



United States Attorneys' Bulletin

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COMMENDATIONS

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

William Barnett (Alabama, Northern District), by Thomasina V. Rogers, Legal Counsel, Equal Employment Opportunity Commission (EEOC), Washington, D.C., for his outstanding representation and professionalism in the remand of a criminal prosecution of a former EEOC employee.

John D. Bates and **Fred Haynes** (District of Columbia), by Peter G. Powers, General Counsel, Smithsonian Institution, Washington, D.C., for their professionalism and legal skill in obtaining the dismissal of a six-year long litigation against the Smithsonian, and for bringing the entire matter to a successful conclusion.

Jean Paul Bradshaw II, United States Attorney, and **Richard J. Marien, First Assistant United States Attorney** (Missouri, Western District), by William S. Sessions, Director, FBI, Washington, D.C., for their exceptional efforts leading to the successful resolution of an investigation into the murder of a Special Agent.

Kathleen Brinkman (Ohio, Southern District), by Jane E. Graham, Assistant United States Attorney, Eastern District of Kentucky, Lexington, for her valuable instruction on asset forfeiture and money laundering issues.

Lynne H. Buck (Ohio, Northern District), by Jerald M. Ruffner, District Manager, Social Security Administration, Department of Health and Human Services, Lorain, Ohio, for her valuable assistance and guidance throughout a sensitive and emotionally charged trial involving allegations of discrimination by two employees.

Leah R. Bussell (California, Southern District), by Paul E. Wilson, Regional Counsel, U.S. Customs Service, Los Angeles, for her prompt and efficient assistance in the successful seizure and forfeiture of Blanca, a rare white Siberian tiger on the endangered species list, departing the United States at the San Ysidro Port of Entry. (With considerable media fanfare, Blanca was donated to the San Diego Zoological Society.)

Terry Clark and **Michael Shelby**, (Texas, Southern District) and **David Schwendiman** (District of Utah) by David J. Jordan, United States Attorney, District of Utah, for their successful prosecution of the LaBaron family, a polygamist sect that ascribed to a deadly doctrine of "blood atonement," and conspired to commit murder for hire in the simultaneous executions of four Texans. (Authorities believe the sect has been responsible for more than 20 deaths and that some former sect members are still targeted for assassination.)

Janet Craig (Texas, Southern District), by Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration, Washington, D.C., for her successful efforts in negotiating a favorable settlement of a case involving difficult and sensitive legal issues and complicated by the death of a key witness.

Charles L. Dause (Texas, Southern District), by Julian W. De La Rosa, Inspector General, Department of Labor, Washington, D.C., for his invaluable counsel and prosecutive assistance in the investigation of fraudulent interstate unemployment insurance claims originating in McAllen and Roma, Texas.

John M. Dowdy, Jr., Special Assistant United States Attorney (Mississippi, Southern District), was presented a special commendation plaque from Special Agent Bob Oliveri and Senior Resident Agent Keith McCartney, U.S. Fish and Wildlife Service for his "superior service to the U.S. Fish and Wildlife Service for outstanding support for wildlife conservation in the Southern District of Mississippi."

Janis Gordon (Georgia, Northern District), by Eljay B. Bowron, Special Agent in Charge, U.S. Secret Service, Atlanta, for her successful prosecution of a wiretap case conducted by the Secret Service, the Drug Enforcement Administration, Internal Revenue Service, and the Postal Inspection Service involving a large ring of individuals engaged in credit card fraud, bank fraud, and money laundering.

Gregory C. Graf (District of Colorado), by Robert M. Blunk, Manager, Civil Aviation Security Division, Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, for his successful efforts in obtaining the conviction of an individual for flying without an FAA airman certificate.

Carroll D. Gray (Washington, Eastern District), by Gordon A. Peterson, Special Agent in Charge, Office of Inspector General, Department of Interior, Sacramento, for his outstanding success in obtaining a conviction and a \$500,000 fine in a Bureau of Reclamation water violations case by a farm corporation in Royal City, Washington. (This is a precedent-setting case for other farms involved in water issues in the West.)

Lisa Grimes and Rita Valdrini (West Virginia, Northern District), by William C. Thurman, Upshur County Prosecuting Attorney, Buckhannon, for their successful prosecution of a notorious criminal originally indicted in an arson-for-profit scheme and which evolved into a conspiracy to commit and carry out two ambush-style attempted murders.

Barbara Guss (New York, Southern District), by William T. Bonacum, Director, Office of Internal Audit and Investigations, New York State Department of Transportation, Albany, for her professionalism and legal skill in the successful prosecution of a criminal fraud case involving a construction job on the New York State Thruway.

James T. Lacey (District of Arizona), by James F. Ahearn, Special Agent in Charge, FBI, Phoenix, for his outstanding efforts and dedication in the successful prosecution of a former Border Patrol agent for violations of the drug statutes.

Beth Levine (California, Southern District), by David M. Thompson, Attorney, Environmental Defense Section, Environment and Natural Resources Division, Department of Justice, for her outstanding leadership qualities and excellent prosecutive skill during the 3-week trial of a difficult and complex environmental case which resulted in considerable cost savings to the government.

Susan Lindquist (District of Alaska), by Joseph J. Molinari, Regional Administrator, Veterans' Employment and Training Service, Department of Labor, Seattle, for her successful efforts in obtaining a favorable settlement on behalf of the Government, and for providing timely and professional service to their veteran clients. Also, by J. P. Tangen, Regional Solicitor, Department of the Interior, Anchorage, for her expeditious and skillful resolution of a number of cases on behalf of the Department of the Interior.

Roslyn Moore-Silver (District of Arizona), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration, Phoenix, for conducting a moot court training program which proved invaluable to the special agents in the audience.

Thomas O. Mucklow (West Virginia, Northern District), by Hal N. Helderhoff, Special Agent in Charge, FBI, Detroit, for his valuable assistance and cooperative efforts in obtaining an order authorizing the installation of a monitoring device with only a few hours notice.

Marilyn Page (District of New Mexico), by Paul F. Hancock, Chief, Housing and Civil Enforcement Section, Civil Rights Division, Department of Justice, for her valuable assistance and professional advice during the course of a trial for relief under the Fair Housing Act, the first case to go to trial in New Mexico since the Fair Housing Amendments Act of 1988. **Anita Clements, Terri Nelson, and other staff members** provided valuable legal support.

Clifford J. Proud and Robert T. Coleman (Illinois, Southern District), by Donald E. Stuke, II, Special Agent in Charge, FBI, Springfield, for their excellent representation and successful resolution of a complicated subpoena matter involving sensitive documents contained in an FBI informant's files.

Crandon H. Randell (District of Alaska), was presented a Certificate of Appreciation by the Regional Forester of the Department of Agriculture for his "outstanding litigation representation and contribution to the protection of National Forest System resources in the prosecution of timber theft-related offenses in Alaska during 1992."

Mary Rigdon (Michigan, Eastern District), by Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration (DEA), Washington, D.C., for her exceptional litigation skills leading to a judgment in favor of the United States in a civil action arising out of a fatal shooting by a DEA employee.

William J. Sauget (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his participation in the Operation Pipeline Seminar held recently at the Southfield Police Department.

Robert L. Skiver (North Carolina, Eastern District), by Judge Malcolm J. Howard, U.S. District Court, Greenville, for his outstanding prosecutorial skill in a drug conspiracy case involving a dozen criminal defendants, twenty five government witnesses, and hundreds of exhibits introduced into evidence.

Steven E. Skrocki (District of Alaska), was presented a Certificate of Appreciation from the National Park Service, Alaska Region, in recognition of his substantial contribution to the National Park Service in Alaska.

Robert M. Small (District of Minnesota), by James R. Richards, Office of the Inspector General, Department of the Interior, Washington, D.C., for his excellent representation in an action involving potential Indian gaming casino fraud, and for bringing the matter to a successful conclusion.

Jeffrey T. Sprung (District of Columbia), by Major General Richard G. Larson, Military Traffic Management Command (MTMC), Department of the Army, Falls Church, Virginia, for his outstanding assistance in two recent cases, and for his valuable contributions to the successful accomplishment of the mission of the Defense Department.

Tom Stahl (California, Southern District), by Douglas W. Curless, Regional Counsel, Western Region, Federal Bureau of Prisons (BOP), Dublin, California, for his outstanding legal skill in representing the United States and fifteen BOP employees sued in their individual capacities for medical malpractice and failure to render medical care to a prisoner (bank robber), and for bringing the matter to a successful conclusion.

Thomas P. Swaim (North Carolina, Eastern District), by Cary H. Copeland, Director, Executive Office for Asset Forfeiture, Department of Justice, for providing valuable assistance and legal expertise for two weeks on a host of issues, including an emergency mission to South Dakota.

Thomas B. Thompson (Louisiana, Western District), by Louis John Zeller, Jr., District Counsel, Internal Revenue Service, New Orleans, for his prompt action in responding to a Bankruptcy Court hearing called on short notice, and for bringing the matter to a successful conclusion.

James E. Torgerson, Timothy M. Burgess, Blaine Hollis, Susan Lindquist, Betsy O'Leary, Richard Pomeroy, Ken Roosa, Mark Rosenbaum, Steven Skrocki and Other Staff Members (District of Alaska), by Burdena G. Pasenelli, Special Agent in Charge, FBI, Anchorage, for their participation and valuable contributions to the success of a joint moot court training program.

Joseph Urbaniak and Robert Kennedy (District of Colorado), by Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Rocky Mountain Division, for their excellent briefing for the Assistant Administrator for Operations and staff on Targeted Kingpin Organizations.

Richard A. Willis (Louisiana, Western District), by Christopher M. Nelson, Special Agent in Charge, U.S. Customs Service, Lafayette, for his outstanding cooperation and assistance in obtaining a settlement of a longstanding civil litigation in favor of the United States Government.

William E. Yahner and Brian T. Moffatt (Texas, Southern District), by Michael D. Wilson, Special Agent in Charge, FBI, Houston, for their valuable assistance and cooperative efforts in the seizure and forfeiture of over \$1.6 million in a complex investigation involving numerous fraudulent activities at several financial institutions.

Gordon Young (Texas, Southern District), by Neil S. Cartusciello, Chief, Environmental Crimes Section, Environment and Natural Resources Division, Department of Justice, for his successful prosecution of a hazardous waste case and for his valuable contribution to the criminal environmental enforcement program.

SPECIAL COMMENDATION FOR THE DISTRICT OF ARIZONA

Charles Steele and Virginia Mathis, Assistant United States Attorneys for the District of Arizona, were commended by Terree Bowers, United States Attorney for the Central District of California, for their outstanding work performed in the investigation and prosecution of former officials of Lincoln Savings and Loan Association and its parent company, American Continental Corporation (ACC). The result has been a stunning record of success, culminating on January 6, 1993, in the historic convictions of Charles H. Keating, Jr., ACC's former chairman of the board, and his son, Charles H. Keating III, a former senior vice-president of ACC. Following a two-month trial and five days of jury deliberations, both defendants were found guilty on all counts: 73 counts of racketeering, conspiracy, bank fraud, securities fraud, bankruptcy fraud, and other charges against Charles H. Keating, Jr., and 64 similar counts against Charles H. Keating III. The Keatings' convictions followed felony guilty pleas by eight former officers and business associates of ACC and Lincoln, including the president, two senior vice-presidents, and the chief financial officer of ACC, two presidents and the chairman of the board of Lincoln, a corporate counsel for ACC and Lincoln, and one of the most prominent real estate syndicators in Arizona. Collectively, the convictions resulting from the Lincoln investigation are among the most important white-collar judgments ever obtained by the United States Attorney's office in the Central District of California.

United States Attorney Bowers said that within a short period of time, Mr. Steele and Ms. Mathis mastered the details of one of the most flagrant of the frauds carried out by the Keatings -- the diversion, through a complex series of monetary transactions, of more than a million dollars in sham personal loans to ACC insiders shortly before the company filed for bankruptcy. Together they obtained the indictment of Keating and others on bankruptcy fraud charges in the District of Arizona, and their work was critical in obtaining the racketeering indictment in the Central District of California. The charges in the two indictments were consolidated for trial in California, and the jury returned guilty verdicts on all of them. Mr. Bowers said that the jury singled out the bankruptcy charges as predicates for finding both Keatings guilty of racketeering. This result was made possible by the exemplary prosecutorial work performed by Charles Steele and Virginia Mathis.

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SPECIAL COMMENDATION FOR THE DISTRICT OF COLUMBIA

Madelyn Johnson, John Bates, and Wilma Lewis, Assistant United States Attorneys for the District of Columbia, were commended by Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration (DEA), Washington, D.C., for bringing about an amicable resolution of a class action filed several years ago on behalf of Hispanic Drug Enforcement Administration agents. Their successful efforts will enable DEA management to address the legitimate concerns of its minority workforce, promote reconciliation with the plaintiff class, and move on to accomplish their mission. In his Order, the U.S. District Judge stated: "The Court commends both parties for leaving aside adversarial posturing and working to reach a consensus which benefits the plaintiff class, the Drug Enforcement Administration, and the taxpayers."

* * * * *

SPECIAL COMMENDATION FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Andrew Quinn and Robert Yevitz, Assistant United States Attorneys for the Middle District of Pennsylvania, were commended by Jack W. Selden, United States Attorney for the Northern District of Alabama, for assisting in the establishment of a Health Care Fraud Task Force. Mr. Quinn and Mr. Yevitz shared valuable hands-on advice and experience with members of his staff and with various state and local agency personnel. Mr. Selden believes a substantial impact can be made in his district in curbing health care fraud by following what has already proven successful in the Middle District of Pennsylvania.

* * * * *

SPECIAL COMMENDATION FOR THE DISTRICT OF COLORADO

Richard A. Zoeter, Department of Justice Auditor, was commended by Joseph D. Martinolich, Jr., Special Agent in Charge, FBI, Denver, for his valuable assistance to the Financial Institution Fraud Unit of the District of Colorado, and for his major contribution to the success of a highly complicated financial institution fraud case. The four-year investigation involved the review and understanding of literally thousands of financial and banking documents, interviews of key witnesses based on the information contained in the documents, and countless hours reviewing and understanding the highly convoluted financial transactions on which the charges were based. With Mr. Zoeter's able assistance, the investigation culminated in guilty pleas of the Executive Vice President and Senior Vice President and an 18-count indictment of the President, all on various fraud charges.

* * * * *

HONORS AND AWARDS

Western District Of New York

Roger P. Williams, Deputy Assistant United States Attorney, Senior Litigation Counsel, Western District of New York, was appointed Assistant Inspector General in Charge of Investigations for the Department of Transportation. During his 21-year tenure, **Mr. Williams** served as Chief of the Criminal Division, First Assistant United States Attorney, and Acting United States Attorney from June, 1981-May, 1982, and again from June, 1986 to June, 1988. **Mr. Williams** is highly respected in the Buffalo legal community as a dedicated and talented prosecutor.

* * * * *

Northern District Of West Virginia

William A. Kolibash, United States Attorney for the Northern District of West Virginia, was the recipient of the "Director's Community Leadership Award" for 1992. The award, from William S. Sessions, Director, FBI was presented by William E. Perry, Special Agent in Charge of the FBI, Pittsburgh Division. Since 1990, Director Sessions has recognized individuals and organizations for their efforts in the pursuit of a drug-free America. **United States Attorney Kolibash** was commended for publicly demonstrating his belief that demand reduction, along with aggressive law enforcement, should be the cornerstones in a community's efforts to eliminate illegal drugs. Director Sessions said, "Many have felt powerless in changing our nation's overwhelming dilemma of alcohol and drug addiction, but you have demonstrated that every single citizen can make a difference. You have proven that a drug-free America is possible when you care enough."

* * * * *

Southern District Of California

David L. Katz, Assistant United States Attorney for the Southern District of California, was selected Prosecutor of the Year by the Board of Directors of the Southern California Chapter of the International Association of Credit Card Investigators. Mr. Katz successfully prosecuted a major credit card fraud and money laundering case against an individual who, using ten different identities, obtained 109 credit cards and other access devices, and then laundered the proceeds of fraud through twenty-seven bank accounts. United States Attorney William Braniff said, "We have long recognized Dave's talents, but it is gratifying that a professional group with a vital stake in an important area of law enforcement gives Dave such public recognition."

* * * * *

ATTORNEY GENERAL HIGHLIGHTS

First Woman Attorney General In The Nation's History

On March 11, 1993, **Janet Reno** was confirmed (98-0) by the United States Senate to be the Attorney General of the United States. Justice Byron White administered the oath of office the following day. **Ms. Reno** said, "I was deeply honored to have the Justice officiate at my swearing-in. . .because his commitment to the rule of law and the pursuit of justice has been an example for all lawyers."

* * * * *

Major Appointments Announced In The Department Of Justice

On April 2, 1993, Attorney General Janet Reno made the following announcements:

Philip B. Heymann was appointed to serve as Deputy Attorney General. **Mr. Heymann**, a Harvard Law School professor, was formerly Assistant Attorney General for the Criminal Division during the Carter Administration.

Webster Hubbell was appointed to serve as Associate Attorney General. **Mr. Hubbell** was formerly a managing partner of a law firm in Little Rock, Arkansas.

Drew Days was appointed to serve as Solicitor General. **Mr. Days**, a Yale law professor, was formerly Assistant Attorney General for the Civil Rights Division during the Carter Administration.

* * * * *

National Women's History Month

On March 17, 1993, **Attorney General Janet Reno** and **Kathleen M. Hawk, Director, Bureau of Prisons**, participated in a National Women's History Month program in the Great Hall of the Department of Justice. The keynote speaker was **Kathleen Matthews**, host of the nationally syndicated television show "Working Woman" and a local television anchorwoman. The event, sponsored by the Department of Justice, is part of a month-long series of programs and activities celebrating the contributions women have made to this nation and to the Department of Justice.

* * * * *

PERSONNEL

United States Attorneys

A current list of United States Attorneys as of April 6, 1993, appears at page 136 of this Bulletin. Further information may be obtained by calling the Executive Office for United States Attorneys. The telephone number is: (202) 514-2121.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

World Trade Center Bombing

On March 17, 1993, Mohammed Salameh and Nidal Ayyad, of New Jersey, were indicted by a federal grand jury in Manhattan for the February 26 bombing of the World Trade Center. In a related case, the federal grand jury charged Ibrahim A. Elgabrowni in a 5-count indictment for assaulting two officers executing a search warrant at a search location. In a statement following the arrest of Mohammed Salameh on March 4, Director William S. Sessions stressed that this is still early in what will be, in all likelihood, a quite lengthy investigative process. (As of April 1, 1993, six suspects have been identified as having been involved in the World Trade Center bombing.)

Thomas G. Donlon, a Special Agent with the FBI for the past twelve years, has been assigned since 1986 to the Terrorist Task Force, which is comprised of members of the FBI New York office and the New York City Police Department. The following is an excerpt from an affidavit filed by Special Agent Donlon explaining the details of the investigation:

- While collecting debris from the explosion site, the explosives expert has identified components of a vehicle which contained the explosive device. Among the components that the explosives expert has identified is a part of the vehicle displaying stamped numerical and alphabetical impressions from the manufacturer of the vehicle which he recognized as a portion of the manufacturer's vehicle identification number ("VIN").

- Using the partial VIN as well as other information gathered during the crime scene investigation concerning characteristics of the vehicle which contained the explosive device, a fellow Special Agent of the FBI reconstructed the complete VIN of the vehicle which contained the explosive device.

- A VIN history check revealed that the vehicle identified by that particular VIN was a Ford Econoline E-350 Van bearing Alabama license plate number XA70668 (the "van"). A check with the Alabama authorities revealed that the van is registered to the Ryder Truck Rental Co. ("Ryder") in Alabama. Further investigation revealed that on or about February 23, 1993, the van was rented for a one-week period from an office located in Jersey City, New Jersey by an individual who identified himself as Mohammed Salameh.

- On or about February 26, 1993, approximately two to three hours after the bombing, Salameh returned to the Jersey City Ryder office. At the time, Salameh stated that the van had been stolen from a grocery store parking lot the night before. Salameh requested a refund of a cash deposit he had left for the van but was told by a Ryder employee that he had to report the theft to the police and produce a copy of the police report in order to obtain a refund.

- Later that evening, an individual identifying himself as Salameh entered a Jersey City police station and spoke with the desk officer. The individual told the desk officer, in substance, that the rental van he had been using had been stolen the previous evening. The individual further stated that he had attempted to report the theft the previous evening, but had been unable to because he did not have the license plate number of the van.

- On March 4, 1993, Salameh returned to the Jersey City Ryder office. At the time, a Ryder employee identified Mohammed A. Salameh as the individual who had rented the van, which was used in the World Trade Center bombing. Shortly thereafter, the defendant was arrested.

• In connection with the rental agreement for the van, Salameh provided the telephone number as a contact number, which further investigation revealed is subscribed to by Josie Hadas, of Jersey City, New Jersey. A search warrant was executed this afternoon at this location, and special agents of the FBI recovered, among other things, a letter addressed to the defendant, tools and wiring, and manuals concerning antennae, circuitry and electromagnetic devices. A law enforcement officer trained as a bomb technician has examined these materials and has concluded that they constitute evidence of a "bomb maker" at the location. Lastly, a dog trained in the detection of explosives responded positively to a closet space within the apartment.

Operation Disconnect

On March 4, 1993, Acting Attorney General Stuart Gerson and Director William Sessions announced that approximately 800 FBI Agents were making arrests and conducting searches in thirteen states as part of "Operation Disconnect," the most significant criminal telemarketing fraud investigation in the history of the FBI. The three-year investigation identified 548 individuals and 123 illegal telemarketing operations across the country. On March 4, eighteen FBI offices began arresting over 240 of these individuals and searching 47 locations.

For the most part, the illegal telemarketers identified through "Operation Disconnect" shared a common method: they contacted the victim, promised them a product or service, and asked them to pay for the product or service prior to receiving it. Over half of these telemarketers used the telephone for their first contact with their victims. Some of these were "cold calls" to unknown victims. But some victims were targeted through lists bought from other telemarketers. These lists contained the names, phone numbers and sometimes even biographical information of victims who had purchased products in the past and had already demonstrated a vulnerability to the seductive lure of deals "too good to be true."

The most popular method of contacting victims involved mailers -- postcards, mailed at random or to selected households, to contact potential customers. These victims were either "eligible to enter sweepstakes or had already won a prize" -- all they had to do was contact the telemarketer. Once the call was made, the victim was told that he or she was "eligible" to win or had already won one of a number of prizes. The victim only had to purchase something or pay a service fee to claim the prize. The items offered were either never delivered, or were far less valuable than the illegal telemarketers claimed. Often these less expensive items were used as bait to lure the victims to buy more expensive items, sometimes again and again.

Director Sessions said, "While 'Operation Disconnect' will close a number of illegal operations across the country, telemarketers will continue to use new schemes to defraud the public. In the meantime, however, we believe the identification, arrest, and successful prosecution of subjects in 'Operation Disconnect' will disrupt many illegitimate operations -- and will serve as a warning to other illegal telemarketers that their day will come."

Acting Attorney General Gerson said, "According to recent surveys, approximately 92 percent of the American public have received mail informing them they were winners of a free prize. Over 53 million Americans have responded to such mailings. While many of these are legitimate offers, others were the first step of elaborate telemarketing schemes that bilk consumers of billions of dollars each year. It is not only the lone consumer who is defrauded, but all of society."

CIVIL DIVISION/TAX DIVISION**Attendance By High-Ranking Department Of Justice Officials At Settlement Conferences**

On March 12, 1993, the Fifth Circuit issued its ruling with respect to a series of mandamus petitions filed by the Civil Division and the Tax Division challenging the authority of Judge John McBryde of the Northern District of Texas to order Department officials having "full" settlement authority to attend settlement conferences. The Government argued that the Attorney General was vested with the exclusive authority to determine which officials should have settlement authority and who should be sent to attend to the interests of the United States in any judicial proceeding. The Department contended that Judge McBryde's orders impermissibly restricted the scope of the Attorney General's discretion, and that, if these orders were left undisturbed, they would as a practical matter require substantial modifications to the Department's settlement procedures.

The Fifth Circuit rejected this argument, concluding that the district courts do have the inherent authority to direct Government officials having full settlement authority to attend settlement conferences, but that this authority should be used sparingly by the district courts. Specifically, the Fifth Circuit ruled that it should be used only after it has been shown to be necessary because intermediate steps have failed. One such step it described was requiring the official with settlement authority "to consider settlement in advance of the conference and be fully prepared and available by telephone to discuss settlement at the time of the conference." In light of this ruling, the court of appeals held that Judge McBryde abused his discretion in requiring attendance by high-ranking officials at settlement conferences on a regular basis, but it dismissed the Government's petitions, expressing confidence that Judge McBryde would be guided by its decision. This opinion could create future problems if district courts attempt to establish that future cases fall within the circumscribed authority delineated by the Fifth Circuit.

Deputy Solicitor General John Roberts presented oral argument on November 4, 1992, in the lead case -- In re Stone, No. 91-1625 (March 12, 1993) [5th Cir.; N.D. Tex.]. Also participating were Civil Division attorneys Robert V. Zener - (202) 514-1597, and Gary R. Allen - (202) 514-3361.

* * * * *

CIVIL DIVISION**Supreme Court Construes "Excusable Neglect"**

Numerous procedural rules allow for the filing of a document after the prescribed time period for filing has expired if a party can show that the failure to file on time was caused by "excusable neglect." Indeed, that standard generally applies to any action, with specified exceptions, required by the Federal Rules of Civil or Criminal Procedure. Fed. R. Civ. P. 6(b); Fed. R. Cr. P. 45(b). That standard also applies to counterclaims (Fed. R. Civ. P. 13(f)) and to reopening judgments within one year after entry (Fed. R. Civ. P. 60(b)(1)). Moreover, after the deadline for filing a notice of appeal has expired, Fed. R. App. P. 4(a)(5) allows a district court to extend that time by up to 30 days upon a showing of excusable neglect. 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 204.13[1] (1993). The courts of appeals were in conflict as to whether "excusable neglect" in these various provisions is limited to circumstances beyond a person's control.

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Ptrsp., 61 U.S.L.W. 4263 (U.S. Mar. 24, 1993), addressed the meaning of "excusable neglect" in the context of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. Patterned after Fed. R. Civ. P. 6(b), Rule 9006(b)(1) allows a bankruptcy court to extend the time for doing any act required by the bankruptcy rules, after the prescribed deadline for that act has expired, only upon a showing of "excusable neglect." The Supreme Court rejected a narrow construction of that term and adopted a more flexible balancing test:

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include * * * the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

61 U.S.L.W. at 4267-4268 (footnote omitted). The Court added, however, that clients must "be held accountable for the acts and omissions of their chosen counsel." *Id.* at 4268.

The Court's opinion analyzes precedents involving all of the examples of the "excusable neglect" standard mentioned in paragraph one above. It is therefore likely that the Court's construction of that term will be applied beyond the bankruptcy context.

If you have any questions, or require additional information, please contact Tony Steinmeyer of the Civil Division Appellate Staff, at (202) 514-3388.

* * * * *

TAX DIVISION

Electronic Tax Return Filing Fraud Information Package

Over the last two income tax filing seasons, the Internal Revenue Service (IRS) and the Tax Division have seen an alarming increase in the number of false and fictitious claims for income tax refunds in the IRS's Electronic Filing (ELF) program. The ELF system allows taxpayers who file their returns by computer through approved return preparers to obtain their refunds in less time than taxpayers who file paper returns. Many of those return preparers are offering loans for the amount of the anticipated refund (up to \$3,300). The instant loan, coupled with the difficulty the IRS has in detecting fictitious claims prior to payment of a refund, has made it possible for a few individuals to steal large amounts of money in a short time by filing multiple false electronic tax returns.

Because losses can occur so quickly, the Government must be able to move swiftly and aggressively to identify the individuals responsible and to stop these schemes while they are active. The Tax Division is expediting the investigation and prosecution of these cases. Under Tax Division Directive No. 96, fictitious ELF refund cases (as well as false and fictitious paper return cases) can now be referred by IRS directly to the United States Attorneys for grand jury investigation.

The Tax Division has provided an information package to each United States Attorney's office which contains an explanation of the referral and authorization procedures, applicable charges, plea bargain considerations, and other topics, as well as a set of attachments that includes sample indictments, plea agreements, and other information. If you would like an information package, please contact Tony Whitledge, a senior attorney in the Tax Division who has been designated to coordinate and monitor all ELF prosecutions. Mr. Whitledge can be reached at (202) 514-2832.

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IRS Non-Filer Tax Initiative

On February 23, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, forwarded a model press release to all United States Attorneys, Criminal Chiefs, Tax Division attorneys, and others, for use in cases generated under the non-filer tax initiative, a special enforcement program developed by the Internal Revenue Service and the Tax Division. A copy is attached at the Appendix of this Bulletin as Exhibit A.

The model press release contains a quote from James Bruton, Acting Assistant Attorney General, Tax Division, who left the Department on April 2, 1993. Please note that the quote may still be used but should not be attributed to Mr. Bruton. It instead may be attributed to the United States Attorney, or simply omitted. If you have any questions, please call Lou DeFalaise, Counsel to the Director, (202) 616-2128, or Gina Talamona, Office of Public Affairs, (202) 514-2007.

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CIVIL RIGHTS DIVISION**Retroactivity And Application Of New Statutes To Pending Cases**

On February 22, 1993, the Supreme Court granted the petitions for certiorari in two cases involving the application of the Civil Rights Act of 1991 to pending litigation (Landgraf v. USI Film Products (No. 92-757), and Rivers v. Roadway Express, Inc., (No. 92-938)). The Department of Justice is in the process of determining whether to participate in the cases, and if so, what its position will be. Because the Department's position is under review, the United States should not assert any positions in the lower courts that could prejudice arguments that may be made in the Supreme Court. Until further notice, all United States Attorneys are therefore requested to clear any proposed filings addressing retroactivity or the application of the 1991 Act with James Angus of the Civil Rights Division, at (202) 514-3845.

NOTE: This clearance is in addition, and does not replace, the required Civil Division clearance provided by Anne Gulyassy (202) 524-3527, or Marleigh Dover (202) 514-3511.

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First Formal Settlement Under Title III Of The Americans With Disabilities Act

On March 16, 1993, the Department of Justice announced that it resolved a complaint filed against the Municipal Credit Union of New York for failing to remove architectural barriers for persons with disabilities at its Manhattan branch -- marking its first formal out-of-court settlement under Title III of the Americans with Disabilities Act (ADA). According to the complaint, the only entrance to the building was inaccessible to persons who used wheelchairs or had other mobility impairments. Title III of the ADA requires, among other things, that existing places of public accommodation, like the Credit Union, remove barriers to make their facilities more accessible to people with disabilities, if its readily achievable. As a result of the settlement, the Credit Union installed a permanent ramp at the entrance and also agreed to notify its customers of the change, post appropriate signs and instruct its staff to assist individuals with disabilities who request assistance.

James P. Turner, Acting Assistant Attorney General for the Civil Rights Division, said a majority of the more than 900 Title III complaints the Department has received relate to barrier removal in existing facilities. Many have been resolved informally as a result of informal negotiations. Mr. Turner said if negotiations are not successful, the Department is authorized to file an action in federal district court to enforce Title III.

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INTERNATIONAL AFFAIRS

Mutual Legal Assistance Treaties

With the recent entry into force of a Mutual Legal Assistance Treaty (MLAT) with Argentina, the United States now has MLATs with thirteen jurisdictions -- Canada, Mexico, Italy, Switzerland, the Netherlands, Turkey, Argentina, Turks and Caicos Islands, the Bahamas, Anguilla, the British Virgin Islands, the Cayman Islands, and Montserrat. Nine additional MLATs are in the final stages of implementation, and several others are being negotiated.

Under a delegation from the Attorney General, the Director of the Office of International Affairs acts as Central Authority under each MLAT. This entails initiating requests on behalf of federal and state law enforcement authorities, receiving and overseeing the execution of requests initiated by our treaty partners' Central Authorities, and administering the day-to-day implementation of the treaties. MLATs create a routine channel for obtaining a broad range of legal assistance, including, inter alia, taking testimony or statements of persons, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures.

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Reference Source For Mutual Legal Assistance Treaties With The United States

Since all extraditions from the United States, and most extraditions to the United States are done by treaty, one of the most common questions the Office of International Affairs receives is whether the United States has a treaty with country "X". A list (with citations) of over 100 countries with which the United States has such treaties appears in West's Federal Criminal Code and Rules, at 18 Appendix 5. In the 1991 volume, this information appears at pp. 952-953.

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HEALTH CARE FRAUD

Medicare Fraud In The Southern District Of California

On December 18, 1992, the Department of Justice and the Department of Health and Human Services announced the largest Medicare settlement ever reached between the government and a health care provider. National Health Laboratories, Inc. (NHL), one of the nation's largest clinical laboratories headquartered in La Jolla, California, and its president, pleaded guilty in federal court to submitting false claims to government health insurance programs. As part of a global resolution, the corporation also agreed to pay the United States \$100 million to settle a Medicare fraud case. (See, United States Attorneys' Bulletin, Vol. 1, No. 1, dated January 15, 1993, at p. 11.)

The criminal convictions and civil settlement are the result of an extensive two-year federal grand jury investigation directed by **Carol C. Lam, Assistant United States Attorney for the Southern District of California**. The San Diego Division of the FBI, the Inspector General of the Department of Health and Human Services, and a number of prosecutors, law enforcement and regulatory personnel dedicated to the detection and prosecution of health care fraud in Southern California, provided valuable assistance. The investigation focused on a national marketing and billing scheme by NHL to induce doctors to order unnecessary laboratory tests that would be billed out to Medicare and other insurance carriers at prices far higher than the doctor expected. The result was a loss to the Medicare, Medicaid, and CHAMPUS (Civilian Health and Medical Program for the Uniformed Services) programs of millions of dollars due to unnecessary laboratory testing.

Assistant United States Attorney Lam noted that offering groups of tests, or "profiles," to physicians at discounted prices, while billing each test separately to insurers at full reimbursement rates, is a widespread practice in the laboratory industry that interferes with a doctor's professional judgment about the medical necessity of the tests. Most insurance companies rely on the physician's determination of medical necessity, and excessive discounting of profiles results in the performance of a great number of unnecessary tests. Ms. Lam said, "While the financial consequences are minimal to the usually unsuspecting physician, society ends up paying the enormous tab."

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DRUG/CRIME ISSUES

International Asian Organized Crime Conference, Las Vegas, Nevada

The 15th Annual International Asian Organized Crime Conference, the largest international gathering of law enforcement officers to address Asian organized crime, was held in Las Vegas on March 28-April 1, 1993. Co-hosted by the FBI and the Las Vegas Metropolitan Police Department, the conference was attended by over 1,200 Federal, state and local law enforcement officers from across the globe to exchange information and explore new trends in Asian organized crime. The three major topics of discussion were: 1) increasing the awareness of law enforcement personnel to the Asian culture; 2) educating law enforcement on how to address the culture and customs of the criminal/victim of Asian organized crime; and 3) continuing to identify the increased prevalence of Asian organized crime and its global impact. Featured workshops included issues such as white collar crime/financial crimes; Asian gambling operations; international credit card fraud; Japanese organized crime; Chinese organized crime; and gang homicide investigations.

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Drug Enforcement In The Dominican Republic

On March 24, 1993, the Select Committee on Narcotics held its last hearing to discuss cooperation problems with the Dominican Republic in the area of drug enforcement and, more specifically, the inability to get fugitives from the United States returned to stand trial. Testimony was provided by the Departments of Justice and State, the Drug Enforcement Administration (DEA), the Immigration and Naturalization Service (INS), and the New York City Police Department. The problems cited were that the current extradition treaty is old and does not include drug offenses as extraditable offenses. Other international agreements were discussed that, if ratified by the Dominican Republic, would automatically incorporate drug offenses into the existing bilateral extradition treaty.

Testimony was presented as to the inability of the system to handle inadmissible aliens, especially Dominican nationals. Of the 15,000 aliens determined to be inadmissible, only seven percent can be detained for hearings due to lack of jail space. Hearings for non-detained aliens are currently scheduled for fourteen months following date of arrival due to crowded dockets. INS is seeing an increase in the number of inadmissible Dominicans found at U.S. ports of entry. In this regard, Chairman Rangel solicited suggestions for statutory and regulatory changes to address the growing problem of aliens entering the United States with fraudulent or no immigration documentation.

The Chairman said that while the formal Committee would cease to exist, members of the Committee intend to retain their interest in this subject matter on their respective standing Committee assignments. In addition, the Chairman intends to form a caucus of interested Committee members of continue their work in this area.

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Felony Sentences In State Courts In 1990

The Bureau of Justice Statistics (BJS) of the Office of Justice Programs, Department of Justice, has recently issued a Bulletin entitled "Felony Sentences in State Courts, 1990," which states that in 1990, an estimated 168,000 persons were convicted of drug trafficking. That number is more than twice the number convicted in 1986, the year the survey was first conducted. An estimated 49 percent of drug traffickers received a State prison sentence in 1990, up from 37 percent in 1986. Other results include the following:

- Drug traffickers (20 percent) and drug possessors (13 percent) together made up 33 percent of felons convicted in State Courts in 1990. Violent offenders, consisting of murderers (1 percent), rapists (2 percent), robbers (6 percent), assaulters (7 percent), and others convicted of a violent crime (2 percent) together made up 18 percent. Burglars (13 percent) and larcenists (14 percent) made up most of the rest.
- State courts sentenced 46 percent of convicted felons to a State prison and 25 percent to a local jail (usually for a year or less.) The remaining 29 percent were sentenced to straight probation with no jail or prison time to serve.
- State courts sentenced to death 2 percent of those convicted of murder.
- The average sentence to local jail was 8 months. The average probation sentence was about 3 1/2 years.
- Felons sentenced to a State prison in 1990 had an average sentence of 6 1/4 years but were likely to serve a third of that sentence -- or about 2 years -- before release, assuming that current release policies continued.
- About 78 percent of felons had one felony conviction offense, 16 percent had two, and the remaining 6 percent had three or more.
- A fine was imposed on 16 percent of convicted felons, restitution on 16 percent, community service on 4 percent, and treatment was ordered for 7 percent.
- Of the total number of convicted felons in 1990, 91 percent had pleaded guilty to their crime. The rest had been found guilty at trial.
- Average time from arrest to sentencing in 1990 was about 7 months.
- Large urban counties disproportionately accounted for felony convictions nationwide -- the 75 largest urban counties had 37 percent of the Nation's residents but 48 percent of its felony convictions.
- Of the felons convicted nationally in 1990, 52 percent were white, 47 percent were black, and 1 percent were of other races. Males were 86 percent of the total. The average age of convicted felons was 29 years.

Single copies of the BJA report, as well as other BJS statistical information and publications may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 10850. The telephone number is: 1-800-732-3277.

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POINTS TO REMEMBER

Use Of Diplomatic And Official Passports

On January 25, 1993, the Department of State issued the following directive to all U.S. Government agencies:

Bearers of diplomatic and official passports are reminded that diplomatic and official passports are, by statute, issued only to officers of the United States proceeding abroad on official business. Outgoing officials and their dependents must submit their diplomatic or official passports for cancellation before separation from federal service. The passports should be returned to the agency office which assisted the employee to obtain it. The passports must then be transmitted with a completed DSP-19 Form to: The Washington Passport Agency, Diplomatic and Congressional Travel, 1425 K Street, N.W., Rm. 358, Washington, D.C. 20522-1705.

If the bearer wishes to have the passport returned after cancellation, a stamped, self-addressed envelope may be included with the passport when submitted for cancellation.

Please note that use of a diplomatic or official passport after the bearer's separation from service is a felony subjecting the user to prosecution under Title 18 of the U.S.C., section 1544, Misuse of a Passport.

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 9, dated March 1, 1993, is attached as Exhibit B at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

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Federal Sentencing And Forfeiture Guide

Due to budget constraints, the Federal Sentencing and Forfeiture Guide Newsletter, published by James Publishing Group, Santa Ana, California, will no longer be included as an attachment in the United States Attorneys' Bulletin. If you would like a copy of the current issues of the Newsletter, please call Audrey Williams, at (202) 501-6098.

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LEGISLATION

National Voter Registration Act

On March 17, 1993, the United States Senate approved its version of the National Voter Registration Act (H.R. 2) by a vote of 62-37. The Senate's version requires states to provide citizens with voter registration forms at state motor vehicle departments. It also requires states to institute uniform mail-in voter registration. The Senate version of H.R. 2 does not require states to provide voter registration forms to citizens at state social services or unemployment offices. The differences between the Senate and House versions of H.R. 2 must now be settled in a Conference Committee.

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Freedom Of Access To Clinic Entrances Act

On March 25, 1993, the House Judiciary Subcommittee on Crime and Criminal Justice approved H.R. 796, the "Freedom of Access to Clinic Entrances Act of 1993," by a vote of 9-4. This bill would make it a Federal criminal offense for a person, with the intent of preventing or discouraging anyone from obtaining reproductive health services, physically to obstruct, impede or hinder the access of another to a medical facility. An amendment was offered and adopted to clarify that expressive conduct at abortion clinics is permitted. The Office of Legal Counsel and the Civil Rights Division have advised that they have some constitutional concerns regarding certain provisions of the legislation, as introduced.

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DNA Identification Act

On March 24, 1993, the House Judiciary Committee marked up H.R. 829, the "DNA Identification Act of 1993." This bill would amend Title I of the "Omnibus Crime Control and Safe Streets Act of 1968" to authorize funds received by States and units of local government to be expended to improve the quality and availability of DNA records. It also would authorize the FBI to establish a DNA identification index and would require the FBI to issue quality standards to be used by laboratories in analyzing DNA. The Committee approved the bill without amendment, and the bill was passed by the House under suspension of rules on March 29, 1993. The Criminal Division is concerned that the bill not be interpreted as prohibiting the use of DNA analyses in Federal criminal prosecutions. The Department plans to address this matter in the Senate.

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Bankruptcy Amendments Act Of 1993

On March 10, 1993, S. 540, the Bankruptcy Amendments Act of 1993 was introduced in the Senate. This legislation is substantially similar to a bill that passed the Senate 97-0 in 1992. Key provisions would: improve bankruptcy administration in various respects (e.g., by encouraging individual debtors to employ Chapter XIII of the Bankruptcy Code (reorganizations), instead of Chapter VII (straight bankruptcy)); address a number of commercial bankruptcy issues; and establish a Bankruptcy Review Commission to look into the need for additional changes in the bankruptcy system. The Department's components are reviewing S. 540. There is no counterpart House bill at this time.

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SUPREME COURT WATCH***An Update Of Supreme Court Cases From The Office Of The Solicitor General*****Selected Cases Recently Decided****Criminal Cases:**

Ortega-Rodriguez v. United States, No. 91-7749 (decided March 8)

This case raised the question whether a defendant who flees after conviction, but before sentencing, waives his or her right to appeal from the conviction. By a 5-4 vote, the Supreme Court has held that such defendants ordinarily retain the right to appeal, although dismissal of an appeal may be appropriate when a defendant escapes for a long period of time and would thereby prejudice the government's position on retrial if the conviction were reversed.

Selected Cases Recently Argued**Civil Cases:**

Darby v. Cisneros, No. 91-2045 (argued March 22)

In this case, the government argues that, notwithstanding Section 10(c) of the A.P.A., 5 U.S.C. 704, district courts may invoke the doctrine of exhaustion of administrative remedies to dismiss the suits of plaintiffs who have elected not to pursue optional appeals from an ALJ to the agency Secretary.

Keene Corp. v. United States, No. 92-166 (argued March 23)

The government contends in this case that 28 U.S.C. 1500 bars simultaneous litigation of a dispute in the Court of Federal Claims and another court.

Daubert v. Merrell Dow Pharmaceuticals, No. 92-102 (argued March 30)

In this case, the government argues that the Federal Rules of Evidence altered the Frye test for admission of scientific evidence, but, under Rules 702 and 703, district courts should preliminarily screen expert opinions so that such witnesses testify only to knowledge that is sufficiently reliable to assist the trier of fact. Factors relevant to that determination are whether the technique relied upon has achieved acceptance by at least a significant minority within the field, whether the rate or possibility of error can be estimated, the degree of subjectivity involved, and the extent of peer review by publication and other means. And, like any evidence, expert evidence may be excluded under Rule 403.

Shalala v. Schaefer, No. 92-311 (argued March 31)

The government argues in this case that a district court's remand of a Social Security claim under the fourth sentence of 42 U.S.C. 405(g) is a final judgment that triggers the 30-day period for filing an attorney fee application under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

Criminal Cases:**Smith v. United States**, No. 91-8674 (argued March 23)

The government argues in this case that the exchange of a firearm for a controlled substance constitutes the "use" of that firearm during and in relation to a drug trafficking crime, for purposes of the penalty enhancements of 18 U.S.C. 924(c).

United States v. Padilla, No. 92-207 (argued March 24)

In this case, the United States argues that various co-conspirators have no standing to challenge the illegal traffic stop of a drug courier unless they have a cognizable privacy or property interest that was adversely affected by the stop. The government contends that a co-conspirator's supervisory role accords no standing by itself, that the absent owners of the car that was briefly stopped suffered no meaningful deprivation of their property interest in the car, and that no one has cognizable property interests in contraband.

Stinson v. United States, No. 91-8685 (argued March 24)

The government argues in this case that sentencing courts generally must follow the Sentencing Commission's commentary on the Sentencing Guidelines, as the Guidelines are equivalent to legislative rules and the commentary to the Guidelines is equivalent to an agency's interpretation of its own legislative rules. We also contend that courts of appeals should not apply amendments to the guidelines retroactively absent express direction to do so. Finally, we argue that to take retroactive advantage of the favorable amendment in this case, Amendment 433, a defendant must file a motion in district court seeking resentencing, rather than seek relief from the court of appeals.

Questions Presented in Selected Cases in Which the Court Has Recently Granted Cert.**Civil Cases:****FDIC v. Meyer**, No. 92-741 (granted March 22)

(1) Whether FSLIC, a federal agency, may be liable for tort damages under an implied Bivens action for denying due process rights; and

(2) Whether FSLIC violated the Due Process Clause by terminating the employment of an officer of a failed thrift without a hearing.

United States v. James Daniel Good Property, No. 92-1180 (granted March 22)

(1) Whether the seizure of real property for forfeiture violated the Due Process Clause because the nonresident owner was not given notice and an opportunity for a hearing before the seizure, even though the seizure was pursuant to a valid warrant; and

(2) Whether a civil action under 21 U.S.C. 881(a)(7) for forfeiture of property used in the commission of a drug offense can be barred as untimely even though filed within the five-year statute of limitations of 19 U.S.C. 1621.

United States Dep't of Defense v. FLRA, No. 92-1223 (granted March 29)

Whether the Privacy Act of 1974 and the privacy exemption to FOIA protect against the disclosure of the home addresses of federal employees to federal employee unions.

Criminal Cases:

Posters 'N' Things, Ltd. v. United States, No. 92-903 (granted March 8)

Whether the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. 857, requires proof that the retailer subjectively intended that items sold would be used as drug paraphernalia.

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CIVIL DIVISION

**En Banc Ninth Circuit Holds That State Anti-Deficiency Laws Cannot Impair
The VA's Right To Indemnification Under Its Home Loan Guaranty Program**

The Department of Veterans Affairs (VA) guarantees home loans for qualified veterans. If a veteran defaults, and a deficiency remains after foreclosure of the property, the VA pays the lender under the guaranty. The applicable regulation permits the VA to seek indemnification from the veteran for monies paid under the guaranty, subject to extensive procedures designed to prevent exorbitant deficiencies. Under Idaho law, deficiency judgments are permitted only if the lender obtains a state-court determination of the fair value of the mortgaged property within three months after foreclosure and credits at least that amount against the outstanding debt. The plaintiff veterans in this case argued that the failure to obtain such a state-court valuation precluded the VA from recovering on an indemnification theory; the district court, relying on the Ninth Circuit's prior decision in Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990), agreed.

The VA appealed, and the case was argued before a panel of the Ninth Circuit. Prior to any decision by the panel, the court sua sponte granted rehearing en banc. The en banc court (Kozinski + 6; Beezer + 3 [diss.]) has now reversed the judgment of the district court. The court held that the applicable regulation, by its clear terms, permits the VA to recover from the veteran under either a subrogation or an indemnity theory. Although a subrogation remedy is contingent upon the lender's compliance with state-law requirements for deficiency judgments, the VA's right to indemnity is unaffected by state law. The court in Whitehead had held that the VA may rely on an indemnification theory only when state law entirely prohibits deficiency judgments. The en banc court in the present case concluded that this holding was inconsistent with the applicable regulation, and that Whitehead should therefore be overruled. The en banc court also noted that its holding was consistent with decisions of the Seventh and Eighth Circuits. The VA's consistent position has been that the home loan guaranty program provides participating veterans with substantial advantages that are unavailable to other mortgage debtors, and that these protections should replace rather than supplement state-law restrictions on deficiency judgments. The en banc decision in this case provides strong support for that position.

Carter v. Derwinski, No. 91-35530 (March 4, 1993) [9th Cir.; D. Idaho].
DJ # 151-22-147.

Attorneys: Mark B. Stern - (202) 514-5089
Malcolm L. Stewart - (202) 514-1633

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Third Circuit Holds That A District Court Lacks Authority To Conduct A Trial And Make Independent Findings To Determine Whether A Social Security ALJ Is Biased, But Rather May Only Review The Findings Of The Secretary

Plaintiffs -- all Social Security disability claimants who were denied benefits after a hearing before ALJ Russell Rowell since 1985 -- brought this class action seeking readjudication of their claims on the ground that ALJ Rowell is biased against disability claimants. The district court certified the class and allowed discovery. Meanwhile, the Department of Health and Human Services (HHS) held its own administrative bias examination of ALJ Rowell's work. After an extensive investigation, HHS issued a report and decision that was very critical of ALJ Rowell, but found that there was no evidence of a pervasive bias that would justify readjudication of the class members' claims. Despite the Secretary's bias ruling, the district court scheduled a trial to determine independently whether ALJ Rowell is biased. The trial was to include testimony from the ALJ's former clerks, staff, and friends. We objected to the trial, arguing that a district court's sole role in an allegation of ALJ bias is either to review the findings of the Secretary or to remand for additional findings. The district court refused to postpone the trial, but agreed to certify the issue for appeal.

On appeal, the Third Circuit has now agreed with our position. The court (Alito and Hutchinson; Higginbotham, dissenting) held that, under the Social Security judicial review statute, a district court may conduct a limited review of the Secretary's findings, or may remand for further findings, but may not make findings of its own. The court of appeals rejected plaintiffs' arguments that a court may engage in fact-finding in a class action. The court ruled that neither the Supreme Court's Yamasaki nor its City of New York decisions permit fact-finding in class action Social Security cases. Further, the court held that permitting a fact-finding trial into the mindset of an ALJ would itself "pose a substantial threat to the administrative process." The court concluded that it was convinced that plaintiffs could fully protect their rights through judicial review of the Secretary's findings.

Lois M. Grant v. Donna E. Shalala, Secretary of Health and Human Services,
No. 91-5675 (March 5, 1993) [3d Cir.; M.D. Pa.]. DJ # 145-16-3210.

Attorneys: William Kanter - (202) 514-4575
Robert M. Loeb - (202) 514-4332

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TAX DIVISION

Federal Circuit Reverses Lower Court And Issues Favorable Opinion On Timeliness Of Refund Claims

On March 18, 1993, the Federal Circuit reversed the adverse decision of the Claims Court (now the Court of Federal Claims) in Mobil Oil Co. v. United States. This case, which involved over \$2 million, presented the question whether the taxpayer's claim for refund was barred by Section 6511(b)(2)(B) of the Internal Revenue Code, which provides that the amount of a refund is limited to the portion of the tax paid during the two years immediately preceding the filing of a claim for refund. For its 1964 tax year, Mobil agreed to an increase in its consolidated taxable income, based on a reallocation of income pursuant to Section 482 of the Internal Revenue Code. As part of this agreement, which took effect in 1973, the Internal Revenue Service agreed to reduce amounts owing to the Federal Government by the amount of tax Mobil's foreign affiliates had already paid to foreign governments on this reallocated income.

Mobil thereafter filed a claim for refund for 1964. In determining that Section 6511 barred Mobil's claim for refund, the Claims Court held that the reduction in tax was tantamount to a payment of additional tax on the date of the agreement, and that since Mobil filed its claim for refund in 1975, the claim was not barred by Section 6511. On appeal, the Federal Circuit reversed, ruling that the reduction in tax liability afforded Mobil should not be considered a payment of tax as the Claims Court held, but merely an adjustment stemming from the Internal Revenue Service's attempt to provide relief from double taxation.

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Fifth Circuit Joins Federal Circuit In Upholding The Taxability Of Lump Sum Payments To Federal Retirees

On March 15, 1993, the Fifth Circuit affirmed the favorable decision of the Tax Court in Guilzon v. Commissioner. This case involved the taxability of a lump-sum payment received by a federal government retiree. Under the retirement laws in effect from June, 1986 through November, 1990, a federal retiree could elect to receive, in lieu of a basic annuity, a lump-sum payment equal to the amount of his contributions to the Civil Service Retirement System (CSRS), together with a reduced annuity. The present value of these benefits was the actuarial equivalent of the present value of the annuity that otherwise would have been provided. The taxpayer argued that the lump-sum payment represented previously taxed contributions to the CSRS, and that it was thus not taxable to him. The Tax Division argued that the tax treatment of this payment was determined under Section 72(e) of the Internal Revenue Code, which provides that an amount received under an annuity contract which "is not received as an annuity" and is "received on or after the annuity starting date, shall be included in gross income." The Tax Court agreed, and the Fifth Circuit affirmed. The Federal Circuit reached this same result in Shimota v. United States, 943 F.2d 1312 (1991), cert. denied, 112 S.Ct. 1669 (1992). Although Congress has suspended the ability of federal retirees to elect to receive a lump-sum payment in this manner, this case nonetheless has substantial administrative importance because thousands of federal employees previously received such distributions upon retirement.

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Ninth Circuit Denies Rehearing In Case Involving The Constitutionality Of An Estate Tax Provision

On March 9, 1993, the Ninth Circuit denied the Government's petition for rehearing (with suggestion for rehearing en banc) in Carlton v. United States. This case involved approximately \$2.5 million in estate tax and represented the question whether Congress's retroactive repeal of the estate tax deduction for certain stock sales to an employee stock ownership plan (ESOP) was constitutional. Section 2057 of the Internal Revenue Code, enacted as part of the Tax Reform Act of 1986, permitted an estate tax deduction for 50 percent of the proceeds resulting from the sale of employer securities to an ESOP. In 1987, Congress retroactively amended Section 2057 to eliminate an unintended loophole. Under the amended Section 2057 a deduction for sales of stock to ESOPs was allowed only for stock that had been owned by the decedent at the time of his death.

Here, the executor purchased stock of MCI Corporation after the death of the decedent and then sold the stock to MCI's ESOP. The estate claimed a deduction under Section 2057 of over \$5 million. After the IRS disallowed this deduction based on the retroactive amendment to Section 2057, the estate filed a suit for refund in the District Court, contending that the retroactive amendment to Section 2057 violated due process. The District Court determined that the 1987 amendment to Section 257 could be applied retroactively. In a split decision, the Ninth Circuit reversed, holding that the estate had "reasonably and detrimentally relied on Section 2057 as enacted," and that "[t]he very fact that [the executor] engaged in a costly transaction for no other reason than the inducement provided by the new section 2057 makes this case significantly different from those rejecting a due process challenge to a retroactively applied revenue law."

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OFFICE OF LEGAL EDUCATION**COMMENDATIONS**

Carol DiBattiste, Director, Office of Legal Education (OLE), and the members of the OLE staff, thank the following Assistant United States Attorneys (AUSAs), Department of Justice officials, and Department of Justice and Federal agency personnel for their outstanding teaching assistance and support during courses conducted from February 15 - March 15, 1993. All persons listed below are AUSAs unless otherwise indicated.

Automating Financial Litigation (Orlando, Florida)

Tim Murphy, Deputy Associate Attorney General. **Richard W. Sponseller**, Associate Director, **Kathleen Haggerty**, Assistant Director, and **Darrell Curtis**, Management Analyst, all from the Financial Litigation Staff, Executive Office for United States Attorneys (EOUSA). **Eileen Menton**, Assistant Director, **Vern Bryant**, Chief, Central Systems Service, and **Patti Ostrowski**, Management Analyst, all from the Case Management Staff, EOUSA. **Judy Johnson**, Program Manager, Evaluation and Review Staff, EOUSA. **Paul Condon**, Regional Financial Litigation Specialist, Northern District of New York; **Sue Davis**, Paralegal Specialist, Southern District of Indiana; **Stacy Joannes**, Systems Manager, Western District of Wisconsin. **Dale Trott**, Acting Director, Debt Accounting Operations Group, Justice Management Division; and **Kim Whatley**, Probation Programs Specialist, Probation Division, Administrative Office of the United States Courts.

Civil Federal Practice Seminar (Columbia, South Carolina)

Steve Mason, Eastern District of Texas; **John Seibert**, District of Hawaii; **Kristin Tolvstad**, Northern District of Iowa; **Robert DeSousa**, Middle District of Pennsylvania; **Bill Campbell**, Western District of Kentucky; **George Wu**, Central District of California; **Kathleen McDermott**, District of Maryland; **David Moynihan**, District of Nevada. **Charles Brooks**, Attorney, Environment and Natural Resources Division. **Joseph Sher**, **Larry Klinger**, and **Mary Leach**, Torts Branch, Civil Division. **Melanie Pustay**, Office of Information and Privacy, Office of Policy and Communications.

FOIA for Attorneys and Access Professionals (Washington, D.C.)

From the Office of Information and Privacy, Office of Policy and Communications: **Dan Metcalfe**, Co-Director; **Richard Huff**, Co-Director; **Margaret Irving**, Associate Director; **Melanie Pustay**, Senior Counsel; **Paul Noel-Chretien**, **Scott Hodes**, **Michael Hughes**, **Janice Galli Mcleod**, **Kirsten Moncada**, and **Anne Work**, Attorney-Advisors; **Charlene Wright**, Deputy Chief, Initial Request Unit; and **Carmen Mallon**, Paralegal Specialist. From the Appellate Staff, Civil Division: **Matthew Collette**, **John Daly**, and **John Schnitker**, Attorneys. **William Borderly**, Attorney-Advisor, FOIA Section, Drug Enforcement Administration. **Stuart Frisch**, Deputy General Counsel, Justice Management Division. **Frank Newett**, Assistant Director, Office of Equal Opportunity, Criminal Division. **Helen Maus**, General Attorney, Office of General Counsel, General Services Administration. **Gayla Sessoms**, Assistant Director for Information Services, Securities and Exchange Commission. **Robert Veeder**, Senior Policy Analyst, Office of Management and Budget. **Kenneth Wernick**, Associate Counsel, Naval Sea Systems Command, Department of the Navy.

Money Laundering (New Orleans, Louisiana)

Robert Boitmann, Executive Assistant United States Attorney, and **Richard Westling**, Assistant United States Attorney, Eastern District of Louisiana. **Claude Hippard** and **Sue Kempner**, Southern District of Texas. **Virginia Covington**, Chief, Asset Forfeiture Section, Middle District of Florida. **Al Gillum**, Inspector, U.S. Postal Service; **Bill Bradley**, Attorney Advisor, Department of Treasury; **Hattie Broussard**, Regional Counsel, U.S. Customs Service. From the Criminal Division: **Lester Joseph**, Deputy Chief, Money Laundering Section; **David Margolis**, Acting Deputy Assistant Attorney General; **Molly Warlow**, Principal Deputy Director, Office of International Affairs; and **Steve T'Kach**, Deputy Chief, Electronic Surveillance Unit. **Laurie Sartorio**, Assistant Director, Executive Office for Asset Forfeiture.

Privacy Act (Washington, D.C.)

Kirsten Moncada, Attorney-Advisor, Office of Information and Privacy, Office of Policy and Communications; **Phillip Kesaris**, Deputy Assistant General Counsel for Inspector General and Administrative Proceedings, Department of Housing and Urban Development; **John Sanet**, Privacy Act Advisor, Personnel Records Services Division, Office of Personnel Management; **Robert Veeder**, Senior Policy Analyst, Information and Policy Branch, Office of Management and Budget; and **Jeff Corzatt**, Staff Attorney, Office of General Counsel, Department of Veterans Affairs.

Advanced Financial Institution Fraud (San Diego, California)

William Braniff, United States Attorney, Southern District of California; **Stephen Learned**, Eastern District of Virginia; **Barbara Sale**, Chief, Criminal Appeals, District of Maryland; **Richard Fishkin**, Southern District of California; **Judy Whetstine**, Northern District of Iowa; **Carolina Heck**, Executive Assistant United States Attorney, Southern District of Florida; **Robert Mosakowski**, Middle District of Florida; **Kurt Shernuk**, District of Kansas; **Leon Weidman**, Chief, Civil Division, Central District of California; **Charles Dobbs**, Northern District of Texas; **Roslyn Moore-Silver**, Chief, Criminal Division, District of Arizona. **Arthur Goldberg**, Assistant Director, Federal Programs Branch, Civil Division. From the Criminal Division: **G. Allen Carver**, Principal Deputy Chief, Fraud Section; **Jonathan Rusch**, Senior Litigation Counsel, Fraud Section; and **John Arterberry**, Deputy Chief, Fraud Section. **William Black**, Senior Deputy Chief Counsel, Enforcement Section, Office of Thrift Supervision.

Complex Prosecutions (Clearwater, Florida)

Charles Lewis, Southern District of Texas; **Kenneth Melson**, First Assistant United States Attorney, Eastern District of Virginia; **Roslyn Moore-Silver**, Chief, Criminal Division, District of Arizona; **Richard Deane**, Chief, Criminal Division, Northern District of Georgia; **Ronald Sievert**, Chief, Austin Division, Western District of Texas; **Alice Hill** and **David Sklansky**, Central District of California; **Joseph Aronica**, **John Hanly, Jr.**, and **Wingate Grant**, all from the Eastern District of Virginia. **John Lenoir**, Southern District of Texas; **Mark Jackowski**, Middle District of Florida; **James McAdams, III**, Managing Assistant, Northern Region, Southern District of Florida. **Stephen T'Kach**, Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations, Criminal Division; **David Farnham**, Senior Trial Attorney, Southern Criminal Enforcement Section, Tax Division; **Linda Chandler**, Associate Director, Office of International Affairs; and **James Donckels**, Resident Agent-in-Charge, FBI, Santa Ana, California.

Trial Preparation (Washington, D.C.)

Richard Parker, **Rebecca Hidalgo**, and **Rachel Ballow**, Eastern District of Virginia; **Robert Erickson**, Deputy General Counsel, U.S. Marshals Service; **David Deutsch**, Attorney, Civil Rights Division; **Michael Reed**, Attorney, Environment and Natural Resources Division; and **Steve Doyle** and **Elizabeth Kroop**, Attorneys, Torts Branch, Civil Division.

USAO Support Staff Training (Austin, TX)

Ronald Sievert, Chief, Austin Division; **Ray Nowak**, Chief, Civil Division; **Kathi West**, LECC Victim Witness Coordinator; **Kay Braun**, **Charles Pleasant**, and **Barbara Brown**, Paralegal Specialists; **Roxanne Claybaugh**, Computer Systems Specialist; all from the Western District of Texas. **Laura Pellatiro**, Eastern District of Virginia. **Eileen Menton**, Assistant Director, Case Management Staff, EOUSA; and **Gary Padgett**, Attorney and Management Analyst, Evaluation and Review Staff, EOUSA.

Appellate Advocacy (Washington, D.C.)

Marcia Johnson, Northern District of Ohio; **Jerry Short**, Western District of Missouri; **Jack Halliburton**, Western District of Louisiana; **Rory Little**, Northern District of California; **Mark Terison**, District of Maine; **Kathy Salyer**, Southern District of Florida; **David Nissman**, District of Virgin Islands; **Linda Reade**, Southern District of Iowa; **George Wu**, Central District of California; **Richard Mark**, Southern District of New York; **Broward Segrest**, Middle District of Alabama; and **Joe Newman**, Southern District of Georgia.

Evidence Seminar for Experienced Criminal Litigators (Columbia, South Carolina)

Michael Carey, United States Attorney, and **Nancy Hill**, Chief, Criminal Division, Southern District of West Virginia; **John Barton**, Chief, Criminal Division, District of South Carolina; ; **Donald Davis**, Chief, Criminal Division, and **Michael McDonald**, Western District of Michigan; **John Hailman**, Senior Litigation Counsel, Northern District of Mississippi; **Steven Miller**, Chief, Special Prosecutions Divisions, **Mark Rotert**, Chief, Major Crimes Division, and **Thomas Scorza**, Senior Litigation Counsel, Northern District of Illinois; **Craig Weier**, Eastern District of Michigan; and **Robert Westinghouse**, Western District of Washington. **Douglas Frazier**, Associate Deputy Attorney General; and **Amy Lecocq**, Special Counsel, EOUSA.

Asset Forfeiture Trial Advocacy (Washington, D.C.)

Ana Barnett, Chief, Asset Forfeiture, Southern District of Florida; **Linda Betzer** and **Stephen Sozio**, Northern District of Ohio; **Noel Brennan**, District of Columbia; **Kathleen Brinkman**, Southern District of Ohio; **Bill Campbell**, Western District of Kentucky; **Donna Eide**, Southern District of Indiana; **John Hieronymus**, Western District of Michigan; **Claude Hippard**, Southern District of Texas; **Eric Honig** and **Tom Ong**, Central District of California; **Jonathan Howden**, Northern District of California; **Patricia Kerwin**, Middle District of Florida; **Frances Reddis**, Chief, Asset Forfeiture, Western District of Missouri; **Esteban Sanchez**, Chief, Asset Forfeiture, Central District of Illinois; **Nancy Svoboda**, District of Nebraska; **James Swain**, Eastern District of Pennsylvania; **Tom Swain**, Eastern District of North Carolina; **Bart Van De Wegne**, Southern District of New York; and **James Warren**, Northern District of Mississippi. From the Criminal Division: **Stefan Cassella**, Trial Attorney, Asset Forfeiture Office; **Scott Glick**, Trial Attorney, Terrorism and Violent Crime Section; **Karen Tandy**, Chief, Litigation Section, Asset Forfeiture Office; **Mary Troland**, Associate Director, Office of International Affairs; and **Steve Zipperstein**, Special Counsel to the Assistant Attorney General. **Laurie Sartorio**, Assistant Director, Executive Office for Asset Forfeiture;

FOIA Administrative Forum (Washington, DC)

From the Office of Information and Privacy, Office of Policy and Communications: **Richard Huff**, Co-Director; **Miriam Nesbit**, Deputy Director; **Margaret Irving**, Associate Director; **Melanie Pustay**, Senior Counsel; **Michael Hughes**, Attorney; and **Charlene Wright**, Paralegal.

Attorney Managers (Washington, D.C.)

Page Newton, Senior Attorney Advisor, Office of Legal Counsel, EOUSA, and **Paul Ross**, Chief, Labor and Employee Relations Branch, EOUSA.

Ethics for Litigators (Washington, D.C.)

Stephen Csontos, Senior Legislative Counsel, Tax Division; **Constance Frogale**, Eastern District of Virginia; **Charles Gross**, Assistant Director, Torts Branch, Civil Division; **George Pruden**, Associate General Counsel, Employment Law and Information, Office of General Counsel, Bureau of Prisons; **Elizabeth Pugh**, Assistant Director, Federal Programs Branch, Civil Division; and **Richard Stearns**, Deputy Chief Counsel, Office of Thrift Supervision.

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PROSECUTOR'S GUIDE TO SEARCH WARRANTS

On March 3, 1993, Carol DiBattiste, Director, Office of Legal Education (OLE), forwarded to all Criminal Chiefs a 5 1/4 diskette entitled A Prosecutor's Guide to Search Warrants, and requested that the diskette be reproduced locally and distributed to all Criminal Assistant United States Attorneys.

Ms. DiBattiste and staff are grateful to the following personnel who produced this outstanding reference book: the **Honorable Charles H. Turner**, United States Attorney for the District of Oregon; **Jonathan S. Haub**, Assistant United States Attorney for the District of Oregon; and **Sarah Himmelhoch**, Trial Attorney, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice, Washington, D.C.

If you have any questions or require further information, please contact Jonathan Haub at (503) 727-1000; Carol DiBattiste (202) 208-7574; or her Deputy, David Downs (202) 208-7574.

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DISSEMINATION OF INFORMATION ABOUT OLE TRAINING

Anthony C. Moscato, Director, Executive Office for United States Attorneys, advised all United States Attorneys, First Assistants, Administrative Officers, and other appropriate training personnel that as of March 15, 1993, the Office of Legal Education will forward information concerning training programs, course announcements and attendee selections, to the districts via electronic mail (E-Mail) over the EAGLE network system. The information will be directed to the Systems Manager in each district for distribution to the appropriate Section Chiefs and training contacts. Those districts not currently connected to the EAGLE network will receive all course information bulletins via fax. Detailed information concerning course offerings and various OLE activities are also available in each issue of the United States Attorneys' Bulletin.

If you have any questions, please contact David Downs, Deputy Director, OLE, at (202) 208-7574.

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COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of May through September 1993, for both the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**. AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel and to paralegal and support personnel in United States Attorneys' offices.

AGAI Courses

The courses listed below are tentative only. OLE will send a teletype approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ Divisions officially announcing each course and requesting nominations. Once a nominee is selected, OLE funds costs for Assistant United States Attorneys only.

May, 1993

<u>Date</u>	<u>Course</u>	<u>Participants</u>
3-7	Appellate Advocacy	AUSAs, DOJ Attorneys
11-13	Asset Forfeiture Component Seminar	8th Circuit (AUSAs, Support Staff, LECC Coordinators)
12-13	Ethics Seminar-USAOs	Ethics Advisors (AUSAs, Support Staff)
12-14	Civil Chiefs, USAOs	Chiefs (Small and Medium USAOs)
17-21	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
17-28	Basic Civil Trial Advocacy	AUSAs, DOJ Attorneys

June, 1993

2-4	USAO Attorney Management	Supervisory AUSAs
2-4	Bankruptcy Fraud	AUSAs, DOJ Attorneys
8-10	Prison Litigation	AUSAs, DOJ Attorneys
8-11	Child Sex Abuse	AUSAs, DOJ Attorneys
15-17	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
15-18	Violent Crimes	AUSAs, DOJ Attorneys
21-25	Financial Crimes	AUSAs, DOJ Attorneys

June, 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
21-25	Basic Narcotics	AUSAs, DOJ Attorneys
21-25	Appellate Advocacy	AUSAs, DOJ Attorneys
22-24	Money Laundering	AUSAs, DOJ Attorneys
22-25	Evidence for Experienced Criminal Litigators	AUSAs
28-Jul 1	Public Corruption	AUSAs, DOJ Attorneys

July, 1993

7 - 9	Criminal Chiefs - USAOs	Chiefs (Small USAOs)
12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
20-23	Basic Attorney Asset Forfeiture	AUSAs, DOJ Attorneys
26-30	Appellate Advocacy	AUSAs, DOJ Attorneys
26-30	Financial Litigation For AUSAs	AUSAs
27-29	Environmental Crimes	AUSAs, DOJ Attorneys
28-30	Criminal Enforcement of Child Support	AUSAs, DOJ Attorneys, Agents

August, 1993

9-11	Complex Prosecutions	AUSAs, DOJ Attorneys
11-12	Alternative Dispute Resolution-Civil	AUSAs, DOJ Attorneys
11-12	Ethics Seminar - USAOs	Ethics Advisors (AUSAs, Support Staff)
11-13	Criminal Chiefs- USAOs	Chiefs (Large USAOs)

August, 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
17-20	Evidence Seminar for Experienced Criminal Litigators	AUSAs
17-20	Advanced Bankruptcy	AUSAs, DOJ Attorneys, Agency Attorneys
18-20	Criminal Enforcement of Child Support	AUSAs, DOJ Attorneys, Agents
24-26	Affirmative Civil Litigation	AUSAs, DOJ Attorneys
30-Sep 3	Appellate Advocacy	AUSAs, DOJ Attorneys
31-Sep 2	International Issues	AUSAs, DOJ Attorneys

September, 1993

1-3	Appellate Chiefs	Appellate Chiefs, USAOs
8-10	First Assistants - USAOs	FAUSAs (Large USAOs)
14-16	USAO Attorney Management	Supervisory AUSAs
20-24	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
21-23	Asset Forfeiture Component Seminar	10th Circuit (AUSAs, Support Staff, LECC Coordinators)
21-23	Basic Bankruptcy	AUSAs, DOJ Attorneys, Agency Attorneys
27-29	Civil Rights	AUSAs, DOJ Attorneys
28	Executive Session (Debt Collection)	U.S. Attorneys
28-30	Computer Crimes	AUSAs, DOJ Attorneys

LEI COURSES

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices (indicated by an * below). Approximately eight weeks prior to the commencement of each course OLE will send a teletype to all United States Attorneys' offices officially announcing the course and requesting nominations. The nominations are sent to OLE via Fax. Once a nominee is selected, OLE funds all costs for paralegal and support staff from United States Attorneys' offices.

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

May, 1993

<u>Date</u>	<u>Course</u>	<u>Participants</u>
4-6	Law of Federal Employment	Attorneys
11-13	Basic Negotiations	Attorneys
18-19	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
18-20	Discovery	Attorneys
19-21	Attorney Management	Supervisory Attorneys
20	Privacy Act	Attorneys, Paralegals, Support Staff
26	Statutes and Legislative Histories	Attorneys, Paralegals
27	Computer Acquisition	Attorneys

June, 1993

2-3	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
2-4*	Civil Paralegals	Paralegals (2-4 yrs. experience), USAOs and DOJ Divisions
4	Privacy Act	Attorneys, Paralegals, Support Staff

June, 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
8	Advanced FOIA	Attorneys, Paralegals
8-11	Examination Techniques	Attorneys
14-18*	USAO Support Staff Training (Civil & Criminal)	GS 4-7 - 11th Circuit Region
15	Ethics & Professional Conduct	Attorneys
22-23	Federal Acquisition Regulations	Attorneys
24	Fraud, Debarment and Suspension	Attorneys
29	Computer Law	Attorneys

July, 1993

7	Computer Assisted Legal Research	Attorneys, Paralegals
7-8	Federal Administrative Process	Attorneys
13-15	Environmental Law	Attorneys
16	Legal Writing	Attorneys
19-22*	Basic Criminal Paralegal	Paralegals, USAOs

August, 1993

3	FOIA Administrative Forum	Attorneys, Senior FOIA Processors and Unit Leaders
3-5	Discovery Techniques	Attorneys
4	Ethics & Professional Conduct	Attorneys, Ethics Officers
9-10	Evidence	Attorneys
11-13	Attorney Management	Supervisory Attorneys

August, 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
17-20*	USAO Experienced Paralegal	Civil and Criminal Paralegals (5+ yrs. experience)
17-20	Advanced Bankruptcy	Attorneys, AUSAs
23-25	Basic Negotiations	Attorneys
26	Introduction to FOIA	Attorneys, Processors, Technicians
31	Appellate Skills	Attorneys

September, 1993

1-2	Agency Civil Practice	Attorneys
7-10	Examination Techniques	Attorneys
13-24*	Financial Litigation for Paralegals	Financial Litigation Paralegals, USAOs
21-23	Law of Federal Employment	Attorneys, Paralegals
21-23	Basic Bankruptcy	Attorneys, AUSAs
24	Legal Writing	Attorneys
28-30	Discovery	Attorneys

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

Address: Room 10332, Patrick Henry Building Telephone: (202) 208-7574
 601 D Street, N.W., Fax: (202) 208-7235
 Washington, D.C. 20530 (202) 501-7334

Director..... Carol DiBattiste
 Deputy Director..... David Downs
 Assistant Directors:
 (AGAI-Criminal)..... Ted McBride
 (AGAI-Civil & Appellate)..... Ron Silver
 (AGAI-Asset Forfeiture)..... Suzanne Warner
 (AGAI-Debt Collection and LEI)..... Nancy Rider
 (LEI)..... Marge Smith
 (LEI-Paralegal & Support)..... Donna Kennedy

ADMINISTRATIVE ISSUES**CAREER OPPORTUNITIES****Office of United States Trustee
St. Louis, Missouri**

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney to fill the position of Assistant United States Trustee in St. Louis, Missouri. The position is responsible for the administrative and legal functions of the Office, including supervising trustees and cases filed in the Eastern District of Missouri under Chapters 7, 11, 12, and 13 of the Bankruptcy Code.

Applicants must possess a J.D. degree for at least one year, be an active member of the bar in good standing (any jurisdiction), and have outstanding academic credentials. At least five years bankruptcy experience, familiarity with accounting principles, and significant litigation and management experience are preferred. Applicants must submit a resume and law school transcript to: Department of Justice, Office of the U.S. Trustee, 911 Walnut, Room 806, Kansas City, Missouri 64106, Attn: John R. Stonitsch.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range is \$50,000 to \$92,000. This advertisement is issued in anticipation of a future vacancy. No telephone calls, please.

* * * * *

**Office of United States Trustee
Peoria, Illinois**

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney to manage the legal activities of the United States Trustee's Office in Peoria, Illinois. Responsibilities include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the United States Attorney's office for possible prosecution, as well as participating in the administrative aspects of the office.

Applicants must possess a J.D. degree, have at least five years of legal experience, be an active member of the bar in good standing (any jurisdiction), possess extensive litigation and management experience and at least three years of bankruptcy law experience. Applicants must submit a resume, salary history and SF-171 (Application for Federal Employment) to: Department of Justice, Office of the U.S. Trustee, 101 West Ohio Street, Suite 1000, Indianapolis, Indiana 46204, Attn: Kenneth C. Meeker.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range is \$50,000 to \$84,400. This advertisement is issued in anticipation of a future vacancy. No telephone calls, please.

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Special Authorizations Unit, Justice Management Division

Relocation

On March 13, 1993, the Special Authorizations Unit of the Procurement Services Staff, Justice Management Division, moved to a new location. The new address, together with a list of the staff members and their telephone numbers, is as follows:

Special Authorizations Unit	Violet Foster.....	(202) 307-1979
Room 4228, Ariel Rios Building	Ernestine Medley.....	(202) 307-1943
13th and Pennsylvania Avenue, N.W.	Harry White.....	(202) 307-1942
Washington, D.C. 20530	Sallie Brown.....	(202) 307-1981

General Information: (202) 307-1982)

Fax: (202) 307-1932

Other Justice Management Division offices that have moved to the Ariel Rios Building are:

Management and Planning Staff	-	(202) 307-1800
Debt Accounting Operations Group	-	(202) 514-6310
Procurement Services Staff	-	(202) 307-2000
Contracts Administration Services	-	(202) 307-1966
Small Purchases Unit	-	(202) 307-1992

APPENDIXCUMULATIVE LIST OF
CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

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

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

* * * * *

UNITED STATES ATTORNEYS

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Richard M. Pence, Jr.
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	George L. O'Connell
California, C	Terree Bowers
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Roberto Martinez
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Jay D. Gardner
Guam	Frederick A. Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Richard D. Bennett
Massachusetts	A. John Pappalardo
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Thomas B. Heffelfinger
Mississippi, N	Alfred E. Moreton, III
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Montana	Doris Swords Poppler
Nebraska	Ronald D. Lahners
Nevada	Monte Stewart
New Hampshire	Peter E. Papps
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Gary L. Sharpe
New York, S	Roger S. Hayes
New York, E	Mary Jo White
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	Gary Annear
Ohio, N	Patrick J. Foley
Ohio, S	Barbara L. Beran
Oklahoma, N	Tony M. Graham
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Joe L. Heaton
Oregon	Jack C. Wong
Pennsylvania, E	Michael J. Rotko
Pennsylvania, M	Wayne P. Samuelson
Pennsylvania, W	Thomas W. Corbett, Jr.
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	John S. Simmons
South Dakota	Kevin V. Schieffer
Tennessee, E	Jerry G. Cunningham
Tennessee, M	Ernest W. Williams
Tennessee, W	Daniel A. Clancy
Texas, N	Richard H. Stephens
Texas, S	Lawrence D. Finder
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Terry M. Halpern
Virginia, E	Kenneth E. Melson
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	Nathan A. Fishbach
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

FOR IMMEDIATE RELEASE
XXXXXXXXXXXXXXXXXX, 1993

PERSONS CHARGED WITH FAILING TO FILE
FEDERAL INCOME TAXES

CITY, STATE -- U.S. Attorney (name) announced that (names of individuals charged) were indicted today on charges of failing to file federal income tax returns on more than (dollar amount) in income between (dates of violations).

"In these tough budgetary times, when all of us are asked to pay our fair share of taxes, it is crucial for the Department of Justice to take a firm stance to prosecute those who fail to comply with the law and pay what they owe," said (U.S. Attorney).

[Describe charges using information contained in the indictment and where returned].

The Internal Revenue Service (IRS) estimates that more than \$7 billion in tax revenue is lost annually due to individuals not filing their tax returns. These nonfilers, who include persons from every walk of life and all regions of the country, account for a significant portion of the so-called "tax gap"--the difference in the amount of tax that should be collected from taxpayers and the amount of tax that is voluntarily paid by taxpayers with their returns. It is the primary mission of the Department and the IRS to increase taxpayers' compliance with the tax laws and to help reduce the "tax gap."

"The Internal Revenue Service has been working hard in recent months to bring nonfilers back onto the taxpaying rolls. These criminal prosecutions make clear the serious consequences of ignoring the law. When individuals refuse to file their income tax returns, they are not only cheating the federal

government, but also are cheating millions of honest Americans who report and pay their taxes," said James A. Bruton, Acting Assistant Attorney General in charge of the Tax Division.

"The Internal Revenue Service has a nationwide initiative to locate nonfilers and bring them back into the tax system," said (IRS District Director). [Quote optional].

"Many (name of state residents) have already voluntarily come forward to get right with the government. The IRS has special assistance programs designed to help nonfilers and we have streamlined our collection procedures for those who are unable to make full payment of taxes immediately," (Director) added. [Quote optional -- Also, in cases where voluntary disclosure is potentially at issue in the case, the U.S. Attorney may decide it is appropriate to omit the quote].

The charges filed today are part of an enforcement initiative targeting nonfilers. The Department and the IRS have made it a priority to investigate and prosecute cases against persons who fail to file returns or evade taxes.

If convicted, (names of individuals charged) face penalties of up to one year imprisonment and a maximum of \$100,000 in fines for each year they failed to file tax returns, in addition to whatever civil payments, penalties and interest owed to the IRS.

[NOTE, this last paragraph should be modified if the indictment charges a felony, e.g., a Spies evasion].

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Guideline Sentencing Update

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

Publication of *Guideline Sentencing Update* signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center. On matters of policy the Center speaks only through its Board.

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Adjustments

OBSTRUCTION OF JUSTICE

Supreme Court reverses *Dunnigan*, upholds application of § 3C1.1 to perjury by defendant. At defendant's trial for conspiracy to distribute cocaine, several witnesses testified about her drug activities. Defendant testified and denied everything, claiming that she had never possessed or distributed cocaine, but the jury found her guilty. The sentencing court concluded that defendant's denials were untruthful and warranted the § 3C1.1 enhancement for obstruction of justice. The Fourth Circuit reversed, holding that applying § 3C1.1 "for a disbelieved denial of guilt under oath [is] an intolerable burden on the defendant's right to testify in his own behalf." *U.S. v. Dunnigan*, 944 F.2d 178, 183-85 (4th Cir. 1991) [4 *GSU* #10].

The Supreme Court reversed the court of appeals, holding that enhancement for perjury is not unconstitutional. The Court first addressed the findings required before enhancement: "[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury. . . . [A]n accused may give inaccurate testimony due to confusion, mistake or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same. . . . When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction or impediment of justice that encompasses all of the factual predicates for a finding of perjury."

The Court then held that the Guidelines' requirement of a § 3C1.1 enhancement for perjury "is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf." A defendant's right to testify "does not include a right to commit perjury," and the "concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by our earlier explanation that . . . the trial court must make findings to support all the elements of a perjury violation in the specific case."

U.S. v. Dunnigan, No. 91-1300 (U.S. Feb. 23, 1993) (Kennedy, J.).

See *Outline* at III.C.5.

VICTIM-RELATED ADJUSTMENTS

U.S. v. Morrill, No. 91-8386 (11th Cir. Feb. 16, 1993) (en banc) (per curiam) (Remanded: "We now hold that bank tellers, as a class, are not vulnerable victims within the meaning of section 3A1.1. To the extent that [*U.S. v. Jones*, 899 F.2d 1097 (11th Cir. 1990) [3 *GSU* #8]] holds to the contrary, that case is overruled. . . . This is not to say that bank tellers in individual cases never may be particularly susceptible or otherwise vulnerable victims of a bank robbery. Enhancement is appropriate under section 3A1.1 when a particular teller-victim possesses unique characteristics which make him or her more vulnerable or susceptible to robbery than ordinary bank robbery victims. . . .")

See *Outline* at III.A.1.

MULTIPLE COUNTS

U.S. v. Taylor, No. 91-30418 (9th Cir. Jan. 21, 1993) (Poole, J.) (Remanded: "We join the Tenth Circuit in holding that grouping under section 3D1.2(d) is not appropriate when the guidelines measure harm differently." Thus, for defendant convicted of one count of engaging in an illegal monetary transaction covered by § 2S1.2, which measures harm by "the value of the funds" attributable to the scheme, it was improper to include as relevant conduct amounts from a dismissed wire fraud count, which measures harm under § 2F1.1 as "the loss" attributable to the scheme.). *Accord U.S. v. Johnson*, 971 F.2d 562, 576-76 (10th Cir. 1992) (remanded: improper to add funds obtained from wire fraud scheme as relevant conduct to funds in money-laundering conviction).

See *Outline* at III.D.1.

Criminal History

CALCULATION

First Circuit holds that five bank robberies could be considered related as "part of common scheme or plan." Defendant was sentenced as a career offender on the basis of five prior convictions for five bank robberies committed during a brief period in 1968. Defendant argued that the robberies should be treated as a single felony under the definition of related cases in § 4A1.2(a)(2), comment. (n.3) ("prior sentences are considered related if they resulted from offenses that . . . were part of a single common scheme or plan"), because all five were part of a common plan to rob banks. The district court rejected defendant's argument and his request for an evidentiary hearing.

The appellate court remanded, finding that under the language of the guideline defendant may be correct. "At first blush, it might seem unlikely that the Sentencing Commission intended a defendant to escape career offender status, in the teeth of two prior convictions for different bank robberies at different times and places, simply because those prior robberies were assertedly linked by a further felony, namely, an

overarching conspiracy to rob banks that could literally be called a 'common scheme or plan.'" The court stated that if the Commission did not intend this result, "we might disregard the literal language of the commentary and treat as a single conviction only those convictions so closely related in time and function that separate treatment would dissuade the purpose of the career offender provision. Yet a broader perspective suggests that the Commission, in defining related convictions, did mean to adopt binding 'rules of thumb,' such as this one, as well as the even more mechanical rule that convictions for entirely separate crimes should be treated as one if they happen to be consolidated for trial or sentence."

"Once we decide that the 'common scheme or plan' definition is both intentional and valid, [the] language should be given its ordinary meaning. This same language is used in Fed. R. Crim. P. 8 (to determine joinder) and there is no doubt that in that context a conspiracy to rob banks would constitute a common scheme or plan. . . . We do not, however, think that the district court is required to hold an evidentiary hearing if the court concludes that it would impose the same sentence even without the 'career offender' label. The guideline commentary itself asserts that the rule of thumb here . . . is over-inclusive and invites judges to depart upward where the rule of thumb operates to understate criminal history. Accordingly, the requirements for departure are satisfied if the judge supportably concludes that . . . five prior bank robberies, united by a conspiracy to rob banks, makes [defendant] deserving of a sentence similar to that he would receive if he were classified as a career offender."

The court noted that the net effect of having a strict rule of thumb with the ability to depart "is to increase the range of discretion of the district judge in these situations, which may be just what the Commission intended. As we have noted, an evidentiary hearing is not automatically required in cases like this one—not because the judge can 'find' no common scheme or plan in the face of a proffer like this one and without a hearing, but rather because the judge may depart rather readily even if such a scheme or plan is assumed."

U.S. v. Elwell, No. 91-1621 (1st Cir. Jan. 20, 1993) (Boudin, J.).
See *Outline* at IV.A.1.b.

Offense Conduct

DRUG QUANTITY

U.S. v. Gilliam, No. 90-5548 (Feb. 12, 1993) (Wilkins, J.) (Widener, J., dissenting) (Remanded: District court erred in automatically attributing to conspiracy defendant the 30 kilograms of cocaine described in the indictment to which he pled guilty. A guilty plea alone is not an admission of responsibility for drug amounts that are attributed generally to a conspiracy. And, "while a plea of guilty to an indictment containing an allegation of the amount of drugs for which a defendant is responsible may, in the absence of a reservation by the defendant of his right to dispute the amount at sentencing, constitute an admission of that quantity for sentencing purposes, Gilliam's indictment did not make any such attribution." Here, defendant admitted only to distributing a much smaller amount and no other evidence was presented to allow the court to make an independent determination of the amounts he should be held responsible for.).
See *Outline* at II.A.3.

Loss

U.S. v. Bartsh, No. 92-1470 (8th Cir. Jan. 13, 1993) (Gibson, Sr. J.) (Affirmed: Agreed with *U.S. v. Curran*, 967 F.2d 5, 6 (1st Cir. 1992), that amount of loss under § 2B1.1 in embezzlement offense includes lost interest.). Note that § 2B1.1 and its Commentary do not mention interest, but Note 7 of § 2F1.1, which refers back to § 2B1.1 to calculate loss, was amended Nov. 1, 1992, to state that loss does not include interest that could have been earned on stolen funds. See *Outline* at II.D.1.

Departures

CRIMINAL HISTORY

U.S. v. Brown, No. 92-50247 (9th Cir. Feb. 10, 1993) (Canby, J.) (Remanded: Departure for career offender may be considered if nature of prior offenses and youth at time of one prior conviction "render his criminal past significantly less serious than that of a typical career offender." Although § 5H1.1, p.s. states that age is not ordinarily relevant to departure, age "becomes relevant when it causes a defendant's criminal history score significantly to overstate the seriousness of his criminal record. . . . [Therefore], nothing in the guidelines would preclude the district court from departing if it found that, in view of the nature of Brown's prior convictions or Brown's age when he committed one of the predicate offenses, placement in the career offender category significantly exaggerated the seriousness of [his] criminal history.".)
See *Outline* at VI.A.2.

MITIGATING CIRCUMSTANCES

U.S. v. Brown, No. 92-50247 (9th Cir. Feb. 10, 1993) (Canby, J.) (Remanded: District court incorrectly concluded that it did not have authority to consider downward departure for defendant who alleged "extraordinary abuse" during his childhood and "extraordinary acceptance of responsibility.".)
See *Outline* at VI.C.1.b, h, and 4.c.

AGGRAVATING CIRCUMSTANCES

U.S. v. Bartsh, No. 92-1470 (8th Cir. Jan. 13, 1993) (Gibson, Sr. J.) (Affirmed: Although defendant received § 3B1.3 abuse of trust enhancement, court could depart upward because "there is nothing in the Guidelines to indicate that the Sentencing Commission considered an abuse of trust by a United States bankruptcy trustee embezzling funds. This defendant's embezzlement of nearly \$1.5 million from an account that he as a federal officer was charged with faithfully managing represents an inordinate abuse of trust that is of a different kind and substantially in excess of the degree which is ordinarily involved in the usual abuse of trust offense.".)
See *Outline* at III.B.8.a and VI.B.1.

U.S. v. Gray, 982 F.2d 1020 (6th Cir. 1993) (Remanded: For defendant convicted of selling drug paraphernalia who had also sold large amounts of a cutting agent to a cocaine ring, "the district judge erred when and to the extent that he considered greed and the danger of narcotics to our society as factors justifying [upward] departure Greed is obviously the chief motivation for drug-related crimes. For the drafters of the Sentencing Guidelines to have overlooked this is simply not credible. The fact that distribution of narcotics is a danger to our society is precisely why promoting it is a crime.".)
See *Outline* at VI.B.2.

Nomination Form

EXHIBIT
C

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C C O U R S E	Course Name	Course Date(s)	Course Location
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N O M I N A T O R	Name	Title	
	Phone Number	Number of Nominees Submitted:	Order of Preference of this Nominee:

N O M I N E E	Name	Title	
	Office, Agency or Department Name		Phone Number

Q U E S T I O N N A I R E	1. Has the nominee applied for this course in the past and not been selected? Yes No (please circle) If yes, how many times?
	2. What percentage of nominee's work involves the subject(s) of the course?
	3. Indicate the level of skill or knowledge nominee has in this area: Novice Intermediate Advanced (please circle)
	4. How many years has the nominee worked in this area?
	5. What training has the nominee had in this area?
	6. If necessary, please indicate any special considerations:

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