



# United States Attorneys' Bulletin

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## COMMENDATIONS

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

**H. Randolph Aderhold, Jr.** and **William Gifford** (Georgia, Middle District), by Gabriel N. Steinberg, Regional Counsel, General Services Administration, Atlanta, for their valuable assistance and cooperation in securing a judgment in favor of the United States in a civil action, and for promptly resolving the unfortunate filing of a motion by plaintiff's attorney.

**Sam Bertolet** and **Steve Holtshouser** (Missouri, Eastern District), by Charles J. Gutensohn, Special Agent in Charge, Office of Training, Drug Enforcement Administration, Quantico, Virginia, for their excellent presentation at a seminar attended by DEA agents and other law enforcement officials on legal issues inherent in conspiracy investigations and use of the federal grand jury.

**David J. Bosley** (Ohio, Southern District), by Thomas T. Kubic, Chief, White-Collar Crimes Section, Criminal Investigative Division, FBI, Washington, D.C., for his valuable participation as guest speaker at the FBI's Health Care Fraud Training Seminar held recently in Houston.

**Kathleen Brinkman** (Ohio, Southern District), by H. P. Petey Kaletta, President, All Ohio Council, American Society of Safety Engineers, for her excellent lecture at the All Ohio Safety and Health Congress on the U.S. Attorneys' involvement in the pursuit of environmental crimes.

**Tim Burgess** (District of Alaska), by Stephen A. Meyer, Deputy Special Agent in Charge, National Marine Fisheries Service, Department of Commerce, Juneau, for his valuable contribution to the success of the annual In-Service training program conducted by the Alaska Enforcement Division in Sitka.

**Melanie D. Caro** (District of Kansas), by Robert E. Lusk, Attorney, Office of General Counsel, Department of Agriculture, Topeka, for her outstanding professional and legal skill in negotiating a settlement of all claims brought by the Prairie Band of Potawatomi Tribe against the Farmers Home Administration of the Department of Agriculture.

**George Christian** (Georgia, Middle District), was presented a Certificate of Appreciation by Thomas W. Stokes, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for his demonstration of professionalism and legal skill in the successful prosecution of a complex arson and fraud conspiracy case.

**Sean Coffey, Seth Farber, Kerry Martin, and Jim Buckman** (New York, Southern District), by Roseanna DeMaria, Chief, Organized Crime Narcotics Unit, Office of the District Attorney of the County of New York, for their valuable assistance and cooperative efforts in obtaining convictions of nine defendants for substantial narcotics and firearms crimes.

**Jonathan B. Conklin** and **William C. Hahesy** (California, Eastern District), by Richard H. Ross, Special Agent in Charge, FBI, Sacramento, for their successful resolution of a complex bank fraud case involving thirteen fraudulent loans totaling nearly \$2.5 million, twenty six escrows, over fifteen participants, numerous bank accounts, and other related transactions.

**Jerry J. Cooper** (District of Colorado), by Glenn E. Walls, Special Agent in Charge, Bureau of Land Management, Department of the Interior, Lakewood, for his excellent representation of the government in a case involving the assault of a law enforcement officer as well as a violation of resource statutes.

**Lewis A. Davis** (California, Northern District), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration, Phoenix, for his outstanding assistance and cooperation in the preparation of various affidavits, arrest warrants and search warrants during the investigation of a large marihuana trafficking ring operating in the Northern District of California.

**Andrew Dember** (New York, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding prosecutive efforts in successfully resolving a complex case involving two career criminals and federal parole violators.

**Neil Evans** (District of Oregon), was presented a Certificate of Appreciation by J. E. Swagerty, Regional Chief Inspector, U.S. Postal Service, San Bruno, California, for his successful prosecution of a complex postal employee theft case.

**Carl M. Faller, Jr.** and **Patrick K. Hanly** (California, Eastern District), by James O. Beasley II, Supervisory Senior Resident Agent, FBI, Fresno, for their successful efforts in obtaining a guilty plea in the prosecution of a case under the new federal "carjacking" statutes.

**Lawrence D. Finder, United States Attorney,** and **John D. Lenoir** (Texas, Southern District), by Michael D. Wilson, Special Agent in Charge, FBI, Houston, for their excellent presentations and invaluable assistance during an intensive 3-day legal training program.

**Michael Gertzman** and **Scott A. Edelman** (New York, Southern District), by John F. Shaw, Assistant Commissioner, Investigations, Immigration and Naturalization Service, Washington, D.C., for their successful prosecution of two Taiwanese nationals for conspiring to bring 150 undocumented aliens from the People's Republic of China into the United States.

**Geoffrey A. Goodman** and **Thomas J. Hopkins** (California, Eastern District), by Eugene M. Thirolf, Director, Office of Consumer Litigation, Department of Justice, for their valuable assistance and support during the investigation of illegal manufacture and interstate distribution by a corporation of unapproved and misbranded test kits for diagnosing serious medical conditions, including hepatitis B and HIV.

**Karen Kalminar** (California, Eastern District), by Scott G. Pearson, Senior Resident Agent, Fish and Wildlife Service, Department of the Interior, Sacramento, for her successful prosecution of a case involving the unlawful destruction of over 1,200 migratory birds protected by Federal law, and for her continued support for the protection of wildlife.

**Thomas Karol** (Ohio, Northern District), by Harold T. Jones, Senior Supervisory Resident Agent, FBI, Cleveland, for his outstanding victory in the trial of the Old Fort Banking Company robbery case.

**Richard C. Kaufman** (District of Colorado), by James P. O'Neil, Director, National Sheriffs' Educational Foundation, Inc., Alexandria, Virginia, for his valuable participation in the National Sheriffs' Institute Executive Development Program attended by twenty-five first-term sheriffs from twenty-three states.

**John Kennedy** (California, Northern District), by Robert S. Elsberg, Senior Special Agent in Charge, Bureau of Narcotic Enforcement, Department of Justice, San Francisco, for his excellent presentation on the Organized Crime Drug Enforcement Task Force program for special agent supervisors.

**Elsa C. Lamelas** (Wisconsin, Eastern District), by Edward G. Langer, Assistant District Counsel, Internal Revenue Service, Milwaukee, for her outstanding success in obtaining convictions in three complex criminal tax cases.

**Dorothy McMurtry** (Missouri, Eastern District), by Donald J. Valdez, Associate Director of Anti-Piracy, Criminal, Recording Industry Association of America, Inc., Arlington, Texas, for her successful prosecution of eight individuals for criminal violation of the U.S. copyright laws. (Evidence indicated that more than 600,000 counterfeit audio cassette tapes were shipped to and received by the convicted defendants.)

**Bernard J. Malone** (New York, Northern District), by John T. Dwyer, Assistant Vice President, Key Bank of New York, N.A., Syracuse, for his outstanding leadership in coordinating an investigation of several bank robberies in New York State and the State of Maine with state and federal law enforcement officers of both states, resulting in the arrest of several people and the prevention of two other planned robberies, one of which was intended to involve hostage taking.

**Peter Ossorio** (Missouri, Western District), by Colonel John P. Cavanaugh, Director, Department of Joint and Combined Operations, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, for his outstanding presentation on drugs and national security and for providing valuable insight into the complexity of the drug crisis in America.

**Mitzi Dease Paige** (Mississippi, Southern District), by Donald R. Kronenberger, Jr., Regional Attorney, Office of General Counsel, Department of Agriculture, Atlanta, and Joseph E. Clayton, Staff Officer, Lands & Minerals, Forest Service, Department of Agriculture, Jackson, for successfully concluding a Forest Service quiet title action of long standing after a history of negotiations and procedural matters failed, and the original defendants had settled out of the case.

**Nicholas J. Pantel** (Ohio, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for his valuable assistance rendered to the Government of the Republic of Turkey in connection with the execution of a Turkish mutual legal assistance request.

**Cynthia M. Parsons** (District of Arizona), by Lt. Colonel Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, Headquarters U.S. Air Force, Arlington, Virginia, for her excellent representation and successful efforts in obtaining a favorable judgment for the United States.

**Lon F. Povich** (District of Maine), by John J. Adair, Inspector General, Resolution Trust Corporation, Washington, D.C., for his outstanding efforts in successfully prosecuting several individuals in a land flip scheme, nine of whom pleaded guilty prior to trial. The only defendant tried in the case was convicted on all counts of an eight-count wire fraud indictment.

**Sharon Ratley and Dixie Morrow** (Georgia, Middle District), by Michael J. Bowers, Attorney General for the State of Georgia, Atlanta, for their successful resolution of a criminal case involving conspiracy to commit arson and conspiracy to commit mail fraud.

**James S. Russell** (District of Colorado), by Robert J. Zavaglia, District Director, Criminal Investigation Division, Internal Revenue Service, Denver, for his excellent presentation on civil and criminal forfeiture at the Financial Investigative Techniques School held in Glenwood Springs, Colorado.

**James Tucker, Donald Burkhalter, Wood Bond, Billups Allen, and Richard T. Starrett** (Mississippi, Southern District), by Joseph J. Jackson, Special Agent in Charge, FBI, Jackson, for their valuable contribution to the success of a special training session conducted by the Undercover and Sensitive Operations Unit for potential undercover agents.

**Tom Walsh** (Illinois, Northern District), by Eugene M. Thirolf, Director, Office of Consumer Litigation, Department of Justice, for his valuable assistance and support in the initiation of a case involving the seizure and forfeiture of thirty kilograms of the veterinary drug gentamicin sulfate.

**Kenneth E. Weinfurt and Marietta Parker** (Missouri, Western District), by Don K. Pettus, Special Agent in Charge, FBI, Kansas City, for their professionalism and legal skill in securing a 17-count indictment in a complicated financial institution case.

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## **HONORS AND AWARDS**

### **1993 Victim Service Awards**

On April 30, 1993, the Office for Victims of Crime (OVC) of the Department of Justice announced that it would present awards to five Department employees in recognition of their exemplary efforts to increase payments from convicted offenders into the Crime Victims Fund in the U.S. Treasury. Monies from the Fund are awarded to states to support programs that provide assistance and compensation to crime victims. The awards were announced in conjunction with National Crime Victims Rights Week (April 25 - May 1, 1993).

Attorney General Janet Reno said, "These five employees provide outstanding examples of the high level of excellence and dedication in the Department of Justice. I am proud to join in recognizing their efforts to ensure that the Crime Victims Fund, and the federal programs it supports to assist and compensate innocent crime victims, receive all the funds owed by convicted offenders." The five employees are:

**Elizabeth Ruf Stein, Assistant United States Attorney, Southern District of Florida.** During the five years she has managed criminal collections in her district, Ms. Stein has instituted a number of reforms that resulted in increased collections for the Crime Victims Fund. She reorganized the Financial Litigation Unit to increase productivity and decrease the backlog of uncollected judgments; insisted on full enforcement of bond forfeiture judgments; developed a close working relationship with the U.S. Probation Office and the Bureau of Prisons Community Treatment Office; and has provided training on effective collection techniques, both locally and at national conferences.

**Stephen J. Stone, Special Assistant United States Attorney, Northern District of Georgia.** Under Mr. Stone's leadership, the Financial Litigation Unit increased criminal collections by 1,300 percent during FY 1992, depositing \$8.4 million into the Crime Victims Fund. This is the largest amount ever collected in the district for any fiscal year. Mr. Stone also developed a training conference for Assistant United States Attorneys and probation and court staff, and increased the use of computerized online services to collect and analyze information about debtors' assets.

**Joseph P. Briggs, Project Leader, Judgment Enforcement Team Pilot Project, U.S. Marshals Service.** The Judgment Enforcement Team (JET) is a highly successful debt collection program which was developed by Mr. Briggs, and has been implemented in eleven U.S. Marshals Service districts. JET locates debtors, serves court orders, and performs financial investigations to uncover debtors' hidden assets. Mr. Briggs also developed an automated management system to track debt collection information.

**Beth A. Mitchell, Case Management Specialist, Federal Correctional Institution (FCI), Phoenix.** As a result of her efforts as coordinator of the Inmate Financial Responsibility Program (IFRP) for the past five years, Ms. Mitchell has increased collections from inmates dramatically. She provides motivation and training to staff on all aspects of the program and also works with inmates to educate them about the objectives of the program and to make clear the consequences of nonpayment.

**Jim Otte, Unit Manager, Federal Correctional Institution (FCI), Bastrop, Texas.** Mr. Otte was instrumental in expanding the Inmate Financial Responsibility Program (IFRP) at this institution, and also developed innovative procedures to increase inmate participation in the program at a time when crowding at the facility has made it increasingly difficult to encourage inmate cooperation. Largely due to his efforts, 95 percent of the inmates at FCI Bastrop have completed, are participating in, or are exempt from IFRP.

This is the second year in which the Office for Victims of Crime has recognized federal employees for their work in collecting debts for the Crime Victims Fund. OVC serves as the federal focal point for addressing the needs and improving the treatment of crime victims. It administers the Victims of Crime Act (VOCA) program, which awards grants to states to expand victim compensation and assistance and supports innovative crime victim projects. It also sponsors training to help criminal justice officials better meet the needs of crime victims and their families. These programs are financed by the Crime Victims Fund which is supported exclusively by fines, penalties and bond forfeitures paid by convicted federal defendants.

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**OVC Certificates Of Appreciation**

The Office for Victims of Crime (OVC) received nearly 200 nominations for the 1993 Victim Service Award from almost every state in the nation. Brenda G. Meister, Acting Director, said, "Although each nominee's strengths are unique, all the individuals nominated demonstrated an uncommon commitment to serving crime victims that truly inspires those of us who work at the federal level." In selecting individuals to receive the award, OVC considers the significance of the nominee's service to the community, the uniqueness of that contribution, and the number of years of salaried or volunteer services, among other factors. The following nominees were presented Certificates of Appreciation for their invaluable work on behalf of crime victims:

**Assistant United States Attorneys**

Alabama, M.D. - Marsha Tunnell  
 Florida, M.D. - Steven A. Nisbet  
 Georgia, M.D. - Paul C. McCommon, III  
 New York, W.D. - Peter R. Galenda  
 Wisconsin, E.D. - Lynne M. Solien

**Financial Litigation Unit, Kentucky, W.D.**

Duane Schwartz  
 Deborah Kay Beld  
 Kimberly Ann Breit  
 Roberta Brazzell  
 Wendy Huffman  
 Carol Uebelhoer

**Federal Correctional Institutions**

James J. Clark, Seagoville, Texas  
 Lori Bruns, Butner, North Carolina  
 Frederico Hernandez, Anthony, New Mexico  
 Edward Jacobsen, Estill, South Carolina  
 Richard Mancha, Three Rivers, Texas  
 Steven O'Connor, Rochester, Minnesota  
 Art Pulford, Duluth, Minnesota

**Financial Litigation Unit, District of Michigan**

Kathy Schuette  
 Cheryl Stoll  
 Lois Hecker

\* \* \* \* \*

**OVC Award For the State Of Louisiana**

On April 6, 1993, the Office for Victims of Crime (OVC) of the Department of Justice awarded \$1,153,000 to the State of Louisiana to help support state and local agencies that provide direct services to crime victims and their families. The State of Louisiana also will receive an award from OVC in the amount of \$404,000 to supplement state funds used to pay claims for medical costs, lost wages, mental health counseling, funeral expenses and other costs resulting from violent crimes committed against innocent victims. These combined federal awards, totaling \$1,557,000, represent the federal government's efforts to ensure that needed financial assistance is provided to innocent crime victims.

The Victims of Crime Act requires Louisiana to give priority to supporting programs that provide services to victims of sexual assaults, spousal abuse, and child abuse, as well as to previously underserved victims, such as victims of drunk driving incidents and survivors of homicide victims.

\* \* \* \* \*

**Program Integrity Awards For the Southern District Of Georgia**

**Fred Kramer, Assistant United States Attorney, and Iverna Campbell, Paralegal Assistant, Southern District of Georgia,** were presented Program Integrity Awards by the Office of Inspector General of the Department of Health and Human Services in recognition of their valuable assistance and support in the successful prosecution of a chiropractor and his wife who were convicted of 207 counts of medicare fraud and mail fraud. The investigation is still ongoing.

\* \* \* \* \*

**PERSONNEL****United States Attorneys**

A current list of United States Attorneys as of June 1, 1993 appears at page 214 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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**ATTORNEY GENERAL HIGHLIGHTS****Department Of Justice Officials**

On May 28, 1993, the United States Senate confirmed, by voice vote, the following Department of Justice officials:

Philip B. Heymann, Deputy Attorney General  
Webster Hubbell, Associate Attorney General  
Drew Days, Solicitor General

Nominations for other top positions in the Department of Justice are still pending.

\* \* \* \* \*

**Interim Attorney General's Advisory Committee Of United States Attorneys**

On June 3, 1993, Attorney General Janet Reno announced the creation of an Interim Attorney General's Advisory Committee of United States Attorneys which she expects to be functional through the end of this calendar year. The Interim Advisory Committee will have the same full force and effect as the permanent Attorney General's Advisory Committee of United States Attorneys. The following is a complete list of the members:

Chairman: Thomas W. Corbett, Jr., Western District of Pennsylvania

Members: Terree Bowers, Central District of California  
William C. Carpenter, District of Delaware  
Zachary Carter, Eastern District of New York  
Michael Chertoff, District of New Jersey  
J. Russell Dedrick, Eastern District of North Carolina  
David J. Jordan, District of Utah  
Daniel G. Knauss, District of Arizona  
Roberto Martinez, Southern District of Florida  
Jay P. McCloskey, District of Maine  
Michael J. Shepard, Northern District of Illinois  
John A. Smietanka, Western District of Michigan  
Richard H. Stephens, Northern District of Texas  
Joseph Preston Strom, Jr., District of South Carolina  
Emily Sweeney, Northern District of Ohio  
Mary Jo White, Southern District of New York  
J. Ramsey Johnson, District of Columbia, ex officio

\* \* \* \* \*

**1993 National Summit On U.S. Drug Policy, Washington, D.C.**

On May 7, 1993, Attorney General Janet Reno attended the 1993 National Summit on U.S. Drug Policy in Washington, D.C. A number of drug policy officials attended the day-long conference, including Lee Brown, National Drug Policy Director, who stressed the Administration's commitment to attacking the U.S. drug problem.

Attorney General Reno discussed the effectiveness of the interdiction program, the policies of the criminal justice system; minimum mandatory sentences, aliens in federal prisons, reintegrating prisoners back into their communities, drug treatment programs, the prosecutorial responsibilities of federal and state officials, and a myriad of social and economic problems related to crime and drugs on the streets of America. Ms. Reno said, "I look forward to working with Dr. Brown and Congress, and most of all, with people throughout this country, local and state officials, in a real partnership to address the problems in a non-political, thoughtful, comprehensive sort of way."

If you would like a copy of Ms. Reno's address, please contact the United States Attorneys' Bulletin staff, at (202) 501-6098.

\* \* \* \* \*

**Governor's Summit On Violent Street Crime, Baltimore, Maryland**

On May 20, 1993, Attorney General Janet Reno was the featured speaker at the Governor's Summit on Violent Street Crime at the Coppin State College in Baltimore, Maryland. In her address attended by approximately 1,000 people, Ms. Reno called for the development of a national agenda for children, and said, "[I]f we are going to do something about violence in America, we have to realize that teen pregnancy, youth gangs, drugs, violence, this horrible phenomena of youth violence that we are seeing, is a symptom of a deeper problem in society.

The following is an excerpt from the Attorney General's speech. If you would like a copy of the complete text, please contact the United States Attorneys' Bulletin staff, at (202) 501-6098.

. . . What I would like to describe to you is the process by which I hope to address the issues that bring you here today and how I hope to form a partnership with you and with all communities and states across this nation to address the problem together, not as the federal government saying, 'This is the way you do things,' not as the federal government saying, 'This is the way you are going to take our money or you do not take our money,' but the communities saying, 'These are what our needs are. These are what our resources are. How can we work together to utilize the very limited dollars we have at every level of government and in the private sector to address the problem?'

One thing I can stand here and tell you is that I believe with all of my heart and soul that we can have an impact on crime at every level. But we have to do it in a non-partisan, thoughtful, analytical way, using what works, understanding that there are times we cannot control crime as we would want, that we cannot prevent the one horrible crime that oftentimes triggers a reaction.

. . . First of all, I am looking at charging policies. People have become concerned because so many crimes have been federalized lately. I would like to take a principled approach to what should be prosecuted in federal court and what should be prosecuted in state court and do that in conjunction with the National Association of Attorneys General, and with the National District Attorneys' Association, so that we are not forcing cases on states, nor states on us, but that we are forming a consensus of how it should be done.

I want to look at the charging guidelines of the Department of Justice to make sure that they are appropriate and fair. Then I want to look at who is going to the federal prison today, to understand an increase in admissions, to understand what impact that will have in three or four years, what the cost will be in terms of prison construction, and in terms of the dollars necessary to operate the prisons.

And I want to try to achieve two goals: one, to recognize that there are some offenders who are so dangerous, that are so recidivous that they should be put away and kept away, and that incapacitation is the best way to prevent future crime. I think, working together, we can reach general consensus on what category of offenders meet those criteria. But then I think, with my ultimate goal being to make sure that person who comes into the system does not commit further crime, that we have to understand that there are people that are coming into this system, both at the state level and at the federal level, that are going to be back out on our streets sooner rather than later. It makes no sense to take a person to prison for three years, leave them there for three years with a drug problem, and then pick them up and drop them back in the community from whence they came and say, "Go, and God be with you." . . .

You have to provide the balance. And that is the way I [would] kind of like to try to approach the criminal justice system and all that we are doing. . .

\* \* \* \* \*

### **DEPARTMENT OF JUSTICE HIGHLIGHTS**

#### **Record-Breaking Civil Penalty Under The Federal Clean Air Act**

On May 24, 1993, Attorney General Janet Reno and EPA Administrator Carol M. Browner announced the second largest civil penalty ever under any federal environmental law -- an \$11.1 million penalty against Louisiana-Pacific Corporation, of Portland, Oregon. The record-breaking civil penalty, the largest ever under the federal Clean Air Act, is for failure to comply with permitting procedures. To protect the environment and public health, the settlement requires Louisiana-Pacific to install state-of-the-art pollution control equipment, valued at approximately \$70 million, at eleven of its facilities located in nine states. The \$11.1 million civil penalty is exceeded by a \$15 million civil penalty paid by the Texas Eastern Natural Gas Pipeline Company in 1987 for violation of the federal toxics and hazardous waste laws.

Louisiana-Pacific, a leader in the wood products industry, failed to properly obtain the appropriate air emissions permits or fully identify air emissions for fourteen of its facilities. The facilities include: Houlton, Maine; Clayton, Alabama; Jackson County, Georgia; Sagola, Michigan; Two Harbors, Minnesota; Hayward, Wisconsin; Tomahawk, Wisconsin; Corrigan, Texas; New Waverly, Texas; Silsbee, Texas; Urania, Louisiana; Missoula, Montana; Oroville, California; and Chilco, Idaho.

There are significant environmental benefits derived from the consent decree, which was lodged in Federal District Court in the Western District of Louisiana. The installation of state-of-the-art pollution control equipment at eleven of Louisiana-Pacific's facilities over the next two years, with three additional facilities to potentially follow, will mean emission reductions of 6,900 tons per year of carbon monoxide, 9,600 tons per year of volatile organic compounds, and 5,760 tons per year of particulate matter, resulting in significantly cleaner air in those regions. EPA believes that the introduction of this technology, called regenerative thermal oxidation, will encourage its use by other companies emitting these pollutants, and should create additional jobs in the pollution-control manufacturing industry.

One of the requirements Louisiana-Pacific failed to comply with is to obtain proper permits. Under the law, a company seeking to construct or modify a major facility that emits air pollution must obtain a permit before proceeding. To comply with the permitting procedures, a company must determine the nature of the emissions created by its manufacturing processes and report its findings to state and federal air permitting authorities.

Attorney General Reno said, "Today's settlement illustrates the vital role the federal government can and will take in enforcing our environmental laws. Penalties are necessary to make sure our business community knows that companies that 'play by the rules' are not at a competitive disadvantage to those willing to risk violating the law. We hope our aggressive enforcement of the laws against Louisiana-Pacific and our resolve to continue such aggressive actions elsewhere will deter those who would otherwise violate environmental laws."

\* \* \* \* \*

### **CIVIL RIGHTS DIVISION**

#### **Alleged Discrimination At Denny's**

On May 21, 1993, James P. Turner, Acting Assistant Attorney General for the Civil Rights Division, issued the following statement concerning alleged racial discrimination at Denny's restaurant in Annapolis, Maryland:

Lawyers representing Secret Service agents have notified us of the alleged incident of discrimination at the Denny's restaurant in Annapolis on April 1, 1993. We have since spoken with the agents, who were in Annapolis preparing for a Presidential visit, and have confirmed that the incident occurred only hours before a federal court in California signed our consent decree with Denny's that was designed to prevent just this kind of racial discrimination. Although our consent decree with the corporation had not been formally entered, the conduct alleged, unless satisfactorily explained by the corporate officials, violates the letter and spirit of the understanding we had with the corporation. We are demanding a complete explanation from the highest officials of the company. These agents will be seeking a more complete personal remedy in private litigation, but we intend to use our authority to the fullest to ensure that incidents like this do not recur in any part of this company's activities.

\* \* \* \* \*

#### **Americans With Disabilities Act**

On May 21, 1993, the Department of Justice filed a civil rights complaint in federal court against a St. Louis, Missouri firm that operates more than 90 discount stores in eight states, charging that its check writing policy violated the Americans with Disabilities Act (ADA). At the same time, the Department moved to consolidate its case with a private suit and also filed a consent decree to resolve both suits.

The complaint, filed in U.S. District Court in Chicago, alleged that Venture Stores, Inc. had a policy that permitted customers with a driver's license to pay for merchandise with a personal check, but refused to extend that privilege to those who did not have a driver's license but possessed a state-issued identification card unless the person also obtained a special check-cashing card. The United

States said this procedure imposed additional burdens on disabled persons who could not obtain a driver's license and cited several instances in which Venture refused to accept checks from individuals who had state-issued identification cards, but whose disability -- epilepsy, blindness and muscular dystrophy -- prevented them from obtaining a driver's license. Venture denied that its policy violated the Act but has agreed under the consent decree to allow the use of state identification cards or driver's licenses for identification in order to purchase merchandise by check. The company also will train employees and provide notice to customers regarding the new policy, which is effective in 90 days, and will report any further complaints to the Department of Justice after implementation. Venture operates stores in Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, and Oklahoma.

The motion also sought to consolidate the government's case with a private suit filed in October, 1992 and resolve it with the proposed consent decree. Under the decree, the four complainants in the two cases would receive certificates to purchase \$2,200 in Venture merchandise as compensation for alleged injuries caused by the former check policy.

James P. Turner, Acting Assistant Attorney General, Civil Rights Division, said, "The filing of this action demonstrates the Department of Justice's strong commitment to effective enforcement of the ADA. We are very pleased with the agreement reached today ensuring that persons who cannot drive due to disability have an equal opportunity to enjoy benefits available to other members of our society.

\* \* \* \* \*

## **CRIMINAL DIVISION**

### **Law Enforcement In Indian Country**

During her confirmation hearings, the Attorney General was questioned about certain aspects of criminal law enforcement in Indian country. Complaints by tribal authorities of high declination rates and of confusion over responsibility among the several police agencies were specifically mentioned.

The Criminal Division reports that past analyses of high declination complaints found these complaints without substance, based as they were upon anecdotal material and inaccurate data, without any attempted comparison with statistics of comparable local jurisdictions. You are reminded, however, of the special responsibility the United States Attorney bears in Indian country where the investigation and prosecution of relatively minor crimes involving Indians and Indian tribal organizations cannot be declined in favor of handling by state or even tribal authorities. In those instances, where cases may be and are declined in favor of tribal prosecution, it is imperative that procedures be in place for the prompt, direct notification of tribal prosecutors so that tribal speedy trial rules are not violated. Reliance upon tribal police to communicate this information has often proved misplaced.

In addition, please note that United States Attorneys' Manual § 9-20.215, and the Table at § 9-20-230, which declare that the states have concurrent jurisdiction with the United States over crimes committed by non-Indians against the persons or property of Indians, do not reflect the Department's current position. The Office of the Solicitor General and four state supreme courts have ruled that federal jurisdiction is exclusive.

The allegation of confusion over agency authority is too vague to merit extended discussion. Many United States Attorneys, in implementation of the policy to accept cases from tribal police, USAM § 9-20-220, already have in place memoranda of understanding delineating the responsibilities of the FBI, the Bureau of Indian Affairs (BIA), and tribal police. In the near future, the Attorney General is expected to sign a Memorandum of Understanding (MOU) addressing FBI and BIA jurisdiction which will require United States Attorneys to address anew the allocation of investigative responsibility. The MOU has

already been signed by the Secretary of the Interior and been approved by the Director of the FBI. The MOU was drafted by the FBI and BIA in consultation with the Criminal Division and the Attorney General's Advisory Committee's Subcommittee on Indian Affairs. The MOU and United States Attorney guidelines are required by § 2(d)(1) of the Indian Law Reform Act, 25 U.S.C. 2801-2809, which clarifies and expands the law enforcement responsibilities of the Department of the Interior in Indian country.

Your attention is invited to two recent court of appeals cases. In United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992), the court held that general laws of the United States do not automatically apply to intra-Indian crimes without a showing of specific federal interest. It also held that in prosecutions for receiving property stolen from Indian tribal organizations (18 U.S.C. 1163), the government must prove that the defendant knew the property had been stolen from such an organization. An amendment is being sought to bring Section 1163 into line with the federal receiving statutes that do not require knowledge of the victim's identity. In United States v. James, 980 F.2d 1314 (9th Cir. 1992), a conviction of violating 18 U.S.C. 1153 was affirmed even though the indictment had failed to allege that the defendant was an Indian. A correction to the form indictment which led to the defective charge was published at p. 216 and Appendix B of the United States Attorneys' Bulletin, Vol. 39, No. 8 (August 15, 1991).

If you have any questions, please call the General Litigation and Legal Advice Section of the Criminal Division, at (202) 514-1026.

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## **PRISON ISSUES**

### **Oversight Of Bureau Of Prisons Operations**

On May 12, 1993, the House Judiciary Subcommittee on Intellectual Property and Judicial Administration held a hearing on Federal prison population trends and Federal prison construction costs. Dr. Kathleen Hawk, Director of the Bureau of Prisons, testified on behalf of the Department of Justice.

Chairman Hughes stated that while this hearing would focus on present and future trends in Federal prison population, subsequent hearings "will shift (the Subcommittee's) emphasis to steps that might be taken to reduce (the) heavy reliance on traditional, high cost prisons." He also said that "a continued reliance on building more and more traditional prisons is not only prohibitively expensive, but is also probably not the most effective and efficient correctional policy." However, while he thinks that ending prison construction is not the answer "when policies enacted by Congress continue to produce increases in the Federal prison population," he believes that it is critically important that Congress seriously evaluate the policies that are driving the unprecedented increase in the Federal prison population.

Norman Carlson, former Director of the Bureau of Prisons and currently a faculty member in the Department of Sociology at the University of Minnesota, told the Subcommittee that he believes that the increase in prison population is a direct result of (1) minimum-mandatory sentences and (2) the Federal Sentencing Guidelines. He stated that the two have significantly reduced the use of probation, even for first-time offenders, and have significantly increased the length of time many inmates, particularly drug offenders, will spend in prison. He urged the Subcommittee to re-examine the use of minimum-mandatory sentences, because he maintains they are frequently circumvented by prosecutors and because they often result in the imposition of prison terms that are, according to Mr. Carlson, unduly harsh, given the facts of the crime and background of the offender.

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### New Study Of Prisoner Backgrounds

On May 19, 1993, the Bureau of Justice Statistics of the Department of Justice issued a report entitled "Survey of State Prison Inmates, 1991." Acting Director Lawrence A. Greenfeld described the report as "the most comprehensive survey ever conducted to gather information on inmate characteristics." For example, an estimated 16 percent of prison inmates were armed with a gun when they committed the offense for which they were serving time; about half of the armed inmates (or about 89 percent of all prisoners) said they had fired their guns during the crime; and an estimated 23 percent of all state prisoners had committed at least one current or past crime while armed. This study of prisoner backgrounds -- the fourth since 1974 -- provides new data about family status, recidivism, gang membership, drug and alcohol use, weapons acquisition and violent crime victims. The findings are based on in-depth interviews in 1991 with a nationally representative sample of almost 14,000 state prisoners in 277 facilities in 45 states. There were 711,000 state inmates at the time.

A copy of the press release summarizing the survey findings is attached at the Appendix of this Bulletin as Exhibit A. The complete report is available from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-800-732-3277.

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### State And Federal Prisoners Reach New High

On May 9, 1993, the Bureau of Justice Statistics, Department of Justice, announced that as of December 31, 1992, the number of state and federal prisoners reached a new high of 883,593 men and women on December 31, 1992. The 1992 growth of 8,651 additional federal prisoners and 50,809 additional state and District of Columbia prisoners -- a 7.2 percent increase -- is equivalent to the need for about 1,143 new prison beds every week. During 1991, the number of prisoners increased 6.6 percent, amounting to a need for almost 981 prison spaces every week.

Acting Director Lawrence A. Greenfeld said that drug offenders were a major source for the increased number of prisoners. During 1990, the latest year for which the information is available, drug crimes resulted in an estimated 103,800 people going to prison directly from court (that is, not including parole violators). For the first time the number of admissions for drug offenses exceeded the number admitted to prison for property crimes (102,400), violent crimes (87,200) or public-order offenses (26,200). In addition to more people going to prison for drug crimes, the number imprisoned for the serious crimes of murder, non-negligent manslaughter, sexual assault, robbery, aggravated assault and burglary also rose. This growth reflected both a larger number of arrests and a greater likelihood of arrestees going to prison. There were 40,000 more admissions for these serious crimes in 1990 than in 1980.

During 1992, the number of offenders incarcerated in state prisons increased 6.8 percent to 803,334 and the number of federal inmates grew 12.1 percent, reaching 80,259. By last December 31, the number of men in state and federal prisons had grown 7.3 percent to 833,184, whereas the number of women incarcerated grew by 5.9 percent, reaching 50,409. Prison populations decreased last year in Maine, New Jersey, North Dakota, Oregon and Wyoming. The highest percentage increases during 1992 were in Texas (18.4 percent), West Virginia (16.2 percent), New Hampshire (15.9 percent), Idaho (15.5 percent) and Wisconsin (15.4 percent). Southern states recorded the largest prisoner gains, up 7.5 percent, whereas the Northeast had the slowest increase, 4.8 percent. The federal system was estimated to be operating at 52 percent above capacity and state prison systems were operating at 18 percent to 31 percent above capacity.

For a copy of the bulletin entitled "Prisoners in 1992" (NCJ-141874), please contact the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-800-732-3277.

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## CRIME ISSUES

### New Murder Statistics

On May 12, 1993, the Bureau of Justice Statistics, Office of Justice Programs, issued a report entitled "Murder in Large Urban Counties, 1988." The report contains information based on an analysis of the homicide cases in which there was an arrest and prosecution in the nation's 75 most populous counties during 1988, as follows:

- Eighty percent of murder victims knew their killers and 16 percent were related to their killers. More than half of the victims had a romantic or social relationship with their murderers.
- Almost half of the victims died in fights with the offender arising from property disputes, domestic arguments, insults or feuds. An estimated 11 percent were involved with the killer in illegal drug activities and 12 percent were collaborating in other criminal activities with their killer.
- A third of the female victims were killed by a spouse or romantic partner compared to 11 percent of the male victims. Ten percent of the female victims were killed by other women.
- Men charged with murder were more likely than women to be convicted, and when convicted, men received harsher sentences than women. No significant differences existed between white and black murder defendants in the likelihood of conviction or the severity of sentence.
- Ninety-four percent of the black murder victims were killed by other blacks, and 76 percent of the white victims were killed by whites.
- Female murder victims were about twice as likely as were male victims to have been killed by a family member (31 percent of the female victims vs. 12 percent of the male victims).

Acting Director Lawrence A. Greenfeld said that these data are from an analysis of almost 10,000 homicide cases involving more than 8,000 victims. About 75 percent of the victims were male, just over 50 percent were black and almost half were between 15 and 29 years old. About half were killed with handguns -- 55 percent of the blacks, and 45 percent of the whites, as well as 54 percent of the males and 36 percent of the females. The Bureau of Justice Statistics estimated that 95 percent of the defendants convicted of murder were sentenced to incarceration -- 75 percent to a prison term, 18 percent to a life sentence, 2 percent to capital punishment and 2 percent to probation. Approximately 4 percent of the cases were either still pending at the end of the study or their sentences were not available.

A copy of the report (NCJ-140614) 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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### Corporate Crime

On May 23, 1993, the National Institute (NIJ) of Justice of the Department of Justice issued the results of a survey indicating that state and local corporate crime is on the rise, and calling attention to special problems that are now emerging in detecting, prosecuting and punishing corporate transgressions. The study called for greater coordination among federal, state and local agencies to counter economic and environmental crimes committed by big and small businesses and stated that isolated enforcement efforts by individual agencies are insufficient. Such cases were once handled almost entirely through

federal enforcement efforts. However, since the National District Attorneys Association established its Economic Crime Project in 1975, local district attorneys began taking corporations to court for a growing variety of offenses, including violating occupational safety regulations and illegally dumping toxic wastes.

Part of the NIJ study was based on the responses 419 local prosecutors made to a questionnaire about their corporate crime caseloads. The study also took an in-depth look at corporate crime prosecutions in Cook County, Illinois; Los Angeles County, California; Dade County, Florida; and Nassau County, New York. In each, prosecutors, regulatory officials and law enforcement officers were asked about their activities. Study participants noted that joint investigations with federal agencies were rare. Fewer than 10 percent of those responding said they worked with the FBI, the United States Attorneys, or one of the federal regulatory agencies as often as once a year. Cooperation with local police and state regulatory agencies was more frequent, however. Some local prosecutors faulted federal officials for not referring cases to their state and local counterparts. They said they recognized the need for federal officials to focus on the larger matters but pointed out that smaller violations can have a significant impact on a local community, and without a referral these cases can escape enforcement.

Prosecutors in the case studies said most of their corporate crime resources were arrayed against economic crimes but noted that prosecutions of offenses against the environment were increasing. Local prosecutors often find themselves at a disadvantage in battles with well-financed and heavily staffed corporate legal departments, the report said. It suggested computer network information sharing, increased automation, regional laboratories and greater publicity to overcome some of the problems and increase local effort effectiveness. In response to the finding that federal officials sometimes failed to refer cases to state and local counterparts, the Department said it makes every effort to work closely with state and local law enforcement groups through such organizations as the law enforcement coordinating committees. The offices of the United States Attorneys will work in the future to strengthen that relationship.

This report (NIJ Research in Brief) entitled "Local Prosecutors and Corporate Crime" (NCJ-137863) was prepared by Michael L. Benson, associate professor of sociology at the University of Tennessee; Francis T. Cullen, professor of criminal justice and sociology at the University of Cincinnati's Department of Justice; and William J. Maakestad, associate professor of management at Western Illinois University, and can be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: (301) 251-5500.

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## **POINTS TO REMEMBER**

### **Media Guidelines**

On May 3, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, issued an interim Bluesheet which augments Bluesheet 1-7.000, Media Relations, dated January 14, 1993, and affects Section 1-7.000 VII.D of the United States Attorneys' Manual. The interim Bluesheet is intended to spell out Justice Department policy with respect to media presence at the execution of search and arrest warrants, or preparations therefore. The following additional guidance should be brought to the attention of all Department personnel who may deal with the press:

## VII. ASSISTING THE NEWS MEDIA

D. In cases in which a search warrant or arrest warrant is to be executed, no advance information will be provided to the news media about actions to be taken by law enforcement personnel, nor shall media representatives be solicited or invited to be present. This prohibition will also apply to operations in preparation for the execution of warrants, and to any multi-agency action in which Department personnel participate.

If news media representatives are present, Justice Department personnel may request them to withdraw voluntarily if their presence puts the operation or the safety of individuals in jeopardy. If the news media declines to withdraw, Department personnel should consider cancelling the action if that is a practical alternative.

Exceptions to the above policy may be granted in extraordinary circumstances by the Office of Public Affairs.

If you would like a copy of the Bluesheet, please call the United States Attorneys' Manual staff, at (202) 501-6098.

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### New Test Version Of The USA-5 Tracking System

The Case Management Staff of the Executive Office for United States Attorneys has installed a new test version of the USA-5 Tracking System in the District of New Jersey. The new USA-5 software replaces an earlier test version used in New Jersey and in the Southern District of Indiana.

The USA-5 Tracking System, which is written in ORACLE, tracks information concerning the utilization of personnel resources by program category, as well as time spent by attorneys in court-related activities. The software allows employees to enter information throughout the month through their EAGLE terminals and generates local management reports as well as the monthly submission to the Executive Office. This software will be tested in a number of districts over the next several months before being distributed nationally.

If you have any questions, please call Eileen Menton, Assistant Director, Case Management Staff, at (202) 501-6598.

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## LEGISLATION

### Independent Counsel

On May 14, 1993, Attorney General Janet Reno appeared before the Committee on Governmental Affairs of the United States Senate concerning S. 24, the Independent Counsel Reauthorization Act, and stated as follows:

After consideration of the issues and options available to us, I am pleased to announce that the Department and the Administration fully support reenactment of the Act, and we will work closely with this Committee and the Congress to pass this very important piece of legislation. I am well aware of the depth of the controversy that has surrounded this Act since its inception. While there are legitimate concerns about the costs and burdens associated with the Act, I have concluded that these are far outweighed by the need for the Act and the public confidence it fosters.

The Attorney General also offered some suggestions for improvements to the Act, designed to foster a more cooperative relationship between the Department and Independent Counsel, to ease some of the practical difficulties that the Department encountered in administering the Act, and to correct some areas where the Act was too rigid, leading to unfair burdens on the public servants covered by the provisions of the Act. In conclusion, she stated, "I believe that in a spirit of cooperation, we can not only pass this important legislation, but significantly improve it."

If you would like a copy of the Attorney General's testimony, please call the United States Attorneys' Bulletin staff, at (202) 501-6098.

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#### **Freedom Of Access To Clinic Entrances Act Of 1993**

On May 12, 1993, Attorney General Janet Reno appeared before the Committee on Labor and Human Resources of the United States Senate in support of S. 636, the Freedom of Access to Clinic Entrances Act of 1993. The Attorney General pointed out that S. 636 is modeled closely on 18 U.S.C. 245, which prohibits the use of force or threat of force to interfere with an individual's exercise of certain federally protected rights because of the victim's race, color, religion, or national origin. The comparable core of Section 3 of S. 636 would prohibit the use of force or threat of force to interfere intentionally with a person because she was "obtaining abortion services" or "lawfully aiding another person to obtain abortion services." It would also prohibit an individual from intentionally damaging or destroying the property of a medical facility because the facility provides abortion services. Ms. Reno discussed the need for federal legislation, the scope of the problem, the inadequacy of existing federal law, and congressional authority to enact S. 636. In conclusion, she said, ". . . Opponents of the right to choose have escalated the level of their opposition in recent years. They have demonstrated a willingness to break the law and to defy court injunctions. Unfortunately, criminal sanctions, including imprisonment, appear necessary to deter and punish unlawful conduct, as well as simply to incapacitate some of the more willful and persistent violators. In this regard, I think the elevated terms of punishment for repeat offenders and those who cause bodily injury or death are justified and necessary." She urged the committee to consider her suggested changes, and then to move expeditiously toward enactment of this essential legislation.

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#### **Thrift Depositor Protection Act**

On May 13, 1993, the Senate passed S. 714, the "Thrift Depositor Protection Act." This legislation would, among other things, provide additional funds for the Resolution Trust Corporation to use in resolving failed thrift institutions.

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### Hatch Act Reform

On May 13, 1993, the Senate Governmental Affairs Committee completed its mark-up of S. 185, the Senate's version of the Hatch Act Reform legislation, which had been postponed on May 11 due to the lack of a quorum. The Committee adopted a substitute amendment by Senator Glenn, which adds a prohibition against political recommendations for career civil service employees being considered for promotion, and the authorization for the garnishment of Federal employees' pay. The Department has submitted its report to the Office of Management and Budget for clearance which addresses these points, as well as others of a more practical nature, while affirming the Administration's strong support for enactment of comprehensive Hatch Act reform legislation.

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### Violence Against Women Act Of 1993

On May 27, 1993, the Senate Judiciary Committee ordered reported (on a bipartisan basis) S. 11, the "Violence Against Women Act of 1993." This legislation includes a number of initiatives designed to combat all forms of violence against women. These initiatives include: new laws to reinforce the focus on an offender's conduct, rather than a victim's character; new investments in local law enforcement efforts that treat rape and domestic violence as serious offenses; a civil rights remedy for victims of offenses motivated by gender; and new education programs in schools and law enforcement institutions concerning domestic violence and rape. The Department's components are reviewing S. 11, as ordered reported.

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### SENTENCING REFORM

#### Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 12, dated May 11, 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

The Federal Sentencing and Forfeiture Guide Newsletter, published and copyrighted by James Publishing Group, Santa Ana, California, has been discontinued. If you wish to continue receiving the Newsletter, please contact the publisher directly. For the address and telephone number, please refer to previous issues of the United States Attorneys' Bulletin prior to January, 1993.

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**SUPREME COURT WATCH*****An Update Of Supreme Court Cases From The Office Of The Solicitor General*****Selected Cases Recently Decided****Civil Cases:****United States v. Idaho, No. 92-190 (decided May 3)**

The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication. The Supreme Court has unanimously held that the Amendment generally subjects the United States both to the state substantive law of water rights and to state law governing pleading, discovery, evidence, and the like. But, the Court ruled, the Amendment did not waive the federal government's sovereign immunity from paying filing fees when submitting notices of claims, because the Amendment expressly preserves federal immunity from paying court costs.

**McNeil v. United States, No. 92-6033 (decided May 17)**

The Supreme Court has unanimously held that plaintiffs may not maintain FTCA actions if they failed to exhaust administrative remedies before filing suit, even if no substantial progress in the litigation took place before administrative remedies were exhausted.

**Keene Corp. v. United States, No. 92-166 (decided May 24, 1993)**

The Supreme Court has ruled, 8-1, that in determining whether 18 U.S.C. 1500 prohibits the Court of Federal Claims from exercising jurisdiction over an action because the plaintiff has another suit pending in another court, the test is whether the other suit was pending at the time the action was brought, not at the time of the motion to dismiss. Moreover, the determination does not focus on whether the actions have different legal theories, but on whether the other suit is based on substantially the same operative facts, at least if there is some overlap in the relief requested.

**Criminal Cases:****United States v. Padilla, No. 92-207 (decided May 3)**

In this case, various co-conspirators claimed standing to challenge the illegal traffic stop of a drug courier. The Supreme Court, in a unanimous per curiam opinion, has disapproved of the Ninth Circuit's rule that a co-conspirator has a legitimate expectation of privacy, and therefore standing to raise Fourth Amendment claims, solely because he or she had either a supervisory role in the conspiracy or joint control over the place or property involved in the search or seizure. Although the parties also disputed whether the traffic stop interfered with a cognizable property interest of the car-owner, the Court declined to reach that issue and remanded it for further consideration.

**Stinson v. United States, No. 91-8685 (decided May 3)**

The Supreme Court has unanimously ruled that courts should treat the official commentary to the Sentencing Guidelines as analogous to an agency's interpretation of its own rules. Thus, if the commentary does not conflict with the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the Guideline it interprets. This is so even if courts had previously interpreted the Guideline in a different way.

United States v. Deal, No. 91-8199 (decided May 17)

The Supreme Court has ruled, 6-3, that defendants may, under 18 U.S.C. 924(c)(1), be given enhanced sentences for "second or subsequent convictions" even when the multiple convictions occur in a single proceeding.

United States Department of Justice v. Landano, No. 91-2054 (decided May 24)

The Supreme Court has unanimously held that in determining the applicability of the law enforcement exemption to FOIA, Exemption 7(D), the government is not entitled to a presumption that all sources supplying information to the FBI are confidential sources. The Court recognized, however, that certain circumstances may justify inferring confidentiality, such as the use of a paid informant or the character of the crime and the source's relation to the crime.

Smith v. United States, No. 91-8674 (decided June 1)

The Supreme Court has held, 6-3, that the exchange of firearms for drugs is a "use" of the firearm "during and in relation to" a drug trafficking crime, requiring an enhanced sentence under 18 U.S.C. 924(c).

**Questions Presented in Selected Cases in Which the Court Has Recently Granted Cert.**

**Civil Cases:**

J.E.B. v. T.B., No. 92-1239 (granted May 17)

Whether the Constitution forbids the use of gender-based peremptory challenges.

**Criminal Cases:**

Staples v. United States, No. 92-1441 (granted May 24)

Whether, in a prosecution under 26 U.S.C. 5861(d), the government is required to prove that the defendant knew that the weapon possessed all the characteristics of a machinegun, or only that the defendant knew that a weapon was a dangerous device of the type that would alert one to the likelihood of regulation.

Cavanaugh v. Roller, No. 92-1510 (granted May 24)

This case involves a challenge to a State's increase in the time between parole reconsideration hearings. The questions presented are: (1) whether the suit was proper under Section 1983 or had to be brought as a petition for habeas corpus; and (2) whether the change violated the Ex Post Facto Clause.

Liteky v. United States, No. 92-6921 (granted May 24)

Whether the basis for disqualifying a judge for apparent bias under 28 U.S.C. 455(a) must stem only from extra-judicial sources.

**CASE NOTES****CIVIL DIVISION****First Circuit, Sitting En Banc, Holds That The Attorney General's Westfall Act Certification May Not Accord Immunity To Federal Employees By Denying That The Alleged Underlying Incident Actually Occurred**

The plaintiff, an Army civilian employee, brought suit against Maj. Charles Owens, her superior, alleging that Maj. Owens had engaged in sexual harassment and committed assault and battery against her in the workplace. The United States Attorney determined that the allegations were without merit and certified that Maj. Owens was acting within the scope of his federal employment under the Westfall Act. The district court held that the question of scope of employment for purposes of substitution must be determined on the face of the complaint, without any opportunity for an evidentiary hearing on the question prior to trial on the merits. Since it was undisputed that assault and battery and sexual harassment, as alleged by the complaint, did not fall within Maj. Owens's official duties, the district court set aside the certification and ordered that Maj. Owens be resubstituted for the United States. On appeal, a panel of the First Circuit affirmed. We successfully sought rehearing en banc on grounds that the panel's decision was in direct conflict with Nasuti v. United States, 906 F.2d 802 (1st Cir. 1990).

The en banc First Circuit, by a 4-3 majority (Breyer, C.J.), has again affirmed the district court, albeit on grounds different from the initial panel opinion. The majority held that in issuing the Westfall Act certification, the Attorney General may not simply deny that the incident alleged in plaintiff's complaint even occurred. Rather, the court held, the Attorney General's certification must "assume some kind of harm-causing incident." Slip op. at 23 (emphasis in original). However, the court went on to hold that the Attorney General and the district courts are not bound by the plaintiff's characterization of the incident and the district court may resolve, prior to trial, any "incident-describing and incident-characterizing facts" alleged in plaintiff's complaint. Id. For example, the court noted that the Attorney General is free to deny that the employee possessed the requisite intent on allegations of assault.

Wood v. United States, Nos. 91-1323, 1324 (April 28, 1993) [1st Cir.; D. Mass.].  
DJ # 157-36-4418.

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Mark W. Pennak - (202) 514-1673

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**Third Circuit, In Conflict With First Circuit, Holds That Judicial Challenges To Base Closure Decisions Are Not Barred By Franklin v. Massachusetts**

This is a suit to enjoin the Department of Defense from closing the Philadelphia Naval Shipyard under the Defense Base Closure and Realignment Act of 1991. At an earlier point in the litigation, the Third Circuit held that the Act precluded substantive challenges to the base closure decision but did not foreclose procedural challenges. The Supreme Court vacated and remanded for reconsideration in light of Franklin v. Massachusetts, 112 S. Ct. 2767 (June 26, 1992), which held that actions by the Secretary of Commerce and the President under a procedurally analogous census statute were not reviewable "final agency action" under the Administrative Procedures Act.

While this case was pending on remand before the Third Circuit, the First Circuit held in Cohen v. Rice, No. 92-2427 (May 3, 1993), that Franklin bars claims identical to those in this case. By a 2-1 vote (Stapleton, Scirica; Alito dissenting), the Third Circuit has now reached a contrary decision, holding that Franklin does not prevent plaintiffs from suing the President to contest procedural errors by subordinate agencies that prepared base closure recommendations for the President.

Specter v. O'Keefe, No. 91-1932 (May 18, 1993) [3d Cir.; E.D. Pa.].  
DJ # 145-6-3183.

Attorneys: Douglas N. Letter - (202) 514-3602  
Scott R. McIntosh - (202) 514-4052

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**Sixth Circuit Holds That FBI Records On Disappearance Of Jimmy Hoffa Are Protected By FOIA Exemption 7(A)**

For the past eighteen years, the FBI has been investigating the disappearance and presumed murder of Jimmy Hoffa, resulting in the creation of a 400-volume investigatory file. The Detroit Free Press sought to compel the FBI to disclose the contents of the Hoffa file under the Freedom of Information Act. The FBI withheld the records under Exemption 7(A), which allows the withholding of records compiled for law enforcement purposes when disclosure "could reasonably be expected to interfere with enforcement proceedings." The district court granted the FBI summary judgment and the newspaper appealed, arguing primarily that: (1) the passage of time had eliminated any realistic prospect of future "enforcement proceedings" relating to Hoffa's disappearance; and (2) the FBI should have been required to produce a document-by-document Vaughn index to prove that each document in the 400-volume file was individually covered by Exemption 7(A).

In a 2-1 decision (Nelson and Beckwith; Batchelder dissenting), the Sixth Circuit has now affirmed, accepting our contentions that the Hoffa investigation is still sufficiently "live" and that Exemption 7(A) does not require the use of document-by-document Vaughn indexes..

Dickerson v. Department of Justice, No. 92-1458 (April 30, 1993) [6th Cir.; E.D. Mich.]. DJ # 145-12-8348.

Attorneys: Leonard Schaitman - (202) 514-3441  
Scott McIntosh - (202) 514-4052

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**Ninth Circuit Reaffirms That Compensation Of Public Employees Is Not Subject To Garnishment**

Two civilian employees of the Navy became subject to a default judgment entered against them in California municipal court for debts owed local hospitals. Plaintiff, a collection service, sought to garnish their wages and compel employees of the Navy to appear in connection with the garnishment proceedings. The United States Attorney removed the matter to federal district court, which granted the

government's motion to dismiss on the ground that the federal government is not susceptible to garnishment actions. The plaintiff appealed, and the Ninth Circuit (Schroeder, Pregerson, and D.W. Nelson, *per curiam*) has now affirmed, finding the district court decision supported by ample Supreme Court and circuit precedent. This issue is currently the subject of proposed legislation that would waive the government's defense under like circumstances.

National Business Factors, Inc. v. Rollins, No. 91-16668 (April 22, 1993)  
[9th Cir.; N.D. Cal.]. DJ # 145-6-3185.

Attorneys: Barbara C. Biddle - (202) 514-2541  
Edward T. Swaine - (202) 514-1201

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### TAX DIVISION

#### Supreme Court Grants Certiorari In Oregon Railroad Case

On May 17, 1993, the Supreme Court granted certiorari in Department of Revenue of the State of Oregon v. ACF Industries. This case presents the question whether a state property tax scheme which exempts various classes of non-railroad property from ad valorem property taxes discriminates against railroads in violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 54. Section 306(1)(a) and (c) of the Act prohibits a state from imposing property taxes that discriminate against railroads through discriminatory assessment ratios or tax rates. Section 306(1)(d) then prohibits the imposition of "any other tax" which discriminates against railroads. The Ninth Circuit held that the "any other tax" language meant "any" tax, including a property tax, that discriminates against railroads, and that Section 306(1)(d) "is violated by any exemption given to other taxpayers but not to railroads." Because Oregon exempts 25 percent of non-railroad real and personal property (e.g., business inventories, farm machinery and equipment, and motor vehicles) from its property tax, the Ninth Circuit concluded that the property tax violates Section 306(1)(d). The Solicitor General had previously filed an amicus brief, recommending the Court grant certiorari in this case.

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#### Supreme Court Rules In Favor Of The Commissioner In ERISA Case Involving The Treatment Of Transfers Of Property In Satisfaction Of An Employer's Funding Obligations To Its Pension Plan

On May 24, 1993, the Supreme Court (Justice Stevens dissenting) reversed the unfavorable decision of the Fifth Circuit in Commissioner v. Keystone Consolidated Industries, Inc., a case involving the application of ERISA's prohibited transaction rules. This case presented the question whether a plan sponsor's "funding" of a defined benefit retirement plan with real property constituted a prohibited sale or exchange by a disqualified person within the meaning of Section 4975(c)(1)(A) of the Internal Revenue Code. The Fifth Circuit held in Keystone that the transfer of property to a pension plan in satisfaction of a minimum funding obligation is not a sale or exchange of the property transferred. The Fourth Circuit expressly rejected its holding in Wood v. Commissioner.

The Supreme Court, agreeing with the Fourth Circuit's decision in Wood, held that a transfer of property to a pension plan in satisfaction of the plan sponsor's minimum funding obligation constitutes a prohibited "sale or exchange." The Court determined that the settled income tax meaning of the phrase "sale or exchange," which embraces a transfer of property in satisfaction of a debt, also applies for purposes of Section 4975. A contrary holding, as the Court noted, would have jeopardized the ability of the Departments of Labor and Treasury to ensure that ERISA's pension funding requirements were met. Justice Stevens in his dissent disagreed with this analysis. In his view, Congress did not intend such an expansive interpretation of this phrase for purposes of Section 4975.

\*\*\*\*\*

**Appeal Filed In Multi-Billion Dollar Tax Shelter Case**

An appeal has been filed in the Tenth Circuit by the taxpayer in Hildebrand v. Commissioner, a test case for over 2,000 related cases involving investors in enhanced oil recovery limited partnerships. The Tax Court disallowed losses claimed by the limited partners, finding that the partners had no profit motive. According to the Tax Court opinion, the total amount at issue in this case and the related cases is over \$2 billion.

\*\*\*\*\*

**Court Of Federal Claims Determines That Rule of 78's Method Of Allocating Interest Does Not Clearly Reflect Income**

On May 3, 1993, the Court of Federal Claims issued its opinion in Mulholland v. United States, holding that the Rule of 78's method for allocating interest expenses to long-term indebtedness does not clearly reflect income. Taxpayers employing the Rule of 78's method claim interest expenses during the early years of a long-term loan in amounts which far exceed actual payments on the loan. The Court held that this method of allocation did not clearly reflect income as it did not reflect the economic accrual of interest, and that the Internal Revenue Service had not abused its discretion in requiring the taxpayer to change to the economic accrual method of accounting.

The Rule of 78's was used extensively in real estate tax shelters in the early 1980's to allocate interest expenses until the Internal Revenue Service announced in 1983 that it would no longer permit this method of accounting. The decision in Mulholland controls sixty seven other cases raising this issue which were consolidated with it.

\*\*\*\*\*

**Court Of Federal Claims Upholds The IRS's Disallowance Of The Bulk Of The Hearst Corporation's Charitable Contribution Deduction For Its Newsreel Library**

On May 4, 1993, the Court of Federal Claims issued its opinion in Hearst Corporation v. United States, which involved the fair market value of the Hearst Metrotone Newsreel Library which the taxpayer donated to the University of California at Los Angeles (UCLA). The Court upheld the IRS's disallowance of \$60 million of the taxpayer's claimed \$62 million charitable deduction, finding that the taxpayer failed to establish that the property had any value in excess of that allowed by the IRS.

\*\*\*\*\*

**District Court Upholds Validity Of Tax Information Exchange Agreement (TIEA)  
With Mexico In Summons Enforcement**

On May 11, 1993, the United States District Court for the Southern District of Texas ruled, in a case of first impression, that: (i) the Secretary of Treasury has statutory authority to enter into a tax information exchange agreement (TIEA) with any country in the world; (ii) the U.S. - Mexico TIEA is the valid agreement under the U.S. Constitution and is the law of the land; and (iii) an IRS summons may be used to obtain information for Mexico under the TIEA. The case arose from the unsuccessful attempt by a Mexican citizen to quash a summons issued by the IRS to the International Bank of Commerce in Brownsville, Texas, calling for bank records requested by the Mexican Competent Authority under the TIEA. This decision is important not only in terms of the United States' relationship with Mexico, but also because similar agreements have been reached with Peru (in effect) and Colombia (not yet in effect). The decision is likely to attract media attention.

\*\*\*\*\*

**\$3.3 Million Recovery Obtained In Braniff Bankruptcy Case**

On May 12, 1993, Braniff, Inc. paid the Government the sum of \$3,338,465 under a compromise of the Government's tax priority claims in this Chapter 11 bankruptcy. This payment follows the Tax Division's success in persuading the Bankruptcy Court for the Middle District of Florida to hold Braniff liable for air transportation excise taxes that were collected by it prior to filing its petition in bankruptcy, but were not due until after the filing of the petition. The court also held that Braniff was liable for penalties for failing to pay over these taxes on a timely basis. The Tax Division expects to receive an additional \$210,000 following confirmation of Braniff's plan of reorganization.

\*\*\*\*\*

**Eleventh Circuit Affirms Tax Court's Favorable Decision In "Test" Case Involving  
Sale-Leaseback Of Computer Equipment**

On May 4, 1993, the Eleventh Circuit affirmed the Tax Court's favorable decision in Walter and Betty Barton v. Commissioner. The court upheld the Commissioner's disallowance of losses claimed by taxpayers with respect to their purchase and leaseback of computer equipment, on the ground that they were not "at risk" under Section 465(b), because they were protected from loss by a stop loss agreement. In so holding, it rejected the taxpayers' claim that the Commissioner bore the burden of proof on this issue since it was raised in the Commissioner's amendment to her answer.

This computer tax-shelter case was the test case for the Internal Revenue Service's St. Joseph Leasing/Equity tax-shelter project. By virtue of closing agreements, approximately 100 other investors are bound by the Barton decision, bringing the total amount at issue in this case to approximately \$2.8 million.

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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 April 15 - May 15, 1993. Persons listed below are AUSAs unless otherwise indicated:

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

**Linda Betzer** and **John Siegel**, Northern District of Ohio; **Lynne Lamprecht** and **Donna Bucella**, Southern District of Florida; **Linda Sybrant**, Western District of Missouri; **Dan Gillogly**, Northern District of Illinois; **D. Broward Segrest**, Middle District of Alabama; **Stu Walz** and **Tena Campbell**, District of Utah; **Kimberly Zimmer**, Northern District of New York; **James Hurd**, District of Virgin Islands; **Lisa Boggs**, Middle District of North Carolina; **Silvia Gonzalez**, District of Columbia; **Huntley Palmer**, Eastern District of Pennsylvania; **Sally Yates**, Northern District of Georgia; **Craig Moore**, District of Rhode Island; **Cedric Joubert**, Southern District of Texas; **Janet Martin**, District of Arizona; **Bonnie Ulrich**, District of South Dakota; **John Barton**, District of South Carolina; **Melinda Haag**, Central District of California; **Bill Barnett**, Northern District of Alabama; **Scott Woodward**, Northern District of Oklahoma; **Gregg Lehman**, Western District of Texas; **Randy Bellows**, Eastern District of Virginia; and **William Welch**, District of Colorado.

**Civil Chiefs Seminar--Large USAOs (Arlington, Virginia)**

**Kenneth Melson**, United States Attorney, **G. Wingate Grant** and **Robert Jaspén**, Eastern District of Virginia; **John Bates** and **Wilma Lewis**, District of Columbia; **Juliet Eurich**, District of Maryland; **Amy Hay**, Western District of Pennsylvania; **Richard Mark**, Southern District of New York; **David Moynihan**, District of Nevada; **Marcia Johnson**, Northern District of Ohio; **Raymond Nowak**, Western District of Texas; **James Sheehan** and **Joan Garner**, Eastern District of Pennsylvania; **Mary Beth Uitti**, Northern District of California; **Alleen Castellani**, Western District of Missouri; **Robyn Hermann**, Southern District of Florida; **Bette Uhrmacher** and **Susan Cassell**, District of New Jersey; **Leon Weidman**, Central District of California; **Lowell Harris**, District of New Mexico; **Jeffrey Hopkins**, Southern District of Ohio; **Christopher Pickrell**, Western District of Washington; **Tom Walsh**, Northern District of Illinois; and **Suzanne Durrell**, District of Massachusetts. From the Civil Division: **Helene Goldberg**, Director, Torts Branch; **Jeffrey Axelrad**, Director, Torts Branch; **Michael Hertz**, Director, Commercial Litigation Branch; and **William Kanter**, Deputy Chief, Appellate Staff. From the Executive Office for United States Attorneys: **Mike Bailie**, Deputy Director, Administrative Services; **Mike McDonough**, Assistant Director, Financial Management Staff; **Gail Williamson**, Assistant Director, Personnel Management Staff; **Mary Anne Hoopes**, Deputy Legal Counsel; **Brian Jackson**, Assistant Director, Evaluation and Review Staff; **Kathleen Haggerty**, Assistant Director, Financial Litigation Staff; **Deborah Westbrook**, Legal Counsel; and **Sharon Hopson**, Management Analyst, Case Management Staff.

**Federal Acquisition Regulations (Washington, D.C.)**

**Paul Turnau**, Assistant Director, Procurement Service Staff, and **Stuart Frisch**, Deputy General Counsel, of the Justice Management Division. **James Whetstone**, Deputy Assistant Administrator, Office of Procurement, Drug Enforcement Administration. **Elizabeth Grant**, Associate General Counsel; and **Carolyn Perry**, Associate General Counsel, Defense Logistics Agency. **George Brezna**, Associate Counsel for the Commandant, Office of the Counsel for the Commandant, United States Marine Corps. **Craig Schmauder**, Acting Deputy Chief Counsel, Office of Chief Counsel, Army Corps of Engineers. **Bertram Berlin**, Assistant General Counsel, General Accounting Office.

**Automating Financial Litigation (Houston, Texas)**

**Tim Murphy**, Deputy Associate Attorney General. From the Executive Office for United States Attorneys: **Kathleen Kahoe**, Acting Deputy Director. **Richard W. Sponseller**, Associate Director; and **Darrell Curtis**, Management Analyst, Financial Litigation Staff. **Eileen Menton**, Assistant Director; **Vern Bryant**, Chief, Central Systems Service; **Donna Johnson**, Supervisory Computer Specialist, and **Patti Ostrowski**, Management Analyst, Case Management Staff. **Judy Johnson**, Program Manager, Evaluation and Review Staff. From the Justice Management Division: **Dale Trott**, Acting Director, Debt Accounting Operations Group, and **Diane Miller**, Program Manager, Central Intake Facility. **Rider Scott**, Southern District of Texas; **Barbara Brouner**, Western District of Washington; **Patsy Ybarra**, Western District of Texas; **Debbie Koga**, District of Utah; **Carol Uebelhoer** and **Jane Bondurant**, Western District of Kentucky; **Patricia Conover**, Middle District of Alabama; **Debbie Gaddy**, Western District of North Carolina; **Suzanne Tucker**, District of Maine; and **Kim Whatley**, Administrative Office of United States Courts.

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**Patrick Malloy**, Chief of Branch Offices, Southern District of Texas. From the Executive Office for United States Attorneys: **Mike Baillie**, Deputy Director, Administrative Services; **Deborah Westbrook**, Legal Counsel; **Brian Jackson**, Assistant Director, Evaluation and Review Staff; **Donna Enos**, Acting Assistant Director, LECC/Victim-Witness Office; **Gail Williamson**, Assistant Director, Personnel Staff; **Mike McDonough**, Assistant Director, Financial Management Staff; and **Richard W. Sponseller**, Associate Director, Financial Litigation Staff.

**Support Staff (Raleigh, North Carolina)**

**James Russell Dedrick**, United States Attorney; **Peter Kellan**, Criminal Chief; **Paul Newby**, Assistant Civil Chief, **Christine Dean**, Assistant United States Attorney; **Dilys Hoeg**, Paralegal Specialist; **Barbara Kocher**, Paralegal Specialist; **Linda Hayes**, Paralegal Specialist; **Steve Matheny**, Paralegal Specialist; and **Connie Raines**, Secretary to the First Assistant United States Attorney; all from the Eastern District of North Carolina. **Betty Pullin**, Southern District of West Virginia. From the Executive Office for United States Attorneys: **Sharon Hopson**, Management Analyst, Case Management Staff; and **Gary Padgett**, Attorney and Management Analyst, Evaluation and Review Staff.

**Asset Forfeiture/FIRREA And Fraud (Salt Lake City, Utah)**

**David Jordan**, United States Attorney, District of Utah; **Mark Aspey**, District of Arizona; **Virginia Gibson-Mason**, Eastern District of Pennsylvania; **Wayne Lamprey**, Northern District of California; **Leon Weldman**, Central District of California; and **William Yahner**, Southern District of Texas. **Cary H. Copeland**, Director, Executive Office for Asset Forfeiture. From the Criminal Division: **Harry Harbin**, Assistant Director; **James I. K. Knapp**, Deputy Director for Program Management; and **Juan Marrero**, Special Counsel to the Director for International Forfeiture Matters, Asset Forfeiture Office; **John D. Arterberry**, Deputy Chief, Fraud Section; and **Sarah McKee**, Senior Trial Attorney, Office of International Affairs. From the Civil Division: **David Epstein**, Director, Foreign Litigation. From the Federal Bureau of Investigation: **Barry S. Dembo**, Supervisory Agent-in-Charge; **Harry J. Kuerner, Jr.**, Supervisory Agent-in-Charge; and **William R. Schroeder**, Chief, Legal Forfeiture Unit.

**Evidence (Washington, D.C.)**

**Nash Schott, Richard Parker, Dennis Kennedy, and John Douglass**, Eastern District of Virginia; **Richard Roberts**, District of Columbia. **Richard Foster**, Chief Attorney, Office of Civil Rights, Department of Education; **Fran Gilligan**, Senior Legal Advisor, U.S. Court of Military Appeals; **Vincent Garvey**, Deputy Director, Federal Programs Branch, and **Doug Coleman**, Trial Attorney, Torts Branch, Civil Division; and **Scott Glick**, Trial Attorney, Terrorism and Violent Crimes Section, Criminal Division.

**Appellate Advocacy (Washington, D.C.)**

**Linda Hertz and Dawn Bowen**, Southern District of Florida; **Martin Weinstein**, Northern District of Georgia; **Jan Kittel Mann**, Western District of Michigan; **Tamra Phipps**, Middle District of Florida; **Ping Moy** and **John Auchincloss**, Southern District of New York; **Karla Spaulding**, Southern District of Texas; **Kent Walker**, Northern District of California; **Fred Stine**, Eastern District of Kentucky; **Christopher Mead**, District of Maryland; **Darcy Cerow**, District of Arizona; and **Glenn Morramarco**, District of New Jersey. **Mervyn Hamburg**, Deputy Chief, Appellate Staff, Criminal Division; and **Mark Stern**, Assistant Chief, Appellate Staff, Civil Division.

**Law Of Federal Employment (Chicago, Illinois)**

**Don Names**, Chief, Technical and Legal Support Branch, Equal Employment Opportunity Commission; **Mary Anne Hoopes**, Deputy Legal Counsel, Executive Office for United States Attorneys; **Thomas J. Lanphear**, Director, Regional Operations, Merit Systems Protection Board; **Bruce Mayor**, Assistant Director for Legal Affairs, Merit Systems Protection Board; **Sandra Shapiro**, Distinguished Visiting Executive, Administrative Conference of the United States; and **S. Jesse Reuben**, Regional Director, Federal Labor Relations Authority.

**8th Circuit Asset Forfeiture Component Seminar (Kansas City, Missouri)**

**Kevin Alexander**, Eastern District of Arkansas; **Deborah Groom**, Western District of Arkansas; **Martin J. McLaughlin**, Northern District of Indiana; **Kevin E. Vanderschel**, Southern District of Indiana; **Mary Jo Madigan**, District of Minnesota; **Frances Reddis**, Western District of Missouri; **Nancy A. Svoboda**, District of Nebraska; **LeAnn Larson LaFave**, District of South Dakota. **Mandy Warford**, LECC Coordinator, Eastern District of Arkansas; **Steven Badger**, LECC Coordinator, Northern District of Indiana; **Al Overbaugh**, LECC Coordinator, Southern District of Indiana; **Patricia Roland**, Public Affairs Specialist, Eastern District of Missouri; **Rebecca Tillman**, LECC Coordinator, Western District of Missouri; **Joseph P. Jeanette**, LECC Coordinator, District of Nebraska; and **David F. Green**, LECC Corrdinator, District of South Dakota. **Cary Copeland**, Director, Executive Office for Asset Forfeiture. From the Asset Forfeiture Office, Criminal Division: **Lee Radek**, Director; **Jim Knapp**, Deputy Director; **Harry Harbin**, Assistant Director; **Alice Dery**, Special Counsel; **Stefan Cassella**, Staff Attorney; **Barry Blyvels**, Staff Attorney; and **Barbara Plater**, Management Analyst. From the Drug Enforcement Administration: **Jack Mahoney**, Chief, Asset Forfeiture, Washington, D.C.; and **Bernard Minarik**, Senior Attorney, Washington, D.C. From the Federal Bureau of Investigation: **Paul King**, Unit Chief, Forfeiture Seized Property Unit; and **William Schroeder**, Unit Chief, Legal Forfeiture Unit. From the Marshals Service: **James Griffis**, Regional Manager, Houston, Texas; and **John A. Wetmore**, Regional Manager, Seattle, Washington. From the Secret Service: **Mark Mulligan**, Attorney Advisor, Washington, D.C.; and **Kevin T. Foley**, Assistant Special Agent-in-Charge, Washington, D.C.

**Ethics And Professional Conduct (Washington, D.C.)**

**Jane Ley**, Deputy General Counsel, and **Julla Loring Eirinberg**, Attorney-Advisor, both from the Office of Government Ethics; **George Pruden**, Associate General Counsel for Employment Law and Information, Bureau of Prisons; and **Roger McNamara**, Senior Ethics Officer, Office of General Counsel, Department of the Air Force.

**Negotiation Skills (Washington, D.C.)**

From the Department of Health and Human Services: **Thomas Parrett**, Director, Labor-Management Relations Division; **Ron Walczak**, Chief, Negotiation/Alternative Dispute Resolution Branch, Office of Human Relations; **Patricia Randle**, Director, Litigation Branch, Labor Management and Employee Relations Division, and **Neil Kaufman**, Director of Mediation Services, Departmental Appeals Board. From the Environmental Protection Agency: **Ranelle Rae**, Director, EPA Institute Division, and **Winston M. Haythe**, Senior Attorney, National Enforcement Training Institute. **Lawrence Klinger**, Assistant to the Director, Torts Branch, Civil Division. **Bruce Mayor**, Assistant Director for Legal Affairs, Merit Systems Protection Board. **Sandra Hicks**, Deputy Director, Division of Personnel Management, Department of the Treasury.

**Ethics Advisors Training (New Orleans, Louisiana)**

**Robert J. Boitmann**, United States Attorney, Eastern District of Louisiana. **Deborah C. Westbrook** and **Donna Henneman**, both from the Office of Legal Counsel, and **Lee Cumberland**, Management Analyst, all from the Executive Office for United States Attorneys. **Mary Biesenbach**, Director, Ethics Program, Office of General Counsel, Justice Management Division. **Robert B. Lyon, Jr.**, Assistant Counsel, Office of Professional Responsibility; and **G. Sid Smith**, Attorney-Advisor, Office of Government Ethics.

**Civil Chiefs--Small and Medium USAOs (Arlington, Virginia)**

**Ken Melson**, United States Attorney, Eastern District of Virginia; **Lorraine Gallinger**, United States Attorney, District of Montana; **Paul Lillios**, Northern District of Iowa; **Sally Johnson**, District of Nebraska; **Helen Toor**, District of Vermont; **Robert Dopf**, Southern District of Iowa; **Robert DeSousa**, Middle District of Pennsylvania; **John Broadwell**, Western District of Louisiana; **William Pease**, Northern District of New York; **Dan Lynn** and **Pshon Barrett**, Southern District of Mississippi; **Dan Leville**, Western District of Michigan; **Emily Metzger**, District of Kansas; **Pat Flatley**, Northern District of West Virginia; **Jim Lewis**, Central District of Illinois; **Phil Klingeberger**, Northern District of Indiana; **Mickale Carter**, District of Alaska; **Rudy Renfer**, Eastern District of North Carolina; **Bette Uhrmacher**, District of New Jersey; and **Joan Garner**, Eastern District of Pennsylvania. From the Civil Division: **Helene Goldberg**, Director, Torts Branch; **Jeffrey Axelrad**, Director, Torts Branch; **Dennis Linder**, Director, Federal Programs Branch; **Ted Hirt**, Federal Programs Branch; and **Andrea McCarthy**, Torts Branch. From the Executive Office for United States Attorneys: **Mike McDonough**, Assistant Director, Financial Management Staff; **Gail Williamson**, Assistant Director, Personnel Management Staff; **Mary Anne Hoopes**, Deputy Legal Counsel; **Carol Sloan**, Acting Assistant Director, Office Automation Staff; **Richard Sponseller**, Associate Director, Financial Litigation Staff; and **Deborah Westbrook**, Legal Counsel.

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**1993 VIDEOTAPE LENDING LIST FOR UNITED STATES ATTORNEYS' OFFICES**

On May 7, 1993, OLE forwarded copies of its 1993 Videotape Lending List to all First Assistant United States Attorneys. The videotapes are available on loan to all United States Attorneys' offices. If you are interested in borrowing a videotape that appears on the list, please contact Hilda Hudson, OLE's CLE Coordinator, 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 June 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 an announcement via Email approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ Divisions officially announcing each course and requesting nominations. Once a nominee is selected, OLE funds costs for Assistant United States Attorneys only.

**June, 1993**

<b><u>Date</u></b>	<b><u>Course</u></b>	<b><u>Participants</u></b>
15-17	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, Systems Managers
15-18	Violent Crimes	AUSAs, DOJ Attorneys
21-25	Financial Crimes	AUSAs, DOJ Attorneys
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

**July, 1993**

7-9	Criminal Chiefs USAOs	Chiefs (Small USAOs)
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July, 1993 (Cont'd.)

<u>Date</u>	<u>Courses</u>	<u>Participants</u>
12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
20-22	Financial Litigation For AUSAs	AUSAs
20-23	Basic Attorney Asset Forfeiture	AUSAs, DOJ Attorneys
26-30	Appellate Advocacy	AUSAs, DOJ Attorneys
27-29	Environmental Crimes	AUSAs, DOJ Attorneys
<u>August, 1993</u>		
9-11	Complex Prosecutions	AUSAs, DOJ Attorneys
10-11	Ethics Seminar USAOs	Ethics Advisors (AUSAs, Support Staff)
11-12	Alternative Dispute Resolution-Civil	AUSAs, DOJ Attorneys
11-13	Criminal Chiefs USAOs	Chiefs (Large USAOs)
17-19	Advanced Bankruptcy	AUSAs, DOJ Attorneys, Paralegals
17-20	Evidence Seminar for Experienced Criminal Litigators	AUSAs
18-20	Criminal Enforcement of Child Support	AUSA, DOJ Attorneys
24-26	Affirmative Civil Litigation	AUSAs, DOJ Attorneys
30-Sep 3	Appellate Advocacy	AUSAs, DOJ Attorneys

September, 1993

<u>Date</u>	<u>Course</u>	<u>Participants</u>
1-2	Appellate Chiefs USAOs	Appellate Chiefs
8-10	First Assistants	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, Paralegals
21-23	International Issues	AUSAs, DOJ Attorneys
27-29	Civil Rights (Criminal and Civil Enforcement)	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 an announcement via Email 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. Attached at the Appendix of this Bulletin as Exhibit C is a nomination form for LEI courses listed below (except those marked by an \*). Local reproduction is authorized and encouraged. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form approximately three weeks before the course begins. **Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an \*).**

June, 1993

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

July, 1993

1	Computer Law	Attorneys
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 and Professional Conduct	Attorneys, Ethics Officers
9-10	Evidence	Attorneys
11-13	Attorney Management	Supervisory Attorneys
17-19	Advanced Bankruptcy	AUSAs, Attorneys, Paralegals
17-20*	USAO Experienced Paralegal	Civil and Criminal Paralegals (5+ yrs. experience)

**August, 1993 (Cont'd.)**

<u>Date</u>	<u>Course</u>	<u>Participants</u>
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	AUSAs, Attorneys, Paralegals
24	Legal Writing	Attorneys
28-30	Discovery	Attorneys

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**OFFICE OF LEGAL EDUCATION CONTACT INFORMATION**

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AGAI-Civil & Appellate..... Ron Silver  
AGAI-Asset Forfeiture..... Suzanne Warner  
AGAI-Debt Collection..... Nancy Rider  
LEI..... Donna Preston  
LEI-Paralegal & Support..... Donna Kennedy

\*\*\*\*\*

**APPENDIX**

**CUMULATIVE LIST OF  
CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES**  
(As provided for in the amendment to the Federal postjudgment  
interest statute, 28 U.S.C. §1961, effective October 1, 1982)

<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%	04-07-93	3.37%
06-02-89	8.85%	09-21-90	7.78%	01-10-92	4.02%	04-30-93	3.25%
06-30-89	8.16%	10-27-90	7.51%	02-07-92	4.21%	05-28-93	3.54%
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**

<b><u>DISTRICT</u></b>	<b><u>U.S. ATTORNEY</u></b>
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	Edward Vulevich, Jr.
Alaska	Joseph W. Bottini
Arizona	Daniel G. Knauss
Arkansas, E	Richard M. Pence, Jr.
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	Robert M. Twiss
California, C	Terree A. Bowers
California, S	James W. Brannigan, Jr.
Colorado	James R. Allison
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
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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	Elliot Enoki
Idaho	Maurice O. Ellsworth
Illinois, N	Michael J. Shepard
Illinois, S	Frederick J. Hess
Illinois, C	Byron G. Cudmore
Indiana, N	David A. Capp
Indiana, S	John J. Thar
Iowa, N	Robert L. Teig
Iowa, S	Christopher D. Hagen
Kansas	Jackie N. Williams
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Robert J. Boltmann
Louisiana, M	P. Raymond Lamonica
Louisiana, W	William J. Flanagan
Maine	Jay P. McCloskey
Maryland	Gary P. Jordan
Massachusetts	A. John Pappalardo
Michigan, E	Alan M. Gershel
Michigan, W	John A. Smietanka
Minnesota	Francis X. Hermann
Mississippi, N	Alfred E. Moreton, III
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Missouri, E	Stephen B. Higgins
Missouri, W	Michael A. Jones

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New York, E	Zachary Carter
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North Carolina, M	Benjamin H. White, Jr.
North Carolina, W	Jerry W. Miller
North Dakota	Gary Annear
Ohio, N	Emily Sweeney
Ohio, S	Edmund A. Sargus, Jr.
Oklahoma, N	Frederick L. Dunn, III
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	John E. Green
Oregon	Jack C. Wong
Pennsylvania, E	Michael J. Rotko
Pennsylvania, M	Wayne P. Samuelson
Pennsylvania, W	Thomas W. Corbett, Jr.
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Rhode Island	Edwin J. Gale
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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	James H. DeAtley
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Hugh Prescott Mabe, III
Virginia, E	Kenneth E. Melson
Virginia, W	E. Montgomery Tucker
Washington, E	Carroll D. Gray
Washington, W	Susan L. Barnes
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	Nathan A. Fishbach
Wisconsin, W	Grant C. Johnson
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# Department of Justice

ADVANCE FOR RELEASE AT 5 P.M. EDT  
WEDNESDAY, MAY 19, 1993

BJJS  
202-307-0784

An estimated 16 percent of prison inmates were armed with a gun when they committed the offense for which they were serving time, the Bureau of Justice Statistics (BJS) announced today. About half of the armed inmates (or about 8 percent of all prisoners) said they had fired their guns during the crime, and an estimated 23 percent of all state prisoners had committed at least one current or past crime while armed.

BJS, a Department of Justice agency, said the findings came from in-depth interviews in 1991 with a nationally representative sample of almost 14,000 state prisoners in 277 facilities in 45 states. There were 711,000 state inmates at the time.

"This is the most comprehensive survey ever conducted to gather information on inmate characteristics," commented Acting BJS Director Lawrence A. Greenfeld. "This latest study of prisoner backgrounds--the fourth since 1974--provides new data about family status, recidivism, gang membership, drug and alcohol use, weapons acquisition and violent crime victims." Other survey findings include:

Inmate Characteristics

The state prison population, which increased 58 percent between 1986 and 1991, changed minimally in general characteristics:

--Sixty-five percent of the inmates belonged to racial or ethnic minority groups in 1991, up from 60 percent in 1986.

--Twenty-two percent of the inmates were younger than 25 years old, down from 28 percent in 1986, and a higher percentage were between 35 and 54 years old--30 percent in 1991, compared to 24 percent five years earlier.

--Women accounted for 5 percent of all state inmates in 1991, up from 4 percent in 1986.

--About 34 percent of the 1991 inmates had completed high school, compared to 29 percent in 1986. In 1991 about 19 percent of the inmates had an eighth grade education or less.

--About one-fifth were married, but more than half had never married. Two-thirds of all inmates were employed during the month before they were arrested for their current offense. More than half of all inmates had been employed full time.

An estimated 38 percent of the women and 13 percent of the men had been receiving Social Security benefits, welfare or charity before they were sent to prison.

About one in every 25 state prisoners in 1991 was not a U.S.

citizen. Half of the non-citizens were Mexican. Forty-five percent of the non-citizens had been convicted of drug crimes.

Types of Offenses

Among the 1991 inmates just under half had been sentenced for a violent crime, a quarter for a property crime and about a fifth for a drug crime.

The percentage of surveyed inmates in state prisons sentenced for various crimes in 1986 and 1991 were as follows:

	1991	1986
Violent offenses . . . . .	47%	55%
Murder . . . . .	11	11
Negl. manslaughter . . . . .	2	3
Kidnapping . . . . .	1	2
Rape . . . . .	4	4
Other sexual assault . . . . .	6	4
Robbery . . . . .	15	21
Assault . . . . .	8	8
Other violent crimes . . . . .	1	1
Property offenses . . . . .	25%	31%
Burglary . . . . .	12	16
Larceny and theft . . . . .	5	6
Motor vehicle theft . . . . .	2	1
Arson . . . . .	1	1
Fraud . . . . .	3	4
Stolen property . . . . .	1	2
Other property crimes . . . . .	*	1
Drug offenses . . . . .	21%	9%
Possession . . . . .	8	3
Trafficking . . . . .	13	5
Other or unspecified . . . . .	*	*
Public-order offenses . . . . .	7%	5%
Weapons . . . . .	2	1
Other public order . . . . .	5	4
Other offenses . . . . .	*	1%
.....	.....	.....

\* Less than 1 percent.

Almost 75,000 inmates were serving a murder sentence during 1991, of whom 44 percent had been sentenced to a term of years, averaging 32 years; 41 percent had received a life sentence; 11 percent had received a life sentence with additional years added and 3 percent had been sentenced to death.

Weapons Possession and Use

Forty-six percent of the inmates who had committed violent crimes had carried or used a weapon when they committed the crime. The percentages were:

Handgun . . . . .	24%
Knife . . . . .	11
Rifle or shotgun . . . . .	5
Other weapon, such as club or bottle . . . . .	5
Military-type weapon . . . . .	1
No weapon . . . . .	54

The use of weapons was strongly associated with age; 52 percent of the offenders who were 24 years old or younger at the time of the crime carried or used them, compared to 33 percent who were 45 years old or older. Such use did not vary significantly between the sexes or among racial or ethnic groups. Forty-six percent of both male and female violent offenders were armed at the time of the offense, as were 43 percent of white, 47 percent of black and 48 percent of Hispanic violent offenders.

More than a third of the inmates who had committed a murder, robbery or an assault carried a firearm. Handguns were the most

commonly owned and used firearm.

All prisoners were asked if they had ever possessed a handgun. Of those who said yes, the most recently acquired handgun was obtained from the following sources:

Family or friends . . . . .	31%
Black market or fenced . . . . .	28
Retail outlet . . . . .	27
Theft . . . . .	9
Other . . . . .	5

Victims of Violent Inmates

Violent inmates were most likely to have victimized a person who was a male, an adult and of the same race as the offender. Eighty-nine percent of the white inmates and 53 percent of the black inmates who had committed a violent crime had attacked someone of their own race.

--Twenty-three percent of the violent inmates had victimized more than one person. One in five had attacked a minor. Thirty-two percent had victimized a relative, intimate or person whom they had known well. Women (36 percent) were more likely than men (16 percent) to have victimized a relative or an intimate.

--Two-thirds of the violent inmates had killed, raped or otherwise injured their victims.

--Forty-four percent of the inmates convicted of rape or sexual assault committed the crime in the victim's home--32 percent in the offender's home.

--Thirty-four percent of the inmates convicted of murder

killed their victims in the victim's home--29 percent in a public place.

Inmates 45 years old or older at the time of the offense were about three times as likely as those younger than 25 to have sexually assaulted their victims.

#### Family Characteristics

More than half of all inmates did not live with both parents while growing up, about a quarter had parents who abused drugs or alcohol and a little less than a third had a brother with a jail or prison record. Thirty-seven percent of the inmates had at least one family member who had been incarcerated.

Fifty-three percent of the black inmates grew up in single-parent homes, compared to 33 percent of white inmates and 40 percent of Hispanic inmates. About 14 percent of all inmates lived in homes with no parent. About 17 percent had lived in a foster home or agency or other institution at one time or another.

The 1991 inmates were parents to more than 826,000 children under 18 years old. Forty-two percent of the women and 32 percent of the men had two or more children under 18. Six percent of the women inmates entered prison while pregnant.

### Recidivism

A large majority of the offenders in state prisons had serious or lengthy criminal records. Ninety-four percent of the state inmates had been convicted of a violent crime or had received a previous sentence to probation or incarceration. More than 60 percent had been incarcerated in the past and almost all of those with prior confinements had been in prison or jail for an offense within five years of their current offense.

About 38 percent of all inmates had never been incarcerated before. Nineteen percent were sentenced for the first time, and the other 19 percent had received only past probation sentences.

Of those inmates serving their first sentence, 65 percent had been convicted of violent crimes, 10 percent of property crime and 22 percent of drug offenses.

Six percent of all state prisoners were non-violent offenders with no prior sentence to incarceration or probation. Of this group, 42 percent were in prison for drug trafficking, 19 percent for drug possession and 12 percent for burglary.

### Drug and Alcohol Use

While about 80 percent of state prisoners reported they had used illegal drugs at least once, half said they had been using drugs in the month before their current offense, and 31 percent said they had been under the influence of drugs at the time of their current offense.

Compared to 1986, state prisoners in 1991 reported an increased use of cocaine and a decreased use of all other drugs. Half of all 1991 inmates had used cocaine or crack at some time in the past, and about one-quarter said they had used cocaine or crack in the month before the offense for which they had been imprisoned.

In 1986 about 10 percent of state prisoners said they had been under the influence of cocaine or crack at the time of the offense. In 1991 about 14 percent were under the influence of these drugs.

Female inmates were more likely than male inmates--and black inmates more likely than whites--to have said they had used crack.

About 14 percent of both black and white prisoners and 21 percent of Hispanic inmates reported using cocaine powder during the month before their current offense. However, blacks (14 percent) were about twice as likely as whites (6 percent) or Hispanics (8 percent) to report having used crack during that period.

Twenty-five percent of the inmates had injected a drug at least once during their lifetimes for a non-medical purpose--17 percent heroin or another opiate, 16 percent cocaine, 6 percent methamphetamine and 4 percent another drug. Twelve percent had shared a needle at least once.

Forty-three percent of all inmates had participated in a drug treatment program. Almost half of those who had used a drug during the month before their current offense had participated in drug treatment after entering prison.

Sixty-one percent of the violent inmates said they or their victims or both had been drinking or using drugs at the time of the crime. Thirty-two percent of all inmates committed their offense under the influence of alcohol. About half of them had been drinking six hours or longer and had consumed the equivalent of about three six-packs of beer or two quarts of wine.

Daily drinking was more common among whites (34 percent) than among blacks (25 percent) or Hispanics (25 percent) and among men (29 percent) than women (19 percent). About half of the daily drinkers had participated in an alcohol-abuse program at one time or another.

#### Gang Membership

Six percent of the state prison inmates belonged to a gang before entering prison. The survey defined a gang as having five or six of the following characteristics:

- o Formal membership with a required initiation procedures or rules for members.
- o A recognized leader or leaders.
- o Common clothing, uniform-like garb, or caps or group colors, symbols, tattoos, or special symbols.

- o A group name.
- o Members from the same neighborhood, street or school.
- o Turf or territory where the group is known and where group activities usually take place.

Half of the gang members in prison reported that their gangs had 60 or more members. On average, the inmates joined a gang at age 14. Half belonged to a gang for three years or more and belonged at the time they were arrested for their current offense.

Of those in prison who had been gang members, 63 percent reported having stolen motor vehicles or vehicle parts with other gang members. Fifty-eight percent had broken into homes or other buildings as a gang activity.

#### HIV and Aids

More than half of the prisoners had been tested for the human immunodeficiency virus (HIV) at one time or another and reported the results to the survey interviewers. Of this group, 2.2 percent were HIV-positive (3.3 percent among women and 2.1 percent among men). Among drug users the rate was 2.5 percent, compared to 0.8 percent among non-drug users.

Intravenous drug users reported higher HIV-positive rates (4.9 percent) than did other inmates. Those who shared needles with other drug users reported even higher rates (7.1 percent).

# 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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## General Application Principles

### COMMENTARY

**Supreme Court holds that commentary is binding.** Defendant was sentenced as a career offender, partly because his instant offense—possession of a firearm by a convicted felon—was held to be a “crime of violence” under § 4B1.2. The appellate court affirmed, holding that such possession “by its nature” is a crime of violence for career offender purposes. *U.S. v. Stinson*, 943 F.2d 1268, 1271–72 (11th Cir. 1991) [4 *GSU* #10]. Shortly after that decision, the commentary to § 4B1.2 was amended to expressly exclude the felon-in-possession offense from the definition of crime of violence. Defendant requested a rehearing, arguing that the amendment should be given retroactive effect. The appellate court denied the request and reaffirmed, holding that the amended commentary is not binding. *U.S. v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992) (per curiam) [4 *GSU* #19].

In a unanimous decision, the Supreme Court vacated and remanded, holding “that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” The Court cited its decision in *Williams v. U.S.*, 112 S. Ct. 1112, 1119 (1992): “Where . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline,” and failure to follow such a policy statement is “an incorrect application of the sentencing guidelines” under 18 U.S.C. § 3742(f)(1). Here the Court held that “[o]ur holding in *Williams* dealing with policy statements applies with equal force to the commentary before us.” See also § 1B1.7 (failure to follow commentary that interprets or explains a guideline “could constitute an incorrect application of the guidelines” subject to reversal).

The Court added that “[i]t does not follow that commentary is binding in all instances. . . . [T]he guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission’s particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency’s interpretation of its own legislative rules. As we have often stated, provided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”

Following these principles, the Court concluded that the amendment must be followed: “We recognize that the exclu-

sion of the felon-in-possession offense from the definition of ‘crime of violence’ may not be compelled by the guideline text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not ‘plainly erroneous or inconsistent’ with § 4B1.2 . . . . As a result, the commentary is a binding interpretation of the phrase ‘crime of violence.’ Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.”

The Court did not address whether the amendment should be applied retroactively, finding that the issue was not properly before the Court and should be decided first by the appellate court on remand.

*Stinson v. U.S.*, No. 91-8685 (U.S. May 3, 1993) (Kennedy, J.).

See *Outline* at I.E and F, and IV.B.1.b.

## Criminal History

### CAREER OFFENDER PROVISION

**D.C. Circuit holds that the career offender provision does not apply when the instant offense is a conspiracy to commit a controlled substance crime.** Defendant pled guilty to a conspiracy charge under 18 U.S.C. § 371, the object of which was possession with intent to distribute PCP. He was sentenced as a career offender under § 4B1.1 and appealed, arguing that the definition of controlled substance offenses in § 4B1.2, comment. (n.1), exceeded the statutory mandate in 28 U.S.C. § 994(h) by including conspiracies to commit such offenses.

The appellate court agreed and remanded. The Sentencing Commission explicitly based the career offender provision on § 994(h), which in relevant part states that a sentence “at or near the maximum term authorized” shall be imposed on a defendant who is convicted of one of several specifically listed drug felonies—each of which is a substantive offense—as well as two prior such drug felonies or violent felonies. The court reasoned that “conspiracy to commit a crime involves quite different elements from whatever substantive crime the defendants conspire to commit . . . . Thus, conspiracy to violate the sections specified in § 994(h) cannot be said to be one of the offenses ‘described in’ those sections.”

The court concluded that “the Commission has acted explicitly upon grounds that do not sustain its action. Because we find its stated basis—§ 994(h)—inadequate for Application Note 1’s inclusion of conspiracies, Note 1 cannot support Price’s sentence as a career offender.” Although in this case only the instant offense and § 994(h)(1)(B) were at issue, the court noted that § 994(h)(2)(B), which applies to prior qualifying felonies, “poses the same problem.” The court left open

whether the Commission could reach the same result under different authority, such as its broader mandate in § 994(a).

*U.S. v. Price*, No. 91-3335 (D.C. Cir. Apr. 23, 1993) (Williams, J.).

See *Outline* at IV.B.2.

## Departures

### MITIGATING CIRCUMSTANCES

Ninth Circuit affirms departure for "coercive" government conduct during investigation and for one defendant's medical condition. In the course of investigating illegal weapons sales at "swap meets" in Arizona, an undercover agent made contact with defendants. Defendants initially demurred when the agent tried to get them to sell automatic weapons and silencers, but over the next three months the agent persisted and persuaded them to do so and also to sell several handguns to a convicted felon. After defendants refused a plea agreement and unsuccessfully filed motions to dismiss the indictment for outrageous governmental conduct during the investigation, the government filed a superseding indictment with additional charges against one defendant. Defendant's motion to dismiss that indictment for prosecutorial vindictiveness was denied. At trial, defendants unsuccessfully moved for acquittals based on entrapment, were found guilty on several counts, and filed motions for judgment notwithstanding the verdict.

The district court denied the JNOV motions, but departed from the defendants' 15–21-month ranges to six months of house arrest, sixty months' probation, and 100 hours of community service. The court found departure appropriate because "the conduct of this investigation, although not amounting to entrapment, was sufficiently coercive in nature as to warrant a downward departure under Guideline 5K2.12," p.s. The court also departed, pursuant to §§ 5H1.3, p.s. and 5K2.0, p.s., for one defendant who "suffers from a medical condition, panic disorder with agoraphobia, which is a mitigating factor of a kind not adequately taken into consideration by the Sentencing Commission."

The appellate court affirmed: "We are satisfied that the sentencing court was sufficiently troubled by the defendants' arguments on entrapment, prosecutorial misconduct and vindictive prosecution to the extent that although not satisfied that the indictments should have been dismissed and a judgment NOV entered, it had the authority to reflect its concern in pronouncing sentence. The court stated in advance what it intended to do, and operating precisely within the Sentencing Guidelines, it relied on section 5K2.12, p.s. to support its action. . . . Agent Murillo did not threaten the defendants, but it was he who initially proposed the illegal activity and persistently contacted Joe Juarez by telephone and in person over several months until the scheme was completed. This sort of aggressive encouragement of wrongdoing, although not amounting to a complete defense, may be used as a basis for departure under section 5K2.12." The court noted that, contrary to the government's argument, "threats of violence are not a prerequisite to application of the guidelines in cases of 'imperfect entrapment.'"

For the one defendant's mental condition, the court concluded "that the district court had authority to grant a down-

ward departure based on sections 5H1.3 and 5K2.0. The language in section 5H1.3, 'Mental and emotional conditions are not *ordinarily* relevant' (emphasis supplied), indicates that the commission intended these factors to play a part in some cases, albeit a limited number." The court noted that this departure was not based on § 5K2.13, p.s., "which concerns diminished capacity."

*U.S. v. Garza-Juarez*, No. 92-10187 (9th Cir. Apr. 23, 1993) (Aldisert, Sr. J.).

See *Outline* at VI.C.1.b and g.

*U.S. v. Gaskill*, No. 92-5588 (3d Cir. Apr. 16, 1993) (Weis, J.) (Remanded: District court incorrectly held it lacked discretion to depart downward for fraud defendant who was sole caretaker of his seriously mentally ill wife. Section 5H1.6, p.s. precludes departure for family ties and responsibilities under ordinary circumstances, but "[t]he record demonstrates circumstances quite out of the ordinary. The degree of care required for the defendant's wife, the lack of close supervision by any family member other than the defendant, the risk to the wife's well-being, the relatively brief . . . imprisonment sentence called for by the guidelines computation, the lack of any end to be served by imprisonment other than punishment, the lack of any threat to the community—indeed, the benefit to it by allowing the defendant to care for his ailing wife—are all factors that warrant departure." The court emphasized that "departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some respects, the rigidity of the guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence.")

See *Outline* at VI.C.1.a.

*U.S. v. Miller*, No. 92-30083 (9th Cir. Apr. 15, 1993) (Kozinski, J.) (Remanded: The district court departed downward to a sentence of six months' home detention, which defendant completed before this appeal. In remanding for reconsideration of whether any departure was proper, the appellate court held that if the appropriate sentence must include prison time, the district court "may depart downward by up to six months to take into account [defendant's] home detention" because the Sentencing Commission "seems not to have considered the issue of compensating for time erroneously served.")

See *Outline* generally at VI.C.4.

*U.S. v. Lewinson*, 988 F.2d 1005 (9th Cir. 1993) (Affirmed: Appellate court rejected the government's argument that defendant's reduction in mental capacity was not "sufficiently 'significant' or 'serious' to meet the requirement of § 5K2.13[. . . p.s. . . . T]he government asks us to read into this section a requirement that the 'qualifying mental disease be severe, [and] that it affect the defendant's ability to perceive reality.' However, the plain language of this section authorizes departure on a showing of 'significantly reduced mental capacity' without qualification as to the nature or cause of the reduced capacity (except with respect to voluntary drug use).")

See *Outline* at VI.C.1.b.

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