. v. United States* that followed the binding precedent of *Pacific Gas & Electric* regarding the proper acceptance rate to be used for the calculation of damages in these cases. On November 10, 2009, the court denied the Government's motion for *en banc* review of that decision.

It is important to note that DOE has never repudiated the standard contract and none of the utilities have yet declared a full breach. However, it is possible that the nuclear utilities will seek damages for a full breach of contract. The difference in the type of breach affects the damages that may be recovered. Under the current partial breach theory, which assumes the contract will eventually be fulfilled, the utilities may recover only damages incurred to date and may return in the future to collect future-incurred damages. If a total breach occurred, neither party would have any further obligation to perform their contract duties, but the utilities would be able to recover all damages in a single lawsuit. This full breach lawsuit would be markedly more complex than the current partial breach suits.

### **Summary of Resource Request**

There will be an estimated 12 trials in FY 2010 and 13 trials in FY 2011. The enormity of this schedule cannot be understated. These cases are massive in terms of scope, complexity, and financial stakes. The Civil Division's FY 2011 base budget funds 25 attorneys and \$6,000,000 for litigation support, significantly less than what the litigation requires. This situation is untenable in light of the tremendous volume of work that lies ahead. As such, this request for an

additional 13 positions (10 attorneys), 7 FTE, and \$11,391,000 (including \$10,000,000 for litigation support), is required to adequately support the SNF cases, as described below.

### **Litigation Support**

The Division has estimated a total need of \$16,000,000 to fund litigation support activities. Of this total, \$6,000,000 is expected to be provided from the Division's base budget. The resulting shortfall of \$10,000,000 must be addressed in order to do the following:

- Provide support for cases currently in trial phase (as well as the 11 cases expected to be released from court-ordered stays), remanded cases, "second claim" cases, and cases on appeal. Litigation support will assist attorneys in pretrial and trial activities including preparing exhibit lists and exhibit sets as well as providing in-court equipment set-up and presentation of electronic evidence for trials. Specific tasks will include acquiring and processing 10,000,000 pages of paper, preparing for 325 interviews/depositions, and preparing 52 expert reports for production.
- Maintain and enhance the Spent Fuel Production Transfer Website, which will be used to produce approximately 6,000,000 additional pages to opposing counsel in FY 2011. Maintain an Internet-based document repository for DOJ and consultant collaboration, and continue to load new documents to the web repository as they are processed. Create and maintain deposition transcript, trial transcript, trial exhibit, case files, and other tracking and management databases as needed. Perform electronic discovery in all cases coming off stay and convert all native electronic files into a uniform form suitable for use by the litigation team. Screen all documents for privileged or protected information before production.
- Maintain "moot and war rooms" within the trial support information center to facilitate attorney, consultant, and litigation support work on cases scheduled for trial and other SNF-related matters. Provide substantive legal and document research on an as needed basis in preparation for briefings including congressional, department, and trial briefings. Assist with trials, hearings, and moots by providing trial technology and personnel. Continually design and provide for new database and search engines required on an as needed basis. Provide other logistical, research, and IT support.

### **Staffing**

The increased pace of litigation is placing an unprecedented strain upon Division resources. In addition to the multiple cases scheduled for trial in the near term, the Government is also actively engaged in discovery in those cases and others, and it is likely that this intense pace of litigation will continue indefinitely.

The SNF attorney team is currently comprised of 25 attorneys. Rather than keeping staff assigned to a single case, the SNF attorneys have been rotating from trial to trial, each of which lasts from one to four weeks. This situation has contributed to a loss in continuity, impeding the Division's ability to most effectively defend the Government. The loss in continuity is extremely problematic because the SNF litigation is far more complex than other CFC cases in that it requires extraordinarily technical subject matter expertise. Thus, these cases require

knowledgeable and experienced attorneys organized into specialized teams to address the specific issues dictated by each trial.

### Impact on Performance

The SNF cases are high profile and raise important questions regarding the responsibility for the costs of storing spent fuel. When the Nuclear Waste Policy Act was passed, it was the intent of Congress that the power companies pay for their own SNF storage. It is likely that the fees under the standard contract were passed on to the utilities' customers – ratepayers. If the utilities are awarded a significant portion of the damages claimed, taxpayers as a whole could, theoretically, be required to pay the storage costs.

The plaintiffs' claims are grossly exaggerated, and without a proper defense, these monetary awards will go unchecked. For example, in two recent decisions from the trial court, the Government successfully reduced the plaintiffs' claims from \$97,000,000 to \$50,000,000 and \$54,000,000 to \$38,000,000. Further, the Government currently has several appeals pending which present common issues that, if overturned, could substantially lower the Government's exposure in all of the cases. Although the Government has lost some judgments in the trial court, most are not final and are being or will be appealed. The appeals process will take several years and, while those appeals are ongoing, other trials will be held. This strategy has been very successful in the past. For example, in the A-12 litigation, the Government initially "lost" \$2 billion in 1996, but the court of appeals reversed that decision. After another trial, the court ruled in the Government's favor in 2007. Finally, the Government may successfully avoid damages in the cases in which it will assert a defense to damages based up on the unavoidable delays clause in the contract.

Given that more than \$50 billion is potentially at stake, the SNF attorney team must be staffed appropriately and the litigation support must be adequately funded so as to protect the U.S. Treasury. A successful conclusion to these cases, which could determine the outcome of future cases, is essential to protecting the Judgment Fund against large material losses. It is imperative that the Administration and Congress work together to avert such a contingency.

## Funding – Spent Nuclear Fuel Litigation

### Base Funding

FY 2009 Enacted (w/resc./supps)				FY 2010 Enacted				FY 2011 Current Services			
Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)
31	25	31	\$10,686	31	25	31	\$10,799	31	25	31	\$10,866

### Personnel Increase Cost Summary

Type of Position	Modular Cost per Position (\$000)	Number of Positions Requested	FY 2011 Request (\$000)	FY 2012 Net Annualization (change from 2011) (\$000)
Attorney	\$113	10	\$1,130	\$1,023
Professional/Administrative Support	87	3	261	160
<b>Total Personnel</b>		<b>13</b>	<b>1,391</b>	<b>1,183</b>

### Non-Personnel Increase Cost Summary

Non-Personnel Item	Unit Cost	Quantity	FY 2011 Request (\$000)	FY 2012 Net Annualization (Change from 2011) (\$000)
Litigation Support			\$10,000	\$200
<b>Total Non-Personnel</b>			<b>10,000</b>	<b>200</b>

### Total Request for this Item

	Pos	Agt/Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)
Current Services	31	25	31	\$4,866	\$6,000	\$10,866
Increases	13	10	7	1,391	10,000	11,391
<b>Grand Total</b>	<b>44</b>	<b>35</b>	<b>38</b>	<b>6,257</b>	<b>16,000</b>	<b>22,257</b>

# Program Increase

**Item Name:** Response to Financial Crisis

Budget Decision Unit: Legal Representation

Strategic Goal & Objective: 2.7 Vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction

Organizational Program: Commercial Litigation Branch

Ranking: 2 of 3

Program Increase: Litigation Support \$3,500,000

## Description of Item

Congress acted swiftly and uniquely to authorize a vast array of programs aimed at stabilizing and preventing further disruption to the economy and financial system. The Troubled Asset Relief Program (TARP) engages in the purchase, management, and disposition of assets held or issued by banks, insurance companies, the automotive financing industry, and other financial institutions. As of September 30, 2009, over \$450 billion has been expended through this program.<sup>6</sup> In addition, the American Recovery and Reinvestment Act of 2009 (Stimulus) provides funding of approximately \$787 billion to stimulate the economy through programs that include infrastructure and employment-related investments.

The unprecedented scope, size, and complexity of these programs create a very significant potential for both affirmative and defensive litigation. The Civil Division will have a role in investigating and holding responsible those who perpetrated fraud against the public, as well as Government programs. As such activity is identified, matters will be referred to the Civil Division and investigated. Litigation will be initiated to avoid the loss of Government funds. Of equal concern is that the Government's exposure will lead to lawsuits filed against it. Prior experience with *Winstar*-related litigation stemming from the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 in response to the last major financial institution/economic crisis during the late 1980s suggests that damages claims are likely to be large, novel, and aggressively pursued, regardless of merit. Without sufficient resources to defend the Government in court, the public fisc could potentially sustain losses from such claims, *in addition to* the direct costs of these programs.

Litigation support services are critical to the Government's ultimate success. In FY 2011, such services will include hiring paralegals to perform research, consultants to uncover evidence and potentially serve as expert witnesses, and an array of staff to provide trial support. This support will enable the Government to effectively assert its position and protect the public fisc. Accordingly, the Division has identified a need for an additional \$3,500,000 for litigation support in FY 2011.

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<sup>6</sup> Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to Congress, October 21, 2009.

### Justification

The FY 2010 appropriation provided funding for 118 positions (87 attorneys) and \$5,027,000 for litigation support services. The positions identified in the FY 2010 budget are likely sufficient to handle this new area of litigation in FY 2011. The FY 2010 litigation support funding will be used to build the infrastructure that will be required throughout the course of this litigation. This includes acquisition of information technology (IT) expertise regarding the development of databases and mechanisms for scanning, storing, and accessing the massive amounts of data likely to be associated with these cases. Between FY 2010 and FY 2011, the Division expects to transition into operational mode. This involves reviewing documents, performing legal research, creating exhibits, and preparing for numerous trials. Where appropriate, trial presentation services will also be acquired. For these activities, the Division requires an increase of \$3,500,000.

Based on the Division's past experiences, there is a reasonable expectation that the Government will be faced with the following litigation.

## **Affirmative Litigation**

### **On Behalf of the Public**

The Civil Division is conducting a nationwide investigations into potential fraud committed in connection with [the recent financial crisis](#). The Division anticipates that this investigation will be extremely resource intensive. The [defendants](#) will likely produce millions of documents, requiring the retention of an outside electronic discovery vendor, as well as several paralegals and junior attorneys to conduct a first level review of the documents. The investigation will also require the Department to interview dozens of third-party witnesses and retain experts to analyze the highly technical data that will be produced.

### **On Behalf of the Government**

In order to pursue unscrupulous lenders and others who defraud the Government – and thereby both protect the integrity of Federal programs and recover the funds needed to make the programs work – the Division will need adequate resources to pursue violations of the False Claims Act (FCA). It has been DOJ's experience that augmentation of agency Inspector General (IG) resources translates into additional referrals to DOJ. Moreover, the significant expenditures that Congress recently authorized to stimulate and rejuvenate the economy can also be expected to result in a substantial number of additional fraud cases.

In particular, the Division expects a sharp increase in referrals from the following sources:

- **Department of the Treasury Special Inspector General**

Congress created this Special IG specifically for TARP and appropriated \$50,000,000 to staff the office. The Special IG's duty is "to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury."<sup>7</sup> The Civil Division is coordinating with the Special IG to ensure timely

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<sup>7</sup> Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 121.

referral of potential cases and to provide appropriate advice and training. The Special IG has started making referrals to DOJ.

- **Department of Housing and Urban Development (HUD) Inspector General**

Recently, the HUD IG created a civil fraud task force, which will focus primarily on underwriters and loan originators participating in the Federal Housing Administration's (FHA) single family and reverse mortgage programs. In 2009, the Washington Post reported that more than 9,200 loans insured by the agency in the past two years have gone delinquent with either one payment or no payments being made. The Civil Division works closely with the task force, including helping to train HUD-OIG investigators and auditors to identify potential FCA cases.

“The failure or near failure of so many financial institutions has caused enormous damage to the national and global economy, wiped out savings for millions of investors, and required an unprecedented level of support by the taxpayer through Government rescue plans. This unprecedented level of apparent corporate malfeasance will require a sustained level of attention by regulators and law enforcement officials to uncover and address wrongdoing administratively, through civil law, and, where warranted, through criminal prosecution.”

- U.S. Senate Committee on the Budget  
Concurrent Resolution on the FY 2010

- **Other Federal Agency Inspectors General**

The Stimulus provided an additional \$252,000,000 for Inspectors General at various Federal agencies, including the Department of Health and Human Services (HHS). The IG at HHS is expected to refer additional cases. An increase in referrals from other agencies is also predicted.

- ***Qui Tam* Filings**

The FCA authorizes private parties who have knowledge of fraud on the United States to file *qui tam* suits on behalf of the Government. The FCA's *qui tam* provisions have proven to be an effective inducement for insiders to disclose wrongdoing. Accordingly, to the extent that TARP and Stimulus funds are misused, *qui tam* filings are expected to be a primary source of fraud cases for DOJ. The Civil Division is already receiving such *qui tam* cases.

## **Defensive Litigation**

In order to protect the public fisc from unwarranted and exaggerated claims, the Division requires funding sufficient to defend against large and complex financial claims. Although the attorneys have spent a significant amount of time advising the Department of the Treasury and other Federal financial entities on how to avoid risk, litigation in the following areas has been initiated or is likely to be initiated:



- **Contract Disputes**

The TARP and Stimulus programs involve numerous Government purchases, guarantees, and other agreements involving sums projected to reach nearly \$3 trillion dollars. Experience suggests that the Government's agreements and actions under TARP will likely be targeted by such litigation. As with the *Winstar* matters, such litigation could implicate entire industries, with numerous plaintiffs bringing complex and unique claims, leading to extensive and costly litigation.

- **Takings Litigation**

The Government's TARP and Stimulus programs are of a size and nature that inevitably will be perceived as affecting private, as well as public interests. Experience suggests that claims will be made that the Government's legislation, regulation, or other acts implementing these programs amount to a taking of property without just compensation. Takings suits tend to be highly fact-intensive and thus require expensive discovery. They often require sophisticated assistance from economic experts.

- **Shareholders Cases**

TARP includes a number of large investments in financial institutions that have conferred upon the Government ownership of not only debt obligations, but preferred stock and warrants convertible into common stock ownership. In some cases, it should be expected that the Government will be perceived to be in a position of a majority or controlling shareholder. As a result of its holdings and management of its investments, the Government may be targeted by lawsuits claiming that it has breached alleged duties to other shareholders, or to the entities in which it has invested. Such lawsuits could involve numerous plaintiffs, highly complex damages models, and other complicating factors requiring extensive resources for litigation.

## **Litigation Support**

The Civil Division envisions using FY 2010 resources to develop a flexible infrastructure to handle the variety of cases described above. In FY 2011, the \$3,500,000 request will allow the Division to expand its support services commensurate with new cases. Critical services that will be available to the largest cases will require the assistance of outside contractors, consultants, and experts, as is typical in complex litigation.

The most massive lawsuits could involve large document collections, myriad financial transactions, or thousands of contracts. Litigation support is needed to manage and organize the large amount of paper inherent to cases of this nature, analyze this data for evidence and patterns of fraud, and aid the attorneys in strategizing to win a case. This type of support is generally centralized in document centers that have the necessary infrastructure to house large numbers of data entry clerks, IT personnel, and paralegals. Consultants and experts will be required to conduct fact discovery and forensic accounting involving a multitude of financial transactions, interpret financial data, analyze claims, and develop evidence and expert testimony.



The Civil Division expects a number of small-to-medium sized cases that can be handled using in-house paralegals armed with an array of equipment, software, and training in order to support the attorneys. The Division has already developed a self-help program and can likely tailor and expand this program to meet the needs of this litigation. The self-help staff assists attorneys as they create and use transcript and document databases, scan evidentiary documents, capture and annotate live transcript feeds on their laptops, organize and share attorney work product, and display electronic evidence at trial. The program is convenient and flexible – qualities that are extremely important in high-stakes litigation.

### Impact on Performance

Given the short time that has elapsed since the two programs were enacted, it is impossible to predict accurately the extent of ensuing litigation. However, as described above, the Civil Division has two past experiences from which to draw guidance.

- Enactment of the Health Insurance Portability and Accountability Act created resources for the HHS-IG, as well as health care investigators and litigators. Since then, the IG has referred, and continues to refer, health care fraud cases to the Civil Division. Between FY 1997 and FY 2009, health care fraud recoveries have exceeded \$15 billion.

Adequate resources have been key to the Division's ability to obtain such recoveries in these extremely complex fraud cases. For example, for years, the Division has provided litigation support to the pharma family of cases, which involves fraudulent marketing and billing practices for numerous drugs by pharmaceutical companies. Full scale support of these cases has included the retention of consulting contractors and the development of databases designed to pinpoint patterns of fraud and support attorneys in their efforts to uncover wrongdoing. Without adequate funding for these pursuits, attorneys would have been unable to develop and pursue effectively more than a small fraction of these cases. In FY 2009 alone, the pharma and medical device cases generated more than \$1.2 billion in Federal and Medicaid state recoveries.

- The bailout of the savings and loan industry in the 1980s resulted in extensive defensive litigation that continues to this day. The “*Winstar*” litigation consisted of 122 cases involving 400 financial institutions claiming a total of \$30 billion in contract breach damages resulting from the enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

These cases could not have been defended adequately without litigation support. Attorneys would not have been able to effectively defend the United States without both the technological support that was provided through litigation support, as well as the analytical support that was provided by consultants. In its peak year, *Winstar* cost the Government over \$70,000,000. Litigation support was needed to scan and organize over 1 billion pages of relevant information.

Many of the institutions were represented by well-funded law firms that had access to litigation support services far in excess of the Government's litigation support. *With sufficient funding, the attorneys were able to limit judgments and settlements to a mere six cents on the dollar claimed.* Cases concerning the implementation of TARP will likely far outpace the size of the *Winstar* litigation.

Experience highlights the Civil Division’s success in high-stakes, complex, and lengthy litigation. The Civil Division’s efforts will not only assist in protecting American investors and markets, but they are also likely to have a high rate of return on the Government’s investment of resources. The precedential value of these cases is extraordinary; there will be huge amounts at stake. It is imperative that the Division receive funding now so that it may handle the massive litigation that is expected in FY 2011.

### **Funding – Response to Financial Crisis**

#### Base Funding

FY 2009 Enacted (w/resc./supps)				FY 2010 Enacted				FY 2011 Current Services			
Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)
0	0	0	0	118	87	28	\$10,000	118	87	118	\$24,836

#### Personnel Increase Cost Summary

Type of Position	Modular Cost per Position (\$000)	Number of Positions Requested	FY 2011 Request (\$000)	FY 2012 Net Annualization (change from 2011) (\$000)
<b>Total Personnel</b>				

#### Non-Personnel Increase Cost Summary

Non-Personnel Item	Unit Cost	Quantity	FY 2011 Request (\$000)	FY 2012 Net Annualization (Change from 2011) (\$000)
Automated Litigation Support			\$3,500	\$70
<b>Total Non-Personnel</b>			<b>3,500</b>	<b>70</b>

#### Total Request for this Item

	Pos	Agt/Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)
Current Services	118	87	118	\$19,708	\$5,128	\$24,836
Increases	0	0	0	0	3,500	3,500
<b>Grand Total</b>	<b>118</b>	<b>87</b>	<b>118</b>	<b>19,708</b>	<b>8,628</b>	<b>28,336</b>

## Program Increase

**Item Name:** E-Discovery

Budget Decision Unit: Legal Representation

Strategic Goal & Objective: 2.7 - Vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction

Organizational Program: Office of Management Programs

Ranking: 3 of 3

Program Increase: Positions 12 Attorneys 3 FTE 12 Dollars \$2,000,000

### Description of Item and Justification

The Department has undertaken a thorough review of its approach to handling document discovery in civil litigation on behalf of DOJ's clients. The review investigated how electronic discovery (e-discovery) is handled in the private sector. Based on interviews with e-discovery specialists from large, private law firms, it appears that the private sector is adapting to the demands of e-discovery by developing a cadre of lawyers with more sophisticated technical expertise. These attorneys, who have been labeled "Tier-3" attorneys in regards to their e-discovery expertise, perform a number of functions including: analyzing and providing advice on the most difficult issues; facilitating conversations between litigating components and the client's technical staff; participating in, or monitoring, Rule 26 conferences; and overseeing non-lawyer support staff that process and handle data. The key to the centralized third tier is that it combines technical and legal expertise.

To address the need for this expertise in e-discovery matters, the Civil Division requests an additional 3 attorney positions, 3 FTE, and \$609,000.

The Department's review also found that the civil litigating components have insufficient support staff to compliment the three tiers of expertise. Existing support staff focuses primarily on contract and case administration. As a result, they are not able to devote sufficient time to support the casework demands of attorney and paralegal staff. When attorneys are able to use support staff expertise early in a case, the support staff's advice can create significant gains in efficiency and reduce the likelihood of errors. For example, some formats are easier to process than others, and an attorney can save hundreds of hours of labor by requesting the information in a preferred format and following specified processes. These issues are not just matters of efficiency, they also serve to protect the client's interests.

It is difficult to quantify the number of FTE currently devoted to support staff functions because most staff identified as "litigation support staff" are dedicated to trial preparation rather than e-discovery and other staff members are cross-designated to handle e-discovery functions on a collateral basis. Nonetheless, the best analysis suggests that the Department's civil litigating components all have more than a 20:1 ratio of attorneys to support staff. According to the working group's findings, such a ratio is too high to provide sufficient support staff services.

To address the need for more support staff for e-discovery matters, the Civil Division requests an additional 9 FTE, and \$1,391,000.

## Funding – E-Discovery

### Base Funding

FY 2009 Enacted (w/resc./supps)				FY 2010 Enacted				FY 2011 Current Services			
Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)	Pos	Agt/Atty	FTE	\$(000)
0	0	0	0	0	0	0	0	0	0	0	0

### Personnel Increase Cost Summary

Type of Position	Modular Cost per Position (\$000)	Number of Positions Requested	FY 2011 Request (\$000)	FY 2012 Net Annualization (change from 2011) (\$000)
Attorney	\$203	3	\$609	\$37
Professional/Administrative Support	154	9	1,391	(129)
<b>Total Personnel</b>		12	2,000	(92)

### Non-Personnel Increase Cost Summary

Non-Personnel Item	Unit Cost	Quantity	FY 2011 Request (\$000)	FY 2012 Net Annualization (Change from 2011) (\$000)
<b>Total Non-Personnel</b>				

### Total Request for this Item

	Pos	Agt/Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)
Current Services	0	0	0	0	0	0
Increases	12	3	12	\$2,000	0	\$2,000
<b>Grand Total</b>	12	3	12	2,000	0	2,000

## Program Offsets

**Item Name:** Adjust Travel Expenditures

Budget Decision Unit: Legal Representation

Strategic Goal & Objective: 2.7 - Vigorously enforce and represent the interests of the United States in all matters over which the Department has jurisdiction

Organizational Program: Office of Management Programs

Ranking: N/A

Program Reduction: Dollars \$341,000

### Description of Item

This item is an offset of \$341,000 for travel and management efficiencies.

### Justification

The Department is continually evaluating its programs and operations with the goal of achieving across-the-board economies of scale that result in increased efficiencies and cost savings. In FY 2011, DOJ is focusing on travel as an area in which savings can be achieved. For the Civil Division, travel or other management efficiencies will result in offsets of \$341,000. This offset will be applied in a manner that will allow the continuation of effective law enforcement program efforts in support of Presidential and Departmental goals, while minimizing the risk to health, welfare, and safety of agency personnel.

### Impact on Performance

The travel and management offset will not have any significant effect on the strategic goal or performance of the Civil Division.