



United States Attorneys' Bulletin

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COMMENDATIONS

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

Nancy Abraham (Michigan, Eastern District), by C. W. Wilson, Postal Inspector in Charge, U.S. Postal Service, Detroit, for her outstanding prosecutive efforts in the recent trial of a government employee charged with misappropriation of postal funds.

John F. Appelquist (Missouri, Western District), by George W. Proctor, Director, Office of International Affairs (OIA), Criminal Division, for his valuable assistance and cooperative efforts rendered to OIA and the Government of Argentina in responding to an Argentine extradition request.

Gary Arbeznik, David Bauer, Marilyn Bobula, Christa Brunst, Nancy Kelley, Thomas Secor, and Nancy Vecchiarelli (Ohio, Northern District), by Charles R. Sekerak, Assistant Inspector General for Investigations, Railroad Retirement Board, Chicago, for their successful prosecution of fourteen subjects accused of fraudulently receiving Railroad Retirement Board Unemployment Insurance Benefits during the course of their employment, and for recovering thousands of dollars in fines and restitution.

Harold O. Atkinson and Paralegal Denise Swain (Texas, Western District), by Dillard Martin, Unit Manager, Federal Correctional Institution, Bureau of Prisons, Butner, North Carolina, for their excellent prosecutive efforts in bringing an eight-year defense of a Bivens case to a successful conclusion. (This case also involved Federal Tort Claims Act claims against the United States, which were tried concurrently in the district court and resolved favorably for the government.)

Wyn Dee Baker (Oklahoma, Northern District), by John G. Hollingsworth, Jr., Deputy Chief Field Counsel, U.S. Postal Service, Memphis, for her excellent representation in two "slip and fall" cases brought under the Federal Tort Claims Act, and for negotiating a favorable settlement on behalf of the Postal Service.

Richard J. Bender (California, Eastern District), by George J. Doane, Chief, Bureau of Narcotic Enforcement, Department of Justice, Sacramento, for his outstanding prosecutorial efforts in a lengthy and complex drug enforcement case.

Louis J. Bizzarri (District of New Jersey), by Edward J. Snyder, Chief, Civil Trial Section, Eastern Region, Tax Division, Department of Justice, for his valuable assistance and cooperative efforts in bringing an IRS summons enforcement and subsequent contempt proceeding to a successful conclusion.

Sandra S. Bower and Michael F. Gallagher (Florida, Middle District), by J. C. Kean, Regional Inspector General for Investigations, Department of Labor, Atlanta, for their successful prosecution of a Job Training Partnership Act white collar fraud case.

Marina Utgoff Braswell (District of Columbia), by Marvin Runyon, Postmaster General, and Mary Elcano, General Counsel and Vice President, U.S. Postal Service, Washington, D.C., for her professionalism and outstanding legal skill in the successful resolution of a complex litigation involving the Express Mail and Priority Mail Service contract.

George Breitsameter and Denise Price (District of Idaho), by A. Daniel Hughes, Special Agent in Charge, Bureau of Land Management (BLM), Department of the Interior, Boise, for their valuable participation in the law enforcement workshop, and for their cooperative efforts in the development of the BLM law enforcement program.

Robert Cares and Joyce Todd (Michigan, Eastern District), by Lawrence M. Gallina, Acting Special Agent in Charge, Drug Enforcement Administration, Detroit, for their outstanding efforts in successfully prosecuting ten individuals who conspired to import major quantities of marijuana from Columbia, South America to the United States.

Michael Christensen (District of Kansas), by Robert B. Davenport, Director, Kansas Bureau of Investigation, Topeka, for his valuable assistance to the asset forfeiture unit of the Kansas Highway Patrol, and for his successful efforts in bringing two real property cases to a favorable conclusion.

Monte Clausen (District of Arizona), by Larry Lee Gregg, General Counsel, U.S. Marshals Service, Arlington, Virginia, for his outstanding representation of two Deputy U.S. Marshals and other supervisory officials in a lengthy trial involving alleged constitutional rights violations during the course of an arrest, and for his success in obtaining a favorable verdict after only three hours of jury deliberations.

Lucy O. Creekmore (Oklahoma, Northern District), by Martin John Weber, Supervisory Special Agent, FBI, Oklahoma City, for her valuable assistance and cooperative efforts in successfully prosecuting auto theft cases in the Northern District of Oklahoma.

John Deits (District of Oregon), by Alfred S. Bosco, Special Agent in Charge, U.S. Secret Service, Portland, for his professionalism and outstanding success in prosecuting an ex-felon with multiple convictions for threatening the life of President George Bush.

Donna R. Eide (Indiana, Southern District), by Stephen L. White, Special Agent, Drug Enforcement Administration, Indianapolis, for her excellent presentation on asset forfeiture for the senior officers of the Great Lakes Region of the Civil Air Patrol (CAP) in Chicago. (CAP plays a major role in the Marijuana Eradication Program in Indiana.)

Nicholas M. Gess (District of Maine), by Terence J. McArdle, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Boston, for his outstanding success in the prosecution of a violent armed career criminal, and for his valuable contribution to the law enforcement effort.

James G. Glazebrook (Florida, Middle District), by Howard L. Marsh, Area Director, Pension and Welfare Benefits Administration, Department of Labor, Atlanta, for his professionalism and legal skill in successfully prosecuting a multi-million dollar employee health benefit fraud case affecting approximately 40,000 insureds.

Jennifer M. Granholm (Michigan, Eastern District), by Cornelius L. Jackson, Supervisor-in-Charge, Internal Revenue Service, Cincinnati, Ohio, for her outstanding prosecutive efforts in the recent trial of an individual charged with assaulting an IRS Criminal Investigation Division Special Agent.

Richard L. Hathaway (District of Kansas), by Richard Cook, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Kansas City, for his professionalism and legal skill in the successful prosecution of an arson case involving the Burlingame City Hall.

James R. Hilbert, Jr. (Florida, Middle District), by Robert J. Creighton, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Miami, for bringing a complicated employment matter to a successful conclusion. Also, by William A. Campbell, Jr., Chief Field Counsel, U.S. Postal Service, Atlanta, for his success in bringing about the dismissal of a complaint against the Postal Service.

Yoshinori H. T. Himel (California, Eastern District), by Steven J. Mopsick, District Counsel, Internal Revenue Service, Sacramento, for his valuable assistance and excellent legal services rendered to the Sacramento District over the past several years.

Michael MacDonald (Michigan, Western District), was presented a plaque by Robert DuHadway, Supervisory Resident Agent in Charge, FBI, Grand Rapids, for his outstanding legal skill and expertise in successfully prosecuting a \$14,000,000 fraud case, the largest bank fraud scheme ever in Western Michigan.

Joseph Maloney, Joyce Vermeersch, Daniel Bensing, and Sheila Oberta (California, Eastern District), by Colonel Laurence A. Sadoff, U.S. Army Corps of Engineers, Sacramento, for their outstanding team efforts in the presentation of a condemnation case involving the Castle Dam Unit of the Merced County Streams Project, and for obtaining a jury verdict in favor of the United States government.

James T. Martin (District of New Mexico), by Rick Dougherty, Special Agent in Charge, Bureau of Land Management (BLM), Department of the Interior, Santa Fe, for his outstanding representation and cooperative efforts in the prompt resolution of a criminal case involving the assault of two BLM employees.

Gary H. Montilla, Thomas E. Morris, John L. Newcomer, and Ronald T. Henry (Florida, Middle District), by Maurice L. Dettmer, Chief, Criminal Investigation Division, Internal Revenue Service, Tampa, for their outstanding efforts and excellent coordination of thirty cases involving false tax claims and electronic filing of income tax returns, resulting in the largest series of indictments of tax charges of this decade.

John R. Morello (Louisiana, Eastern District), by Roy A. Roberson, Acting District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for his successful prosecution of a labor union case, and for his continuing cooperation in detecting and deterring corruption in the Eastern District of Louisiana.

Dixie A. Morrow and Sharon T. Ratley (Georgia, Middle District), were presented Certificates of Appreciation by Thomas W. Stokes, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for their successful prosecution of two complex bombing cases involving extensive crime scene evidence, laboratory findings, multiple witness interviews, and grand jury presentations.

John F. Paniszczyn (Texas, Western District), by Mark E. Dennett, Attorney, U.S. Postal Service, Memphis, for his excellent representation in the defense of a Federal Tort Claims Act case that raised numerous legal issues of importance to the Postal Service.

Salvador E. Perricone (Louisiana, Eastern District), by Anthony E. Daniels, Assistant Director, FBI Academy, Quantico, Virginia, for his outstanding contribution to the success of an in-service training course entitled "Special Bank Investigations - Check Kiting" as part of a continuing program to train special agents to effectively combat financial institution fraud.

Michael E. Quinton (California, Southern District), by James S. Dillman, Assistant Chief Counsel for Litigation, Federal Aviation Administration, Washington, D.C., for his outstanding representation and professional legal skill in the successful prosecution of a plane accident case involving complex computer data technology, instrument approach procedures and pilot navigational aids, as well as air traffic control equipment and procedures.

Albert Ratliff (District of Virgin Islands), was presented a plaque by George A. McNenney, Special Agent in Charge, U.S. Customs Service, San Juan, Puerto Rico, in appreciation of his continuous cooperative efforts and valuable support of the mission of the U.S. Customs Service.

Ronald F. Ross (District of New Mexico), by Lt. Colonel Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, Headquarters U.S. Air Force, for his excellent representation in a slip and fall case which developed into a complex litigation involving the contractor defense, as well as difficult medical issues.

John Roth and William Sauget (Michigan, Eastern District), by Lawrence Gallina, Acting Special Agent in Charge, Drug Enforcement Administration, Detroit, for serving as guest instructors at the Law Enforcement Investigators School at Macomb Community College Criminal Justice Academy in Fraser, Michigan.

Stephen Shefler (California, Northern District), received the Inspector General's Integrity Award at the Office of Inspector General Region IX Awards Ceremony for his significant contributions to the Office of the Inspector General's mission. (Mr. Shefler is the Chief of the Financial Responsibility Unit in the Northern District of California.)

Lynne M. Solien (Wisconsin, Eastern District), by J. Douglas Wiggs, Chief, Office of Special Services, U.S. Marshals Service, Arlington, Virginia, for her valuable contribution to the success of the Financial Investigator's Pilot Training Course held recently in Kansas City.

Michael Stein and David C. Bayha, Financial Investigator (West Virginia, Northern District), by Larry R. Mincks, Acting Chief, Criminal Investigation Division, Internal Revenue Service, Parkersburg, for their successful efforts in obtaining guilty pleas for wire fraud, failing to file a false income tax return, and a report of foreign bank account. This case involved \$685,000, of which \$435,000 was laundered through the Grand Cayman Islands, British West Indies.

Al Winters (Louisiana, Eastern District), by Mary Lee Warren, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Department of Justice, for his participation in the US/Colombian Evidence Sharing Project-Prosecutors Training Seminar, and for his excellent presentation on accomplice witnesses, a new phenomenon for the Colombian prosecutors in attendance.

Dave Wood (Northern Mariana Islands), by James P. Turner, Acting Assistant Attorney General, and John M. Gadzichowski, Acting Chief, Employment Litigation Section, Civil Rights Division, Department of Justice, for his valuable assistance and hospitality provided over the past three years to the Employment Litigation Section in a discrimination case based upon national origin against Filipinos and local Chamorro and Carolinian teachers.

SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF ILLINOIS

Joan Safford, Deputy United States Attorney for the Northern District of Illinois, was recently honored on "Joan Safford Day" at a special luncheon sponsored by the Chicago office of the Criminal Investigation Division (CID) of the Internal Revenue Service. Ms. Safford was commended by John H. Imhoff, Jr., CID Chief, for her tireless commitment and extraordinary service on behalf of criminal tax prosecutions and the CID; for her valuable assistance in organizing and operating special task forces to deal with special emphasis programs, including bankruptcy fraud; for enthusiastically participating in training sessions (she is one of the most well received speakers at the annual Continuing Professional Education for Special Agents); for developing support for fully utilizing 26 U.S.C. 7212 relative to corrupt endeavors to impede and impair the lawful functions of the IRS; for pursuing a strong enforcement policy relative to illegal raids on the treasury through electronic filing frauds; and for her dedication and imaginative efforts to strengthen criminal tax prosecutions.

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SPECIAL COMMENDATION FOR THE DISTRICT OF NEW MEXICO

John Zavitz, Assistant United States Attorney for the District of New Mexico, was commended by James P. Perry, Assistant General Counsel, Natural Resources Division, Department of Agriculture, Washington, D.C., for his outstanding legal representation and for obtaining a decision in favor of the Forest Service in McKinley v. United States. McKinley involved a challenge to a Forest Service decision to reduce by 44 percent a grazing permit on the Cibola National Forest in New Mexico. In ruling for the Government, the court upheld the permit reduction and rejected the permittee's arguments that the Forest Service range analysis was flawed and that the permit reduction resulted in a taking without just compensation. While this lawsuit involved only one permit, Mr. Perry believes that the ramifications of the court's decision will apply throughout the National Forest System and provide the Forest Service with some much needed support as they continue to implement their range management program. Mr. Zavitz demonstrated a solid understanding of the Forest Service and the statutory and regulatory authorities governing grazing on National Forest lands.

* * * * *

SPECIAL COMMENDATION FOR THE MIDDLE DISTRICT OF FLORIDA

Susan H. Raab and Robert T. Monk, Assistant United States Attorneys for the Middle District of Florida, were commended by John J. Adair, Inspector General, Resolution Trust Corporation (RTC), Washington, D.C., for their successful prosecution of three defendants on various felonies relating to conspiracy, impeding the lawful functions of the RTC, misapplication, false statements, and illegal financial transactions, all in connection with a scheme to defraud the RTC by billing the agency for goods and services which were not provided. The conviction of two of the defendants for corruptly impeding the functions of the RTC is the first successful prosecution under Title 18, United States Code, Section 1032.

* * * * *

HONORS AND AWARDS

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

On June 30, 1993, at a ceremony in the Great Hall of the Department of Justice, Attorney General Janet Reno presented the 1993 Director's Awards honoring the men and women of the United States Attorneys' offices and the Executive Office for United States Attorneys for their outstanding efforts in the areas of drug-related cases, violent crime, financial institution fraud, civil enforcement, financial litigation, and a wide spectrum of law enforcement activities. The 1992 nominees for the Attorney General's Awards were included in the considerations for the Director's Awards. The Award recipients are as follows:

Superior Performance As An Assistant United States Attorney

California, Central District

Julie Fox Blackshaw
Bryan D. Daly
Gary S. Lincenberg
Michael Reese Davis
Mary A. Sedgwick
Ronald K. Silver,
Executive Office for
United States Attorneys

California, Eastern District

William J. Portanova

Florida, Northern District

Benjamin W. Beard

Florida, Middle District

Stephen M. Kunz

Florida, Southern District

Dexter A. Lee
William Richard Scruggs
Gertrude Novicki, Special
Assistant United States
Attorney

Georgia, Middle District

Paul C. McCommon, III
Sharon Thames Ratley

Georgia, Northern District

Richard H. Dean

Illinois, Northern District

Joel D. Bertocchi

Louisiana, Eastern District

Robert J. Boitmann
Mary Jude Darrow

District of Maine

Michael M. Dubose

District of Massachusetts

Gary S. Katzmann

Michigan, Western District

Brian K. Delaney

Missouri, Western District

Peter M. Ossorio

District of Nevada

Joseph M. Angelo
Kevin J. Cloherty

District of New Jersey

R. David Walk

New York, Eastern District

Geoffrey S. Mearns
Arthur P. Hui
Gary R. Brown
Jennifer C. Boal
Joseph D. McCann
Rona M. Wittels
A. Ross Pearlson
Deborah B. Zwany

New York, Northern District

Andrew T. Baxter

New York, Southern District

Jonathan N. Halpern
Lorin L. Reisner
F. Thomas Rossetter,
Special Assistant United
States Attorney

New York, Western District

Richard D. Endler
Russell P. Buscaglia
Charles B. Wydysch

North Carolina, Eastern District

William D. Delahoyde

District of North Dakota

Lynn E. Crooks

Ohio, Northern District

James C. Lynch
James V. Moroney

Oklahoma, Western District

Ronny D. Pyle

Pennsylvania, Eastern District

Walter S. Batty, Jr.
Debra L. Cohn
Amy L. Kurland
Barbara Jo Cohan

Tennessee, Eastern District

Steven H. Cook

Tennessee, Western District

Timothy R. DiScenza

Texas, Northern District

Myrna Silen

Texas, Southern District

Susan Beth Kempner
Michael E. Clark

Texas, Western District

Wayne F. Speck
Richard L. Durbin
Winstanley F. Luke

District of Utah

Stephen J. Sorenson

District of Virgin Islands

James A. Hurd, Jr.

Virginia, Eastern District

Randy I. Bellows
Laura M. Everhart
John P. Rowley, III
Marcus J. Davis, Special
Assistant United States
Attorney

Virginia, Western District

Morgan E. Scott, Jr.

Washington, Western District

Kurt P. Hermanns
Brian C. Kipnis

Wisconsin, Eastern District

Nathan A. Fishbach

Wisconsin, Western District

Mark A. Cameli

* * * * *

Mark Gallinghouse Memorial Award For Excellence In Financial Litigation

The Director's Award for Superior Performance in Financial Litigation has been renamed in honor of Assistant United States Attorney Mark Gallinghouse, who supervised the Financial Litigation Unit in the Eastern District of Louisiana. Mr. Gallinghouse was killed in a tragic automobile accident earlier this year.

Georgia, Northern District

Stephen Joel Stone
Joyce C. Schnurr
Nancy Kelly
Diane T. Williams
Delina M. Johnson
Patricia B. Wells

District of Hawaii

Erlinda Lowry
Lisa S. Yoshimura
Eugene T. Ippongi

Pennsylvania, Middle District

James A. Gibbons
Andrew S. Quinn

Affirmative Civil Enforcement (ACE) Working Group

California, Central District

Leon W. Weidman
Howard F. Daniels

California, Eastern District

Edward L. Knapp
Joseph E. Maloney

California, Northern District

Stephen A. Shefler

District of Columbia

Michael L. Martinez

Florida, Southern District

Barbara K. Bisno

Illinois, Northern District

Linda A. Wawzenski

Kentucky, Western District

William Campbell

District of Massachusetts

Suzanne E. Durrell

District of New Jersey

Susan C. Cassell

New York, Western District

Louis J. Gicale

Ohio, Southern District

Dana M. Peters

Pennsylvania, Middle District

Robert J. DeSousa

Pennsylvania, Eastern District

James G. Sheehan
Catherine L. Votaw

Texas, Eastern District

Olen Kenneth Dodd

Executive Office for United States Attorneys

Richard W. Sponseller,
Director, Financial Litigation
Unit

* * * * *

Superior Performance In A Managerial Or Supervisory Role**Florida, Southern District**
Theodore H. Rentz, Jr.**North Carolina, Eastern District**
Rudolf A. Renfer, Jr.**Texas, Western District**
James H. DeAtley**Iowa, Southern District**
Linda R. Reade**Pennsylvania, Western District**
Carol A. Brickley**District of Virgin Islands**
David M. Nissman

* * * * *

Superior Performance In A Litigative Support Role**California, Central District**
Dennis T. Yanaihara**North Carolina, Eastern District**
Sue C. Beasley**Executive Office For United States Attorneys**

EAGLE Installation Team:

California, Eastern District
Minnie Y. Iseri**Pennsylvania, Eastern District**
Vanessa Garrett-Harley

Carol Sloan

Linda S. Barth

Christopher Roe

Florida, Southern District
Roberta Greenspan**FBI**
Christopher M. Favo
George J. Hanna, Jr.

Anne M. Larsen

Sharon M. Hopson

M. Joanne Beckwith

Robert J. Hardos

Michigan, Eastern District
Patricia A. Turczynski**Justice Management Division**
Joan B. Kendall

FOIA/PA Unit:

Virginia L. Wright,

New York, Eastern District
Karyn Kenny**U.S. Park Police**
Gregory J. Higgins

* * * * *

Superior Performance In Asset Forfeiture**California, Central District**
Kevin L. James**District of Hawaii**
Florence T. Nakakuni**Executive Office for United States Attorneys**

Suzanne M. Warner, Assistant

Director, Office of Legal

Education

Florida, Southern District
Jeanne M. Mullenhoff**Virginia, Eastern District**
G. Wingate Grant

* * * * *

Superior Performance As A Special Assistant United States Attorney**Georgia, Middle District**
Douglas A. Dribben**Department of Veterans Affairs**
David L. Busse

* * * * *

Superior Achievement In Furthering Equal Employment Opportunity**Washington, Western District**

Richard A. Jones

Outstanding Performance In Law Enforcement Coordination**Alabama, Northern District**

Geri C. O'Byrne

Outstanding Performance In Assistance And Management Of Witnesses**North Carolina, Eastern District**

Retha J. Lee

Outstanding Performance In Assistance To Victims Of Crime**District of Oregon**

Pamela A. Heimuller

**Appreciation Award For Contributions To The
Executive Office for United States Attorneys and the United States Attorneys' Offices****Florida, Middle District**Frank V. Hall
Annette L. Barber
Thomas W. Moore
Nena M. Myers
Jeffrey L. Hahn
Martha S. Worthington**West Virginia, Southern District**

James M. Fleshman

Justice Management DivisionEdward H. Crim
Diane Kelly**Office of Legal Counsel**

Daniel L. Koffsky

**Immigration & Naturalization
Service**

David B. Hopkins

**Executive Office for United States
Attorneys**

Nancy Lee Cumberland

* * * * *

DISTRICT OF NORTH DAKOTA

Lynn E. Crooks, First Assistant United States Attorney for the District of North Dakota, was selected by the Federal Bureau of Investigation Agents Association to receive an Award of Excellence for Distinguished and Exemplary Service for his outstanding contributions over the past eighteen years, and especially for his extraordinary efforts in the Leonard Peltier case. The Peltier case involved the execution style murder of two young FBI agents on the Pine Ridge Indian Reservation in South Dakota. The case was tried in North Dakota on a change of venue in 1977. Peltier was convicted by a jury of two counts of first degree murder and was given two consecutive life sentences. Since his conviction, Peltier has repeatedly sought to have his convictions overturned through appellate review. Thus far, he has been unsuccessful in doing so despite his attempts to turn his case into a cause celebre.

[NOTE: At the 1993 Director's Awards Ceremony on June 30, 1993, Attorney General Janet Reno presented an Award for Superior Performance as an Assistant United States Attorney to Mr. Crooks for his outstanding victory in the Peltier case.]

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SOUTHERN DISTRICT OF NEW YORK

Beth A. Kaswan, Steven Froot, and Deborah Yeoh, Assistant United States Attorneys for the Southern District of New York, and Paralegal Specialist Nancee Adams-Taylor, were presented a Special Citation by the Commissioner of the Food and Drug Administration (FDA), Dr. David A. Kessler, "for outstanding dedication, professionalism and perseverance in the litigation of FDA's investigation into violations of the FD&C Act for drugs." The FDA presented the award for their expert handling of an action against Barr Laboratories, which was required to comply with FDA regulations concerning fraudulent manufacturing practices for an array of prescription and over-the-counter drugs.

* * * * *

SOUTHERN DISTRICT OF ILLINOIS

James L. Porter, Assistant United States Attorney for the Southern District of Illinois, was presented the Governor of the State of Illinois Award by David M. Shiffer, Chairman of the Illinois Advisory Committee on Arson Prevention, in special recognition of his dedicated service to the people of Illinois and the community for his success in an arson and embezzlement case. Mr. Porter and the investigators involved in the case are the first ever to receive this distinguished award.

* * * * *

DISTRICT OF COLUMBIA

Barbara Van Gelder, Assistant United States Attorney for the District of Columbia, was presented a Public Service Award by the Office of Inspector General of the General Services Administration in recognition of her outstanding success in negotiating one of the largest civil recoveries ever received in a case initiated by the Inspector General's office. As a result of her efforts, Ms. Van Gelder settled a \$14.8 million case involving product substitution and Buy America Act violations by IBM in their sales of computer products to the government.

* * * * *

SOUTHERN DISTRICT OF TEXAS

Bernard E. Hobson, Assistant United States Attorney for the Southern District of Texas, was presented an Honorary Badge Award Plaque by Ronald J. EATINGER, Chief, Criminal Investigation Division, Internal Revenue Service, Houston, for his successful prosecution of numerous money laundering cases utilizing the Title 18, Section 1956 statutes. As the head of the Gulf Coast Organized Crime and Drug Enforcement Task Force since January, 1991, Mr. Hobson has participated in more than a dozen criminal investigations and numerous civil forfeitures, and has always been a strong supporter of IRS in its currency enforcement efforts.

* * * * *

WESTERN DISTRICT OF ARKANSAS

J. Michael Fitzhugh, United States Attorney, and Charles E. Smith, Assistant United States Attorney, Western District of Arkansas, were presented the Chief Inspector's Award of the United States Postal Inspection Service for their successful prosecution of a massive staged automobile accident mail fraud case originating in the Fayetteville, Arkansas area and encompassing the states of Missouri, Kansas, Oklahoma, and Texas. As a result of their efforts, more than seventy-five staged accidents were identified as having occurred from 1987-1992, losses to over twenty-five insurance companies exceeded \$1.3 million, and more than one hundred people have been dealt with by trial, pleas of guilty, or pretrial diversion. **FBI Special Agent Wayne Edenfield** was also recognized for his outstanding efforts.

* * * * *

DEPARTMENT OF JUSTICE LEADERSHIP**Commissioner, Immigration And Naturalization Service**

On June 18, 1993, President Clinton nominated **Doris Meissner** to serve as Commissioner of the Immigration and Naturalization Service. Attorney General Janet Reno stated as follows:

I applaud the President's decision to nominate Doris Meissner to head up the United States Immigration and Naturalization Service. Her extensive experience and commitment to immigration issues make her a strong choice for an area that is one of my highest priorities. Events in recent weeks have brought into focus the tremendous economic, human and social impact immigration has on our country. We have much work to do in this area to ensure that those who truly deserve political asylum are granted it but those who break the laws of this country are given the strictest possible penalties. I feel Doris Meissner is the best possible Commissioner we could have."

Ms. Meissner has directed immigration and refugee studies at the Carnegie Endowment for International Peace since 1986, and also served in senior positions at INS during the Reagan Administration.

* * * * *

Director, U.S. Marshals Service

On June 25, 1993, President Clinton nominated **Chief Eduardo Gonzalez** of the Tampa, Florida, Police Department as Director of the United States Marshals Service. Chief Gonzalez has served as Chief of Police in Tampa since March, 1992, and has been in law enforcement for twenty-eight years. He joined the Metro-Dade Police Department in Miami in 1965 as a patrol officer, rising through the ranks to become deputy director -- the No. 2 position -- in 1986. Chief Gonzalez was responsible for a department that included 801 sworn officers and 262 civilian employees with an annual budget of \$58 million. Attorney General Janet Reno praised the President's choice.

* * * * *

Assistant Attorney General, Criminal Division

On June 25, 1993, Attorney General Janet Reno announced that President Clinton intends to nominate Jo Ann Harris, an attorney in private practice in New York City and a law professor at Pace University School of Law, as Assistant Attorney General in charge of the Criminal Division. Ms. Harris was formerly an Assistant United States Attorney for the Southern District of New York, and then became Chief of the Fraud Section of the Criminal Division in 1979. She returned to the Southern District of New York in 1981 and served as an Executive Assistant United States Attorney before entering private practice in 1983. Attorney General Reno stated that she will be a tremendous asset to the Department of Justice and to the Criminal Division in particular.

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United States Attorneys

A current list of United States Attorneys as of July 2, 1993, appears at page 256 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

Attorney General Janet Reno has been attending various meetings and conferences in which she has addressed a wide variety of issues facing this Administration and the nation as a whole. The following are summaries of a few of her recent appearances:

Attorney General Janet Reno Visits The District Of Utah

On June 23, 1993, Attorney General Janet Reno addressed the National Sheriff's Association convention in Salt Lake City, Utah, which was attended by 700 sheriffs and 2,000 law enforcement officials from across the country. She also visited the Children's Justice Center for physically and sexually abused children, and toured the United States Attorney's office, the Federal Bureau of Investigation, and the Drug Enforcement Administration. At the convention, the Attorney General said, ". . . I am going to dedicate myself to making sure that I do what I can to eliminate turf wars between federal agencies, to eliminate duplication, to eliminate fragmentation, and to take the very limited resources we have in this nation that are focused on law enforcement and make sure that we use them in as professional and as cost effective manner as possible, in a cohesive effort that has a strategy and tactics to match the real problems we face in law enforcement."

Attorney General Reno further discussed the need for developing priorities, and said, "We have got to do something about violence. We've got to focus on the career criminal. We've got to focus on gangs. And we have got to focus on family violence." She further stated, "I want to keep every bit of emphasis I can and bring every force I can to bear on drug traffickers and drugs in this country. I think law enforcement has made some significant headway, but I think particularly federal agencies have to revisit how they're doing things, make sure they're working together, develop a comprehensive strategy that involves all federal agencies, look at what works, back up source country efforts whenever possible, but look at whether interdiction is really cost effective and whether the monies could be better used in terms of local efforts. But we must renew our efforts against drugs and send the message that we are not going to tolerate them."

The Attorney General also discussed prison overcrowding, a national agenda for children, and a wide variety of other law enforcement issues. Concerning immigration, she remarked, "I think immigration is going to be one of the single greatest issues I face as Attorney General. How we balance the fact that all of us are a nation of immigrants versus the burden that immigration is placing on your jails, on your public hospitals, on your public schools, throughout America. It is going to require a thoughtful, careful reasoned approach, and I look forward to working with you in that effort."

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

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Attorney General Reno Attends Harvard Law School Class Day

On June 9, 1993, Attorney General Janet Reno addressed the 1993 Harvard Law School graduating class in Cambridge, Massachusetts. She stated, "Thirty-three years ago this September, I walked into Austin Hall to hear Dean Griswold welcome us. I don't think I've ever felt so lost as I did then. I wondered what it would be like. Contracts and torts were confusing, I didn't understand the perspective of the law, criminal law was boring. As I left, I wondered what the future would bring to me

and what I will tell you unequivocally and what I have told people consistently over the years, that within about three years, I had concluded that my education at Harvard Law School was the single best educational experience I had ever had, because, first, it taught me to think and, secondly, it taught me to appreciate and understand the framework of the law. And if I have any success as Attorney General, I can trace it in part back to the educational experience, to the challenge the professors gave me to think, to analyze, to understand, and to use my best judgment to reach solutions."

Ms. Reno advised the law graduates to go into the communities in the course of their legal career "to serve people, to develop new and innovative and bold ways of making the law accessible to people." She also thanked the Harvard faculty for "sharing Professor Heymann." [Note: Philip B. Heymann was sworn in as Deputy Attorney General on June 4, 1993 in a ceremony in the Great Hall of the Department of Justice.)

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

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"This Week With David Brinkley"

On June 20, 1993, Attorney General Janet Reno was interviewed on ABC's "This Week with David Brinkley." Host David Brinkley was joined by Sam Donaldson and George Will. Various immigration issues, such as pre-entry procedures, the misadventure and tragic ending of Chinese illegal aliens attempting to enter the United States, granting political asylum, and a number of other immigration problems were the main topics of discussion. The Attorney General said, "I think we have to develop fair procedures that continue to honor the tradition that this nation can be a haven for those who are truly in fear of persecution in the country that they flee from. But it's got to be understood that the process has to be fair but expeditious and that we cannot become a haven for those just seeking greater opportunity who do not follow our procedures."

In response to a question of fashioning the Administration's anti-crime bill to include 100,000 new police officers over the next four years, the Attorney General stated, "We want to work with local law enforcement and local communities to provide to them the police support that they need consistent with their resources. And to do that requires an orderly development that is a real plan for real support for local police. We're working on that, and I'm committed to that effort. . . If 100,000 [police officers] are needed and we can figure out how to get 100,000 police officers to communities in an orderly way with trained police officers, I will work towards that. But I have seen a federal government in the past throw monies into a community without adequate planning. I've watched monies be wasted. I'm committed to working with local law enforcement to get them the help they need in an ordered way so that the help and the support makes sense."

In response to a question about whether it is possible to place 100,000 officers over the next four years, Ms. Reno said, "I always have questions in my mind as I approach issues as to how they should best be addressed, how they should best be solved. I don't like to shoot from the hip. I like to work it out in a thoughtful, considered way where the limited federal dollars we have will mean something to local communities throughout America."

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Independent Review Announced For The Branch Davidian Tragedy In Waco, Texas

On June 24, 1993, Deputy Attorney General Philip B. Heymann announced that Edward S.G. Dennis, Jr. was named to review the performance of the Department of Justice in the Branch Davidian tragedy in Waco, Texas. Mr. Dennis will review the strategies and analyze whether the decisions were reasonable in light of the information available at the time, and whether Department personnel had sufficient information and resources. He will also evaluate how information was shared and transmitted. The review is expected to be completed by September.

Mr. Dennis previously served as Assistant Attorney General for the Criminal Division from 1988 to 1990, and as United States Attorney for the Eastern District of Pennsylvania (Philadelphia). Mr. Dennis is presently a partner in the Philadelphia law firm of Morgan, Lewis & Bockius.

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Departments Of Justice and Treasury Announce Experts In Waco Review

On June 24, 1993, Deputy Attorney General Philip B. Heymann and Ronald K. Noble, Assistant Secretary for Enforcement, Department of the Treasury, named ten jointly selected experts to provide both Departments with recommendations on how best to address Waco-type situations in the future. The Deputy Attorney General said, "We must ensure that we have the capability to deal successfully with barricaded suspects who hold hostages, and that includes strategies to negotiate with suspects who believe that they are not accountable to civil authorities." Those experts named are:

- Dr. Nancy Ammerman, Associate Professor of Sociology and Religion, Candler School of Theology, and Adjunct Professor of Sociology, Emory University.
- Colin Birt, Head of the Contingency Planning Section, F4 Division, Home Office, Great Britain (expert on responding to hostage-taking and terrorist incidents).
- Dr. Robert Cancro, Professor and Chairman, Department of Psychiatry, New York University Medical Center.
- Richard J. Davis, Attorney, Weil, Gotshal & Manges, former Assistant Secretary (Enforcement), Department of the Treasury.
- Robert J. Loudon, Associate Director, John Jay College of Criminal Justice.
- Ronald M. McCarthy, former manager of the Center for Police Studies, International Association of Chiefs of Police, and former Assistant Commander and Senior Supervisor, Special Weapons and Tactics Unit, Los Angeles Police Department.
- Dr. Ariel Merari, Department of Psychology, Tel Aviv University (expert on terrorism and low-intensity warfare).
- Dr. Alan A. Stone, Professor of Law and Psychiatry, Harvard University.
- Dr. Lawrence Sullivan, Director, Center for the Study of World Religions, Harvard University.
- William H. Webster, Attorney, Milbank, Tweed, Hadley & McCloy, former Director of the Federal Bureau of Investigation, and former Director of the Central Intelligence Agency.

The experts will examine three categories of concern:

-- Mr. Louden, Mr. McCarthy and Dr. Merari will consider what methods should be used to deal with suspects who have barricaded themselves inside a structure with innocent persons, including potential hostages, under their control. Do law enforcement agencies have adequate technology and training to handle such situations with a minimum use of lethal force?

-- Drs. Amerman, Cancro, Stone and Sullivan will explore how law enforcement agencies should deal with persons or groups whose thought processes or motivations are unconventional. What assistance can be provided by experts in such fields as psychiatry, psychology, sociology and theology?

-- Mr. Birt, Mr. Davis, and Mr. Webster will provide advice on coordinating law enforcement efforts in barricade situations. What decision-making should be left to the field? How wide should the circle of decision-making be?

The experts will have access to the results of FBI fact-finding and interviews, and FBI data which includes a chronological account of every significant event involving Justice Department personnel beginning on February 18 and terminating with the destruction of the Branch Davidian compound on April 19. Each expert will develop individual conclusions and make a final report to both the Deputy Attorney General and the Assistant Secretary for Enforcement of the Department of the Treasury.

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Joint Effort Underway To Improve Gun Dealers' Compliance With Firearms Regulations

On June 2, 1993, the Department of Justice announced that its Bureau of Justice Assistance has awarded the New York City Police Department (NYPD) a \$174,994 grant to support a joint effort with the Bureau of Alcohol, Tobacco, and Firearms (BATF) to improve gun dealers' compliance with federal, state, and local firearms regulations. With this grant assistance, two officers from NYPD's Pistol License Division, and a third NYPD officer, will work with BATF Compliance Inspectors to conduct comprehensive background investigations of applicants for federal firearms licenses. Currently, according to the NYPD grant application, only one NYPD officer is assigned to work one day a week on federal firearms license investigations.

The teams will advise applicants of New York State and New York City firearms licensing laws, supply information regarding the New York City gun dealer permit application process, and inform current federal firearms license holders of NYC firearms statutes and efforts to track firearms deliveries in the city. It is anticipated that dissemination of this information will discourage applicants from pursuing a federal firearms license until they have complied with local laws. BATF receives an average of fifty applications for federal firearms licenses each month from New York City residents. In addition, approximately 800 dealers currently have federal licenses, which must be periodically renewed. The objectives of the Firearms Licensee Compliance Program are to: eliminate firearms dealer applications from unqualified persons; conduct examinations of renewal applicants; refuse licenses to persons who have maintained federal licenses without obtaining the required local credentials or distributed firearms in violation of federal, state, or local laws; and reduce the volume of illegally purchased firearms in New York City. The Project will also develop a policy and procedures manual in collaboration with BATF to facilitate the replication of this pilot project in other jurisdictions throughout the country.

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Law Enforcement Task Force Activated To Pursue University Bomber

More than two dozen veteran law enforcement agents from three federal agencies have been organized into a unified task force to pursue the so-called "university bomber." Representatives of the FBI, the Treasury Department and the Postal Service met on June 28, 1993 to map out the search for the person believed responsible for fourteen bombings since 1978. The latest incidents occurred during the week of June 21, 1993 when a professor at the University of California at San Francisco was injured when a package mailed to his home exploded, and when a Yale University professor was injured by a similar device mailed to his office. Deputy Attorney General Philip B. Heymann assigned a senior FBI official to head the task force.

A previous task force was formed in 1982 to apprehend the bomber whose victims were an airline executive and scientists at a number of campuses and high technology companies. The bombs injured 21 people and killed one man, the owner of a Sacramento, California computer shop. The so-called UNABOM task force held its last meeting in 1990, after three years passed without an attack.

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CIVIL RIGHTS DIVISION**Department Of Justice Wins Largest Civil Penalty Ever In Racial Housing Discrimination Suit**

On June 21, 1993, James P. Turner, Acting Assistant Attorney General, Civil Rights Division, announced that the Department of Justice has obtained the largest civil penalty and settlement ever levied against a private housing provider as a result of its first fair housing testing program in Detroit. Mr. Turner further stated that a fifth housing discrimination case was filed on June 21, 1993, and a sixth had been authorized for filing. The suits have been brought against the suburban Detroit apartment complex owners who allegedly pursued a policy and practice of discriminating against African American prospective tenants. The cases are part of the Department's first proactive testing effort in which random evaluations are conducted to identify and eliminate housing discrimination. The Department chose the metropolitan Detroit area to begin the testing program, because the area is one of the most segregated in the nation and thus a ripe area for housing discrimination. Similar testing programs have been initiated in six other metropolitan areas and testing will continue in Detroit.

The evidence supporting the Department's allegations in all six cases was gathered through random tests conducted in small and large developments in which trained pairs of black and white persons posing as prospective tenants were sent to apartments to ask about available units. In each case, the white testers were uniformly told of available apartments, while all black testers were told that no apartments were available. The Department developed its proactive testing program immediately after Congress, in 1989, amended the Fair Housing Act authorizing the Department to seek civil penalties and monetary damages for victims of housing discrimination. Mr. Turner said, "Random testing is a critical tool for identifying discrimination, because sometimes it is so subtle, victims don't know it's happening to them. If we only tested on the basis of complaints, we would not be able to truly attack a covert problem."

The Department contracted with the Fair Housing Center of metropolitan Detroit, a private organization, to do the tests. Mr. Turner praised the work of the Center and stressed the importance of cooperative efforts between the federal government and local private fair housing groups. Individuals who believe they may have been the victims of housing discrimination in the Detroit area should call: Housing and Civil Enforcement Section, Department of Justice - (202) 514-4713; Cliff Schrupp, Fair Housing Center, Detroit - (313) 963-1274; or the Department of Housing and Urban Development's Fair Housing Hotline - 1-800-669-9777.

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ASSET FORFEITURE

Oversight Of The Asset Forfeiture Program Of The Department Of Justice

On June 22, 1993, the House Government Operations Subcommittee on Legislation and National Security held an oversight hearing on the administration of the Asset Forfeiture Program. Cary Copeland, Director, Executive Office for Asset Forfeiture, represented the Department of Justice.

Mr. Copeland stated that asset forfeiture, especially civil forfeiture, is an historic remedy, dating in this country from its founding. The program, as presently administered, dates from the enactment of the Comprehensive Crime Control Act of 1984. The goal of the program is to remove the profits, proceeds, and infrastructure that support criminal organizations and their illegal activities. Mr. Copeland described some recent initiatives by the Executive Office for Asset Forfeiture that are intended to strengthen the quality control in the program and to minimize any adverse effects of forfeiture on innocent persons: 1) expedited notice to owners of seized property; 2) expedited payments to innocent lienholders; 3) pre-forfeiture payments to lienholders in exceptional circumstances; 4) more careful review of petitions to contest seizures without payment of a cost bond; 5) a Model Code of Professional Conduct for Asset Forfeiture; and 6) new requirements for "adopted" seizures. Mr. Copeland concluded that, while he believes the Asset Forfeiture program is working well, he recognizes that it is not perfect and that there is room for improvements. He indicated that his office stands ready to work with interested members of Congress to search for ways to enhance confidence in the program.

Also appearing before the Subcommittee was: 2) a white male, who was the apparent mistaken target of a Drug Enforcement Administration raid, which did not involve any seizure of assets by federal or state authorities; and b) a black female, whose cash assets were seized during a traffic stop by county authorities in Florida, but which did not involve the federal Asset Forfeiture program, nor any federal law enforcement personnel, or the Department of Justice.

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

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Two Supreme Court Decisions Are Handed Down On Asset Forfeiture

On June 28, 1993, the Department of Justice issued the following statement on two decisions by the Supreme Court on asset forfeiture:

The Supreme Court held today in Austin v. United States that the Eighth Amendment's prohibition against excessive fines, previously understood as applying only in criminal forfeiture cases, also applies in civil forfeiture cases. The Court remanded the case to the Court of Appeals for a determination of whether the particular forfeiture constituted an excessive fine. In doing so, it provided no test for the lower court to use in making such a determination.

The Department of Justice believes that the particular forfeiture in question, the forfeiture of a mobile home and auto body shop used for the unlawful distribution of cocaine, will not be found to be excessive. The Department has exercised restraint in enforcing civil forfeiture laws, and will continue to do so. It does not expect the Austin decision to have any significant effect on the day-to-day operations of the forfeiture program.

The Department is pleased with the holding of the Supreme Court in Alexander v. United States, that the forfeiture of business assets where the business has engaged in the distribution of pornography, pursuant to the RICO forfeiture statute, is not violative of the First Amendment. The Court remanded the case to the Court of Appeals for a determination of whether there had been a violation of the excessive fines clause, consistent with its holding in Austin. The Department believes that the lower court will find that the particular forfeiture did not constitute an excessive fine under the totality of the circumstances involved in the case, and does not anticipate any significant change in day-to-day operations resulting from this decision either.

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CIVIL DIVISION

Supreme Court Decides Major Exhaustion-Of-Remedies Case

The Supreme Court's recent decision in Darby v. Cisneros, 61 U.S.L.W. 4679 (U.S. June 21, 1993), will require Department of Justice attorneys and Assistant United States attorneys to re-evaluate every case in which they are arguing that administrative appeals must be exhausted prior to filing suit. Darby holds that, under the Administrative Procedure Act, a person aggrieved by an agency action can seek judicial review of the action without exhausting an available administrative appeal, unless the agency's regulations provide both (1) that the administrative appeal must be taken, and (2) that during the pendency of the administrative appeal the agency action shall be inoperative.

The ruling was based on section 10(c) of the APA, 5 U.S.C. § 704, which provides, "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined * * * an appeal to superior agency authority" "unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative * * *."

There may be many instances in which the government has made the exhaustion argument where the Darby criteria are not met. That is, many agency regulations merely provide that an administrative appeal "may," not "must," be pursued. Moreover, many agency actions, such as terminations of grants or benefits, revocations of permits or licenses, and personnel actions, now typically become immediately effective upon the initial decision rather than when the final agency appeal is decided.

Not all of these cases will be controlled by Darby. The Supreme Court emphasized that Darby applies only to actions governed by the Administrative Procedure Act:

[T]he exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA. But where the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. [61 U.S.L.W. at 4684.]

Tony Steinmeyer (202-514-3388) and Jonathan Siegel (202-514-4821) of the Appellate Staff of the Civil Division will be available to answer any questions regarding the impact of Darby.

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CRIMINAL/CIVIL DIVISION

Division Of Authority Concerning The Bureau Of Prisons' Civil Litigation

At a Bureau of Prisons' (BOP) Litigation Seminar on June 8, 1993, a memorandum was distributed clarifying the division of authority at the Department of Justice concerning the Bureau of Prisons' civil litigation. A slightly revised version of that memorandum is attached at the Appendix of this Bulletin as Exhibit A.

To summarize, the vast majority of BOP civil litigation falls under the jurisdiction and supervision of the Civil Division (including Bivens cases and common law tort cases filed by inmates against BOP and its employees). Whenever a case involves a common law tort or any case relating to the delivery or failure to deliver medical care, correspondence should be directed to the Federal Tort Claims Act staff. The contact person for medical malpractice cases is Assistant Director Roger D. Einerson - (202) 501-6322. For all non-medical, common law tort cases, the contact persons are Deputy Director Paul Figley - (202) 501-7475, and Assistant Director Phyllis Pyles - (202) 501-6879. If the case is a non-medical case involving claims under the Constitution, correspondence should be directed to the Constitutional and Specialized Tort Litigation Staff. The contact person is Director Helene Goldberg - (202) 501-7020.

The Criminal Division has jurisdiction and supervisory authority over: (1) purely injunctive civil actions (no money damage claims) filed to enjoin grand jury proceedings or to interfere with a criminal case/investigation or other criminal justice activities; (2) purely injunctive civil actions (no money damage claims) filed to challenge the law, administrative action or investigation designed to protect the national security, and (3) petitions for writs of habeas corpus and coram nobis. The Criminal Division is also responsible for resolving questions that arise as to federal prisons and prisoners, juvenile delinquents, mentally defective defendants and sentencing, probation and parole. Correspondence should be directed to Deputy Chief Candice M. Will, General Litigation and Legal Advice Section, Criminal Division. The telephone number is (202) 514-1026.

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CRIMINAL DIVISION

Money Laundering Testimony

On May 25, 1993, Mark Richard, Deputy Assistant Attorney General, Criminal Division, and James R. Dedrick, United States Attorney for the Eastern District of North Carolina, testified before the Committee on Banking, Finance and Urban Affairs of the House of Representatives, concerning efforts to curtail money laundering. Deputy Attorney General Richard discussed the nature of the money laundering problem, and how the Department of Justice is responding to this problem. He noted the increasing sophistication of money laundering practices, and also cited the increasing levels of interagency and international cooperation in addressing money laundering. He pointed out that, in recognition of the increased problem of money laundering, the Criminal Division created a separate Money Laundering Section in 1991. In conclusion, Mr. Richard stated that, while the Department of Justice is making significant progress in fighting illegal money laundering, we are continuing to learn how to deal with this menace and to improve our methods for investigating and prosecuting this activity.

United States Attorney Dedrick addressed the concerns of the Committee about the resources the United States Attorneys' offices commit to combatting money laundering annually; how United States Attorneys' offices coordinate their operations with federal and local law enforcement agencies; evaluation of the effectiveness of the federal government's prosecution of money laundering cases; and guidelines that are used by United States Attorneys to determine which money laundering cases to prosecute. Mr. Dedrick said, "Cases that are coupled with the investigation and prosecution of money laundering along with asset forfeiture programs can literally strip criminal defendants and organizations of their ill-gotten gains and instrumentalities of criminal activity, as each and every financial transaction associated with criminal activity is vulnerable to investigation and prosecution. The money laundering statutes have proven to be an effective and well-utilized weapon against crime in the hands of trained and supervised law enforcement personnel."

If you would like a copy of the testimony, please call the United States Attorneys' Bulletin staff, at (202) 501-6098. For further information, please call the Money Laundering Section of the Criminal Division, at (202) 514-1758.

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Money Laundering Field Hearing

On June 29, 1993, the Office of Legislative Affairs of the Department of Justice advised that the field hearing on money laundering scheduled by the Committee on Banking, Finance and Urban Affairs of the House of Representatives for July 8, 1993, in San Antonio will not require a witness from the Department of Justice or any of its agencies. The Committee plans to highlight a closed U.S. Customs Service case, and possibly an Internal Revenue Service case at the hearing. Texas state officials are expected to provide testimony depicting the flow of money into the state, which will illustrate the magnitude of the money laundering problem in that state.

The State of Texas has implemented regulatory laws that deal with the *casas de cambios*, which authorize revocation of licenses for non-compliance. Other states along the Mexican border do not have similar laws. The lack of consistent regulatory treatment among the states, and the role of the Federal government are expected to be topics of discussion at the hearing.

For further information, please call the Money Laundering Section of the Criminal Division, at (202) 514-1758.

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OFFICE OF INTERNATIONAL AFFAIRS

"OIA Connections" Newsletter

The past decade has witnessed an exponential growth in transnational crime, and the criminal justice system is having to deal with increasing numbers of major cases involving evidence that is located in foreign countries, defendants who are foreign nationals, and U.S. nationals who flee to foreign countries in hopes of avoiding arrest or trial. In an effort to provide prosecutors a reliable and convenient desk reference for international criminal matters, the Office of International Affairs of the Criminal Division now publishes a monthly electronic newsletter entitled "OIA Connections."

"OIA Connections" highlights new developments, treaties and practice aids that can be used in connection with international extraditions, requests for evidence located in foreign countries, and other international law issues that could impact prosecutions in the United States. It is distributed by electronic mail to designated International and National Security Coordinators in each United States Attorney's office, the Chiefs of all Criminal Division sections and offices, other Department of Justice attorneys with special interest in international law, and the international operations units of the Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Customs Service, and U.S. Marshals Service, as well as law enforcement attaches overseas.

Attached at the Appendix of this Bulletin as Exhibit B is a quick reference index of the issues covered in the first six issues of "OIA Connections." If you would like a copy of any of these articles, or if you would like to be added to the distribution list for this publication, please contact Matt Bristol, Office of International Affairs, Criminal Division, at (202) 514-0031. If you wish to send an E-mail request, Mr. Bristol's User Code is: CRM03 (BRISTOL).

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Mutual Legal Assistance Treaties

Instruments of ratification were recently exchanged in Madrid and Washington with respect to Mutual Legal Assistance Treaties (MLATs) with Spain and Thailand. The Thai treaty entered into force on June 10, 1993, and the Spanish treaty entered into force on June 30, 1993. The Thai treaty is the first MLAT with an Asian country. Both of these treaties are comprehensive in scope and provide a broad range of remedies for U.S. prosecutors and criminal investigators. The United States also has MLATs with Argentina, Canada, Mexico, Italy, Switzerland, the Netherlands, Turkey, the Bahamas, Turks and Caicos Islands, Anguilla, the British Virgin Islands, the Cayman Islands and Montserrat.

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POINTS TO REMEMBER

Contacts With The White House

On May 24, 1993, then Deputy Attorney General-designate Philip B. Heymann submitted a letter to Chairman Joseph R. Biden, Jr., Senate Committee on the Judiciary, concerning contacts with the White House. Copies were distributed to all Offices, Boards and Divisions, and all United States Attorneys. The subject of communication between the Department of Justice and the White House arose at the confirmation hearings of both Mr. Heymann and Associate Attorney General Webster Hubbell, where Senator Specter requested the Department's policy in writing. The letter states as follows:

It is the view of the Attorney General that in the matter of any pending Department of Justice investigation or criminal or civil case only the White House Counsel's Office (with the exception of the President and Vice President) should initiate contact with the Department of Justice. Any other White House staff person wishing to evidence an interest or seek information as to such matters should do so only through the White House Counsel. These initial contacts should be only with the Attorney General or the Deputy Attorney General or the Associate Attorney General.

The White House Counsel's Office may deal directly with the Office of Legal Counsel on matters in which it is seeking the opinion of the Department.

Conversely, if persons in the Department of Justice have a need to contact persons on the White House staff in the matter of any pending Department of Justice investigation or criminal or civil case, the initial contact shall be directed through the attorney General, the Deputy Attorney General or the Associate Attorney General.

If continuing contact is required on particular matters it will be left to the White House Counsel's Office and the senior Justice Department official with whom it is dealing to design and monitor that continuing contact.

The Attorney General's goal is to insulate the line attorneys and division chiefs from any effort, however well intended, by persons outside the Department of Justice to influence their actions.

On matters of policy, appointments, legislation, budgeting and public relations, members of the White House staff may deal with the appropriate persons in the Department of Justice just as with other departments.

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Office Of Special Counsel Issues Advisory To Employers

On June 8, 1993, the Office of Special Counsel (OSC) issued an advisory on the employment eligibility verification standards for Salvadoran nationals who have been granted an extension of Temporary Protected Status (TPS) by the Immigration and Naturalization Service (INS). According to William Ho-Gonzalez, Special Counsel for Immigration-Related Unfair Employment Practices, the Immigration Reform and Control Act (IRCA) allows an employee to present any of several documents to establish eligibility to work in the United States.

Many of the Salvadorans previously granted Deferred Enforced Departure received an Employment Authorization Document that expires on June 30, 1993. However, INS stated in a Federal Register notice published on June 8, 1993, that it has automatically extended these aliens' work authorization to October 31, 1993. INS said the extension was necessary for the orderly processing of the large number of requests for renewal that it expects to receive. Mr. Ho-Gonzalez stated that the INS notice makes clear that employers of Salvadorans granted Deferred Enforced Departure will not be subject to sanctions by allowing these individuals to continue working. An employer can determine whether an employee is covered by the INS extension of work authorization granted to aliens with Deferred Enforced Departure if 1) the employee presents an Employment Authorization Document Form I-688B; 2) the Form I-688B bears an expiration date of June 30, 1993; and 3) the notation on the Form I-688B under "Provision of Law" is "274a.12(a) (11)", or, "274a.12(a) (12)". An employer may not refuse to accept a Form I-688B presented for purposes of verifying or re-verifying employment eligibility if it satisfies these criteria. Essentially, the employer should treat the Form I-688B as if it had an expiration date of October 31, 1993.

Mr. Ho-Gonzalez also said employers cannot demand to see an INS document from an alien. As with any other worker, employers must accept any document presented which is permitted by law as sufficient proof of work authorization. Accordingly, an alien who shows a social security card as proof of work authorization that does not contain the notation "Not Valid for Employment" or "Valid for Work Only With INS Authorization" has provided sufficient proof of employment eligibility.

OSC said violations of federal law could subject employers to fines and added that additional information about IRCA's unfair employment practices provisions can be obtained by writing or calling the Office of Special Counsel for Immigration-Related Unfair Employment Practices, P.O. Box 27728, Washington, D.C. 20038-7728. The telephone number is (202) 616-5594 or 1-800-237-7688.

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Department Of Justice Responds To Supreme Court Ruling On Haitians

On June 21, 1993, Associate Attorney General Webster Hubbell responded to the Supreme Court's decision on intercepting Haitians at sea. Mr. Hubbell stated as follows:

I am pleased that the Supreme Court has sustained the President's authority to provide for the direct repatriation of Haitian boat migrants interdicted on the high seas. The Court thoroughly reviewed the text and history of relevant provisions of the Immigration and Nationality Act and the United Nations Convention Relating to the Status of Refugees and concluded that neither was intended to limit the President's power to address the immigration crisis and the grave dangers to human life resulting from the attempted mass migration of people in unseaworthy boats. This Department, through the Immigration and Naturalization Service, will continue to work with the State Department and others in the Administration to ensure that interdicted boat migrants who fear political persecution will be afforded meaningful opportunity for refugee processing in Haiti.

[Note: Refugee asylum requests are being accepted by U.S. officials in Port-au-Prince.]

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 14, dated June 22, 1993, is attached as Exhibit C 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. [Note: Volume 5, No. 13, which has apparently been misdirected, will be included in the next issue of the Bulletin dated August 15, 1993.]

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LEGISLATION

Federal Rules Of Civil And Criminal Procedure

On June 16, 1993, a hearing was held by the House Judiciary Subcommittee on Intellectual Property and Judicial Administration regarding proposed amendments to the Federal Rules of Civil Procedure. These amendments, as well as amendments to the Federal Rules of Criminal Procedure, were adopted by the Supreme Court on April 22, 1993, and will become effective on December 1, 1993, unless the Congress acts to rescind or amend them. While the Department did not testify at the hearing, several components are developing written views on the proposed rules.

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Independent Counsel Reauthorization

On June 18, 1993, the Senate Governmental Affairs Subcommittee on Oversight of Government Management ordered reported S. 24, a bill that would reauthorize and extend the now-expired independent counsel statute. As ordered reported to the full Committee, the bill incorporates a number of suggestions made by the Department (e.g., that the statute expressly permit details of Department of Justice employees to the staffs of independent counsels) but does not include others (e.g., clarification of the coverage of national campaign officials by the statute). Department representatives are working with Committee staff concerning the details.

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Oversight Of Arrest And Search Warrant Practices And Procedures

On June 9 and 10, 1993, the House Appropriations Subcommittee on Treasury, Postal, and General Government held two days of hearings on the training that law enforcement personnel receive to prepare themselves for complex and dangerous situations, such as the siege at the Branch Davidian Compound in Waco. Departmental testimony was provided by representatives of the FBI's Training Division at Quantico. Additional witnesses included representatives from the Federal Law Enforcement Training Center (FLETC), local police department special operations teams (Dallas and Los Angeles), and a news reporter from New York who specializes in criminal justice stories. The first day of testimony was devoted to the Bureau of Alcohol, Tobacco and Firearms.

The Subcommittee was interested in the kind of specialized training available to federal law enforcement. FLETC stated that they only give basic instruction to all federal law enforcement personnel; additional, more specialized agency-specific training is provided by the particular agency. The FBI explained the difference between SWAT teams, one or more in each field office with regional training made available among offices, and the Hostage Rescue Team. (There is only one such Team.)

Of interest during the second day of the hearing was the testimony of the news reporter regarding the advisability of notifying the media prior to a raid or raid-type situation.

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Competition In The Airline Industry

On June 9, 1993, the House Judiciary Subcommittee on Economic and Commercial Law held a hearing on the state of competition in the domestic airline industry. Representatives of the airline industry, airline-worker unions, academics, and other interested parties testified before the Subcommittee regarding their perspectives on the competitive health of today's domestic airline industry -- fifteen years after the deregulation of the industry. The Administration was not represented at this hearing. A President's Commission was recently appointed to study the state of the domestic airline industry and is required to report back within ninety days. In all likelihood, representatives from the Department's Antitrust Division will be asked to appear before the committees.

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SUPREME COURT WATCH

An Update Of Supreme Court cases From The Office Of The Solicitor General

Please note that this is the last Supreme Court Watch Update for this Term. The next series of Supreme Court case summaries will resume in October, 1993.

Selected Cases Recently Decided

Civil Cases:

United States v. Texas, No. 91-1729 (decided April 5)

By an 8-1 margin, the Supreme Court has ruled that the Debt Collection Act of 1982 did not abrogate the States' common law obligation to pay prejudgment interest on debts owed to the federal government.

Criminal Cases:

Withrow v. Williams, No. 91-1030 (decided April 21)

By a 5-4 margin, the Supreme Court has held that federal courts may consider Miranda claims on petitions for writs of habeas corpus.

Brecht v. Abrahamson, No. 91-7358 (decided April 21)

This case raised the question of what standard of harmless error to apply on a petition for habeas corpus that raises a claim that the prosecutor mentioned that the defendant remained silent after having received Miranda warnings, in violation of Doyle v. Ohio, 426 U.S. 610 (1976). By a 5-4 margin, the Supreme Court has ruled that although under Chapman v. California, 386 U.S. 18 (1967), trial errors of constitutional magnitude require reversal on direct review unless the error was harmless beyond a reasonable doubt, the more lenient standard of Kotteakos v. United States, 328 U.S. 750 (1946), should be applied on habeas review. Thus, habeas corpus should not be granted unless the trial error "had substantial and injurious effect or influence in determining the jury's verdict."

United States v. Olano, No. 91-1306 (decided April 26, 1993)

The Supreme Court has held, 6-3, that although the presence of alternate jurors during jury deliberations was conceded to be "plain error," that error did not "affect [the defendant's] substantial rights" because there was no showing that the alternate jurors' presence affected the jury's deliberations. Therefore, the Court ruled, the court of appeals erred in reversing the conviction under Federal Rule of Criminal Procedure 52(b). The Court declined to decide as a general matter whether errors can affect substantial rights absent prejudice, or when courts should presume prejudice.

Selected Cases Recently Argued**Civil Cases:**

McNeil v. United States, No. 92-6033 (argued April 19)

Under 28 U.S.C. 2675(a), a claimant desiring to file an FTCA action must, before bringing suit, present that claim to the appropriate federal agency and have it finally denied in writing. In this case, the government argues that Section 2675(a) requires a district court to dismiss a complaint filed before the agency's denial of the plaintiff's administrative claim, even if the agency denies the claim before substantial proceedings on the merits have begun.

Austin v. United States, No. 92-6073 (argued April 20)

In this case the government argues that the Eighth Amendment does not apply to in rem civil forfeitures of property authorized by 21 U.S.C. 881.

Criminal Cases:

Wisconsin v. Mitchell, No. 92-515 (argued April 21)

In this case the government argues, as amicus curiae, that the First Amendment does not prohibit enhancing criminal penalties because the defendant selected the victim because of race, religion, or other protected status.

Godinez v. Moran, No. 92-725 (argued April 21)

The government argues here, as amicus curiae, that a finding that a defendant is competent to stand trial establishes that he or she is competent to plead guilty and waive the right to counsel.

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

Criminal Cases:

Retzlaf v. United States, No. 92-1196 (granted April 26)

Whether, to convict a defendant under 31 U.S.C. 5324(3), the government must show that the defendant knew that it was illegal to structure cash transactions to evade currency reporting requirements.

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CASE NOTES

CIVIL DIVISION

First Circuit Upholds CIA's Right Not To Search Its Operational Files In Response To Plaintiff's FOIA Request, And Further Holds That The Plaintiff May Not Invoke The 1992 JFK Assassination Records Act Until The Agency Actions Being Taken Under That Act Are Final

Plaintiff Sherry Sullivan sought information pursuant to the Freedom of Information Act (FOIA) from nine federal agencies regarding her father and Alexander Roarke, who were active in anti-Castro activities in the early 1960s. She brought suit challenging the extent of the agencies' searches and disclosures. The district court ruled in the government's favor. Sullivan appealed to the First Circuit, arguing that the CIA should have been required to search its "operational" files. Further, she argued that some of the material sought qualified as assassination records under the 1992 John F. Kennedy Assassination Records Act (JFK Act) and that the case should be remanded to decide whether the information sought must be released pursuant to that Act.

In a very favorable opinion, the First Circuit (Breyer, Selya, Stahl) has now affirmed. The court held that, pursuant to the CIA Information Act of 1984, the CIA's operational files are generally exempt from disclosure under the FOIA. The court rejected Sullivan's argument that she fell within any of the three exceptions to the CIA Information Act. In so holding, the court adopted the very narrow construction of these exceptions advocated in our brief. Specifically, the court construed the "special activity" exception as being limited to documents that have been unclassified or declassified, and the court read the statute to require the requestor to identify a specific operational activity that has been officially and publicly acknowledged by the Executive Branch. The court held that Sullivan's request for information about the CIA's activities against Cuba in the 1960s was not "specific" enough. Further, the court held that the fact that the CIA had declassified some information about operations in Cuba did not throw open all CIA files regarding special operations in Cuba. Finally, the court rejected Sullivan's request for a remand under the JFK Act. The court held that Sullivan must wait until there is final agency action under that Act before seeking review.

Sherry Ann Sullivan v. Central Intelligence Agency, No. 92-2234
(May 26, 1993) [1st Cir.; D. Me.]. DJ # 145-12-7694.

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Fourth Circuit Reverses District Court And Upholds Our Claim That Investigative Documents Were Exempt From Disclosure Under Exemption 5 Of FOIA

The City of Virginia Beach brought this action to compel the National Marine Fisheries Service (NMFS), a component of the Department of Commerce, to release documents relating to the agency's position on the City's plan to withdraw 60 million gallons a day from Lake Gaston to supplement the water needs of Southeastern Virginia. The government claimed the documents were exempt under the deliberative process prong of Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5). To be exempt under that subsection, documents must be "predecisional" and "deliberative."

The district court held that the documents were not predecisional because they were generated in response to a letter from the City which had raised allegations of impropriety in a previous, related proceeding before the U.S. Corps of Engineers. Therefore, the court found the documents were not generated in the process of making future NMFS policy, but were created to explain, after the fact, NMFS decisions which already had been made. After an in camera review, the court also found the documents not to be "deliberative," but largely "factual."

In a very favorable opinion which should be useful in future FOIA litigation, the Fourth Circuit (Phillips, Hamilton, Luttig) has now reversed. The court accepted our argument that the total context here demonstrated that the investigative documents not only look back to the Corps proceedings, but also look forward to, and are predecisional to, pending FERC proceedings to which NMFS was obligated by statute to comment on the proposed water project. In addition, after conducting its own in camera review, the court of appeals found that the factual and deliberative material were not "reasonably segregable."

City of Virginia Beach v. Department of Commerce, No. 93-1038
(June 9, 1993) [4th Cir.; E.D. Va.]. DJ # 145-9-894.

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Fourth Circuit Upholds HHS' Interpretation Of Unearned Income Under The Social Security Act, Creating A Conflict With The Ninth Circuit

Barbara Kennedy brought this class action against the Secretary of HHS, challenging Social Security Ruling 82-31 (SSR 82-31), which treats as unearned income to her that portion of her husband's VA benefit payment designated for her support. The district court invalidated SSR 82-31 as violative of the Social Security Act on the ground that the class member did not actually receive the supplemental portion of the VA benefits.

The Fourth Circuit (Hall, Luttig, Hilton, DJ) has now reversed, concluding that SSR 82-31 is a "manifestly reasonable" interpretation of the Act. The Fourth Circuit adopted our argument that the statutory term "received" can reasonably be construed to include payments constructively received by the class members. The court also concluded that SSR 82-31 was consistent with HHS' regulations concerning unearned income. The panel recognized that its holding was in conflict with that of the Ninth Circuit in Paxton v. Sec'y of HHS, observing that "we simply disagree with Paxton." We are currently litigating this issue in the Second and Tenth Circuits.

Kennedy v. Shalala, Nos. 92-2302, 92-2304 (June 1, 1993)
[4th Cir.; N.D.W.Va.]. DJ #181-83-27.

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Sixth Circuit Requires Partial Disclosure Of Information On Reinstated Air Traffic Controllers

Following the firing of most air traffic controllers for participating in the 1981 strike, most of those fired brought appeals to the Merit Systems Protection Board. Following review by FAA attorneys, 123 of those appeals were settled, with the controllers being reinstated. This FOIA suit was brought by an attorney representing some 200 fired controllers who were not reinstated, seeking documents underlying the reinstatements. The district court ordered the factual portions of most of the documents released, rejecting claims of privacy, work product, and deliberative process privilege.

The court of appeals reversed in part, holding that work product privilege protected attorney-prepared case summaries, even as to segregable factual material. As to privacy claims, the court of appeals agreed that the names, addresses, social security numbers and work locations of the reinstated controllers should not be released. However, the court of appeals held that other material (such as individual medical and legal problems and financial information), with these deletions, must be released, on the ground that they were not "by themselves" identifying. Finally, the court of appeals agreed with the district court that, with the exception of attorney work product material, the factual portions of other internal documents were segregable and therefore must be released.

Norwood v. Federal Aviation Administration, No. 92-5280
May 21, 1993) [6th Cir.; W.D. Tenn.]. DJ # 145-18-1119.

Attorney: Robert V. Zener - (202) 514-1597

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Sixth Circuit, Creating A Conflict With The Third Circuit, Affirms District Court's Decision Rejecting Secretary of HHS' Reading Of Medicare Regulation Prohibiting Increased Medicare Reimbursement Based On A "Redistribution" Of Costs From A Medical School To A Hospital

This case involved a university teaching hospital's attempt to obtain reimbursement under Medicare for graduate medical education (GME) costs which it had not previously claimed. The Medicare Administrator held that the hospital did not demonstrate that it had paid the medical school's overhead costs in prior years, and thus there was a violation of the prohibition against "redistribution." The hospital appealed to federal district court. Granting the hospital's motion for summary judgment, the district court determined that there was no violation of the "redistribution" prohibition, and reversed the Administrator's decision.

On appeal to the Sixth Circuit (Martin, Contie, Senior Circuit Judge; Boggs, concurring in result), the court of appeals affirmed. The court endorsed the district court's conclusion that "the underlying purpose of the redistribution principle is to limit reimbursement to educational costs related to patient care." After a long footnote complaining about the principle of deference to agency interpretations, the

court stated "we are back to essentially the old rule that courts are not bound by agency interpretations and that courts are to apply laws based on the court's interpretation of the law's reasonable meaning." Consideration presently is being given as to whether to seek rehearing and/or certiorari. The same issues, which have a major fiscal impact, presently are pending before the Eighth Circuit in University of Minnesota v. Shalala, No. 93-2420.

Ohio State Univ. v. Secretary, United States Department of Health and Human Services, No. 92-3045 (June 8, 1993) [6th Cir.; S.D. Ohio].
DJ # 137-58-1871.

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Eleventh Circuit Holds That Park Service's Allegedly Negligent Safety Inspection Is Protected By The Discretionary Function Exemption To The Federal Tort Claims Act (FTCA)

Roy Autery was killed and Charlotte Schreiner, a passenger in his car, was injured when a tree fell on them as they drove through Great Smokey Mountain National Park. Autery's estate and Schreiner brought a negligence claim against the United States under the Federal Tort Claims Act. The district court awarded plaintiffs \$520,000, holding that the United States had negligently failed to properly inspect and remove hazardous trees.

The Eleventh Circuit (Tjoflat, Kravich, Roney) has now reversed, holding that the discretionary function exception to the FTCA bars suit. The court applied the two part test established in Berkovitz. First, the court decided that the Park Service's discretion to manage the Park's trees was not limited by any controlling statute, regulation, or policy. The court stressed that the general guidelines regarding safety were insufficiently specific to remove the government's discretion. The court also criticized the district court for "appear[ing] to collapse the question of whether the park service was negligent into the discretionary function inquiry," and emphasized that the question of negligence is irrelevant in determining the applicability of the discretionary function exception.

Applying the second part of the discretionary function test, the court concluded that decisions about the management of dangerous trees implicated policy concerns, such as weighing the risk of harm, the need for other safety programs, the interest in preserving the forest's natural state and the limited available resources. The court analyzed a number of decisions arising in the Ninth Circuit which have held that safety management decisions did not fall within the ambit of the discretionary function exception. The Court offered limiting constructions of these decisions and also suggested that, to the extent that they relied upon fact-based inquiries, the decisions could not be reconciled with the Supreme Court's analysis in United States v. Gaubert. The Eleventh Circuit's thorough discussion of the discretionary function exception should be very helpful to us in FTCA cases.

Autery v. United States, NO. 92-6427 (June 11, 1993) [11th Cir.; S.D. Ala.].
DJ # 157-3-243.

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False Claims Act Cases

Eastern District Of New York Issues Ruling Regarding 1) Government Knowledge Of Fraudulent Activity, 2) the Government's Burden On Its Motion For Summary Judgment In Labor Mischarging Case To Prove Specific Instances of Such Mischarging, and 3) The Non-Collateral Estoppel Effect Upon A Defendant Company Of Admissions By Employees In Guilty Pleas

The Eastern District of New York declared that Government knowledge may be relevant to a defendant's liability when the defendant has fully disclosed to the Government all information relating to his fraudulent acts, but denied defendant's motion to dismiss, on the grounds that there were material questions of fact regarding the extent of defendant's disclosure. The court also denied the Government's motion for summary judgment on liability, reasoning that although the Government had offered evidence of a general nature that time records had been falsified, it had failed to offer undisputed proof with regard to specific instances of labor mischarging. The court also ruled that the defendant company could not be collaterally estopped from denying liability because of admissions by 2 employees in their guilty pleas.

United States v. Target Rock Corp., CV-90-4414, (E.D. N.Y. April 14, 1993).

Attorney: Deborah Zwany - (718) 656-2898

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Court Of Federal Claims Holds 1) 1986 False Claims Act Amendments Are Not Retroactive But The Pre-1986 Six-Year Statute of Limitations Is Subject To Equitable Tolling, 2) Allegations Of False Claims Act Violations Must Reference Time, Place and Manner Of Fraud, 3) Misrepresentation Is Material If It Is Essential, Important Or Pertinent Part Of The Claim, And 4) The Contract Disputes Act Does Not Require That Intent Be Pleaded

Based on the non-retroactivity presumption analysis set forth in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) and Kaiser Aluminum & Chemical Corp v. Bonjorno, 494 U.S. 827 (1990), the Court of Federal Claims held that the 1986 False Claims Act Amendments apply only prospectively. The court nonetheless held that the pre-amendments 6 year statute of limitations is subject to equitable tolling until the Government knew or should have known of the facts giving rise to the cause of action. The court also held that allegations of violations of the False Claims Act must include references to time, place and manner of the fraud. In addition, the court rejected the argument that a misrepresentation is not material unless it tends to or is capable of influencing the contracting officer; instead the court held that a misrepresentation is material if it is an essential, important or pertinent part of the claim. Finally, the court concluded that the Contract Disputes Act does not require that intent be pleaded explicitly.

Tyger Construction Company, Inc. v. United States, Nos. 468-88C, 526-88C and 90-134C (Fed. Cl. March 31, 1993).

Attorney: Anthony Alexis - (202) 616-1435

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TAX DIVISION**Supreme Court Grants Certiorari In Gift Tax Case**

On June 14, 1993, the Supreme Court granted the Government's petition for a writ of certiorari in Irvine v. United States. The Eighth Circuit, sitting en banc, had affirmed the order of the District Court in this case by a 7-4 vote, and held that a taxpayer's disclaimer of an interest in a trust was not a taxable gift. In Ordway v. United States, 908 F.2d 890 (11th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991), the Eleventh Circuit reached the opposite result, ruling that a related taxpayer's disclaimer of an interest in the same trust was a taxable gift.

Each of these cases involved a beneficiary of a trust created in 1917 by Lucious Ordway, one of the principal founders of the 3M company. The taxpayer in each case filed a disclaimer with respect to his interest in the trust's corpus when the trust terminated in 1979, and not upon learning of his interest in the trust (1931 and 1941, respectively). The district court in each case held that the disclaimer was not a transfer subject to the federal gift tax because the trust interest was created prior to the imposition of the gift tax in 1932 and thus a disclaimer of that interest could not be a transfer subject to the gift tax.

In Irvine, the Eighth Circuit affirmed the decision of the district court with the majority opinion finding it anomalous that a disclaimer could turn a gift that was not subject to the gift tax into one that was. Four dissenting judges would have followed Eleventh Circuit's decision in Ordway, where the court of appeals concluded that the disclaimer was itself a taxable transfer regardless of when the trust was created and that the partial disclaimer was taxable because it was not made within a reasonable time after taxpayer learned of the interest as required by Jewett v. Commissioner, 455 U.S. 305 (1982).

In our petition for writ of certiorari, we pointed out that the decision of the Eighth Circuit was in acknowledged conflict with the Eleventh Circuit's decision in Ordway, and that, because a substantial number of trusts created before the enactment of the gift tax in 1932 remain in existence, the issue was one of continuing importance.

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Mandamus Petition Filed Challenging District Court Order Requiring United States To Be Represented At A Settlement Conference By An Official Having Full Settlement Authority

On June 21, 1993, the Tax Division filed a petition for a writ of mandamus with the Tenth Circuit in Theodore C. Johnson v. United States, (D.Colo.), asking the court of appeals to direct the district court to vacate its order instructing the United States to appear at a settlement conference through a representative having "full settlement authority" over the case. The lowest ranking person having full settlement authority over this case is the Chief of the Tax Division's Western Civil Trial Section. In our petition, we argue, as we did in a series of petitions previously filed in the Fifth Circuit, that the Attorney General is vested with the exclusive authority to determine which officials should have settlement authority and who should be sent to attend to the interests of the United States in any judicial proceeding. The Fifth Circuit rejected that position in In re Stone, 986 F.2d 898 (1993), holding that the district courts have the inherent authority to direct Government officials having full settlement authority to attend settlement conferences, but that this authority should be used sparingly by the district courts.

In our petition to the Tenth Circuit, we contend that the Fifth Circuit's "inherent authority" analysis is incorrect. We further contend that, even if the Fifth Circuit's analysis is correct, this case is not an appropriate exercise of whatever limited authority the courts may have in this regard. Discovery in this fact-bound case, which involves only \$5,000, has not been completed. Accordingly, the Government is not yet in position to assess litigating risks. Nor is there any basis to contend that the Government has delayed the resolution of the case.

On June 21, the Tenth Circuit issued an order staying the "full settlement authority" aspects of the district court's conference order and directing the District Court Judge (Hon. Jim R. Carrigan) to file a response to the Government's petition.

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Ninth Circuit Rules In Freedom Of Information Act (FOIA) Case That Exempt Organization Division Of The Internal Revenue Service Performs A Law Enforcement Function

On June 9, 1993, the Ninth Circuit reversed the District Court's decision in Church of Scientology International v. IRS, a FOIA case presenting the question whether the Exempt Organization Division of the Internal Revenue Service performs a "law enforcement" function in evaluating an applicant's request for tax-exempt status. Reversing the adverse holding of the District Court, the Ninth Circuit held that the IRS has the "requisite law enforcement mandate" to qualify as a law enforcement agency and that "the EO performs a law enforcement function by enforcing the provisions of the federal tax code that relate to qualification for tax exempt status." This holding will permit the IRS more easily to protect confidential informants and information that might intrude upon employees' and other's "privacy interests."

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Ninth Circuit Rules That Losses Of Insolvent Company Cannot Be Used To Offset Income Of Another Member Of Its Consolidated Group

On June 23, 1993, the Ninth Circuit reversed the unfavorable decision of the Tax Court in Idaho First National Bank v. Commissioner. This case, which involved over \$3 million, presented the question whether losses that were realized by a member of a consolidated group of corporations after the member was acquired by the group, but which were attributable to a decline in the value of the assets which occurred prior to the member's acquisition, could be used to offset income of other members of the group. Treasury regulations governing the filing of consolidated returns state that such "built-in" deductions are not eligible to offset income from other members of the consolidated group, unless the losses were incurred in rehabilitating the acquired corporation. The Tax Court determined that the losses here were incurred in rehabilitating the acquired corporation, and thus they could be used to offset the income of other members of the group.

On appeal, we contended that the Tax Court had misconstrued the Treasury regulation, and that the regulation only permitted the deduction of additional expenditures incurred to rehabilitate the corporation and not losses that were "built-in." The Ninth Circuit agreed, noting that the Tax Court's interpretation of this regulation would have permitted "[e]very acquiring company. . . [to] argue that its purchase of a financially trouble company was for rehabilitative purposes, thereby circumventing the safeguards against the use of consolidated returns for tax avoidance purposes."

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OFFICE OF LEGAL EDUCATION**COMMENDATIONS**

Donna Bucella, the new Director of the 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 May 15 - June 14, 1993. Persons listed below are AUSAs unless otherwise indicated:

Federal Practice Seminar (Clearwater, Florida)

Ted L. McBride, United States Attorney, District of South Dakota; **Miriam Krinsky**, Chief, Criminal Appeals Section, and **David Sklansky**, Central District of California; **Roger Haines**, Southern District of California; **Richard Roberts**, District of Columbia; **Gary Montilla**, **Robert Mosakowski**, and **Virginia Covington**, Middle District of Florida; **Lynne Lamprecht**, Deputy Director for Professional Development, Southern District of Florida; **Michael O'Leary**, Northern District of Georgia; **Patrice Harris**, Eastern District of Louisiana; **Ronald Slevert**, Western District of Texas; **Benjamin Bryant**, Southern District of West Virginia. **Michael Sklaire**, Electronic Surveillance Unit, Criminal Division. **Frank Larry**, Senior Training and Technical Services Specialist, U.S. Sentencing Commission. **Kenneth W. Nimmick**, Special Agent, Federal Bureau of Investigation Academy. **Wayne A. Rich**, Principal Deputy Director, Executive Office for United States Attorneys.

Civil Trial Advocacy (Washington, D.C.)

Jack Wong, United States Attorney, **Riley Atkins** and **Herb Sundby**, District of Oregon; **Susan Dein Bricklin**, Eastern District of Pennsylvania; **Susan Cassell**, District of New Jersey; **Alleen Castellani**, Western District of Missouri; **Glenn Dawson**, District of Utah; **Scott Frost** and **Wayne Hughes**, Northern District of Texas; **Jim Gibbons**, Middle District of Pennsylvania; **Gail Killefer** and **Anne-Christine Massullo**, Northern District of California; **Judy Kobbervig**, District of Oregon; **Tom Majors**, Western District of Oklahoma; **Mary Ann Moore**, Northern District of Texas; **John Neece** and **Kathy Snyder**, Southern District of California; **John Nordin** and **George Wu**, Central District of California; **Jill Ondrejko**, Eastern District of Louisiana; **John Selbert**, District of Hawaii; **Paula Silsby**, District of Maine; **Robert Taylor**, Western District of Washington; **Helen Toor**, District of Vermont. and **Jerri Dunston**, Civil Rights Division.

Freedom of Information Act (San Francisco, California)

From the Office of Information and Privacy: **Kirsten J. Moncada**, Attorney-Advisor; **Margaret Ann Irving**, Associate Director; **Thomas J. McIntyre**, Senior Attorney; **Melanie Ann Pustay**, Senior Counsel; **Bertina G. Adams**, Freedom of Information Specialist. **John Sanet**, Privacy Act Advisor, Office of Workforce Information, Office of Personnel Management. **Stuart Frisch**, Deputy General Counsel, Justice Management Division. **John F. Daly**, Attorney, Appellate Staff, Civil Division; and **Margaret A. Smith**, Special Assistant U.S. Attorney, Eastern District of Virginia.

Discovery: Interrogatories and Depositions (Washington, D.C.)

From the Federal Programs Branch of the Civil Division: **Anne Welsmann**, Assistant Branch Director; **John Tyler**, Senior Trial Counsel; **Brian Kennedy**, Assistant Director; **Elizabeth A. Pugh**, Assistant Director; **Michael Truscott**, Trial Attorney; and **Thomas Millet**, Assistant Branch Director. From the Torts Branch: **Marie Hagen**, Trial Attorney. **Richard Parker**, Eastern District of Virginia; **Madelyn E. Johnson**, District of Columbia. **Richard Stearns**, Assistant Chief Counsel, Office of Thrift Supervision, Department of the Treasury; and **Richard Philpott**, Director, Naval Justice School, Department of the Navy.

Attorney Management (Washington, D.C.)

Yvonne Hinkson, Deputy Associate General Counsel for Employment Law and Information, Bureau of Prisons.

Privacy Act (San Francisco, California)

John Sanet, Privacy Act Advisor, Office of Workforce Information, Office of Personnel Management; **Kirsten J. Moncada**, Attorney-Advisor, Office of Information and Privacy; and **Robert N. Veeder**, Senior Policy Analyst, Information and Policy Branch, Office of Management and Budget.

Acquisition of Federal Information Processing Resources, (Washington, D.C.)

Ellen Washington, Information Technical Acquisition Center, Washington Navy Yard; and **Rob Marvin**, Department of the Army, Arlington, Virginia.

Freedom of Information Act (Washington, D.C.)

William E. Bordley, Attorney-Advisor, Freedom of Information Section, Drug Enforcement Administration. From the Civil Division: **Matthew M. Collette**, Attorney, Appellate Staff, and **Elizabeth A. Pugh**, Assistant Director, Federal Programs Branch. From the Criminal Division: **Frank R. Newett**, Assistant Director, Office of Enforcement Operations; and **Lee (Jeff) Ross, Jr.**, Deputy Chief, Money Laundering Section. **Gerald A. Schroeder**, Senior Attorney, Office of Intelligence Policy and Review. **Constance J. Aherns**, Paralegal Specialist, FOI/PA Section, Federal Bureau of Prisons. **J. Brian Ferrel**, Assistant Chief, Tax Division. **Linda S. Kahan**, Associate Chief Counsel for Public Information, Office of General Counsel, Food and Drug Administration. From the Office of Information and Privacy: Co-Directors **Richard L. Huff** and **Daniel J. Metcalfe**; **Charlene K. Wright**, Deputy Chief, Initial Request Unit; **David Dougherty**, **Scott A. Hodes**, **Janice Galli McLeod**, **Paul-Noel Chretien**, and **Michael H. Hughes**, all Attorney-Advisors; and **Carmen L. Mallon**, Paralegal Specialist.

Economic Crime (Phoenix, Arizona)

Daniel Knauss, United States Attorney, District of Arizona; **Ted McBride**, United States Attorney, District of South Dakota; **Leon W. Weldman**, Chief, Civil Division, Central District of California; **Carol Lam**, Southern District of California; **Deborah Smith**, Director, New England Bank Fraud Task Force; **Howard Shapiro**, Special Assistant U.S. Attorney, Southern District of New York; **Barbara Poarch**, Western District of Oklahoma. From the Criminal Division: **Laurence A. Urgenson**, Acting Deputy Assistant Attorney General; **Steven E. Zipperstein**, Special Counsel to the Assistant Attorney General; **G. Allen Carver, Jr.**, Principal Deputy Chief, Fraud Section; **Donald Foster**, Deputy Chief, Administration, Fraud Section; **Ellen Meltzer**, Special Counsel, Fraud Section; **Gerald E. McDowell**, Executive Director, Economic Crime Council, Chief, Fraud Section; **Karen A. Morrisette**, Deputy Chief, Business and Government Frauds; and **Paul E. Coffey**, Chief, Organized Crime and Racketeering Section. From the Civil Division: **Ronald H. Clark**, Senior Trial Counsel, Commercial Litigation Branch.

Attorney Management Seminar (Annapolis, Maryland)

From the Executive Office for United States Attorneys: **Wayne A. Rich**, Principal Deputy Director; **Michael Baille**, Deputy Director, Administrative Services Staff; **Brian Jackson**, Assistant Director, Evaluation and Review Staff; **Gail Williamson**, Assistant Director, Personnel Staff; **Mike McDonough**, Assistant Director, Financial Management Staff; **Kathleen Haggerty**, Assistant Director, Financial Litigation Staff; **Donna Enos**, Acting Assistant Director, LECC/Victim Witness Staff; and **Mary Anne Hoopes**, Deputy Legal Counsel.

Bankruptcy Fraud (Albuquerque, New Mexico)

Lawrence B. Lee, Southern District of Georgia; **David Schiller**, Eastern District of Virginia; **Maureen Tighe**, Central District of California; **Bill Yahner**, Southern District of Texas; **Joan Safford** and **Brian Netols**, Northern District of Illinois. **Victoria Young**, United States Trustee, Region 5, New Orleans; **Sandra Wittman**, United States Trustee, Region 15, San Diego; **Joe B. Brown**, Special Assistant United States Trustee, Nashville; **Sandra Rasnak**, Assistant United States Trustee, Region 11, Chicago; and **Joe McGonigal**, Attorney-Advisor, United States Trustee's Office, Region 10, Indianapolis. **Peter Goldberg**, Senior Trial Attorney, Antitrust Division. **Judith Benderson**, Assistant Director, Financial Litigation Staff, Executive Office for United States Attorneys. From the Federal Bureau of Investigation: **Tyra Reid**, Special Agent, Los Angeles, and **Richard Ress**, Special Agent, Economic Crimes Unit, Washington, D.C.

Civil Paralegal Course (Washington, D.C.)

Joan Garner, Deputy Civil Chief, Eastern District of Pennsylvania; **Debra Prillaman**, Eastern District of Virginia; **Marianne Tomecek**, Chief, Civil Division, Southern District of Texas; **Vanessa Garrett Harley**, Special Assistant United States Attorney, Eastern District of Pennsylvania; **Mark Nagle**, **David Orbuch**, and **Jim Layton**, District of Columbia; **Moni Henderson**, Paralegal Specialist, and **Jacque Bartlett**, Paralegal Assistant, Middle District of Pennsylvania. From the Environment and Natural Resources Division: **Kevin Kidwell**, Supervisory Paralegal Specialist. From the Civil Division: **Lawrence Klinger**, Assistant Director, Torts Branch; **Aleta T. Bodolay** and **Larry Lange**, Paralegal Specialists, Torts Branch; **Thomas W. Hussey**, Deputy Director, Office of Immigration Litigation, **Mark C. Walters**, Assistant Director, Office of Immigration Litigation. From the Executive Office for United States Attorneys: **Bonnie Gay**, Director, FOIA Unit, and **Gary Padgett**, Attorney and Management Analyst, Evaluation and Review Staff. From the Justice Management Division: **Michele Gelger**, Training Instructor, and **Garnett Weiland**, Acting Assistant Director, JURIS Office.

Prison Litigation Seminar (Denver, Colorado)

James R. Allison, United States Attorney, **George Gill**, and **Kathleen Torres**, District of Colorado; **Robert DeSousa**, Chief, Civil Division, and **Fred Martin**, Middle District of Pennsylvania; **Amy Hay**, Chief, Civil Division, and **Bob Eberhardt**, Western District of Pennsylvania; **Bob Jaspen**, Chief, Civil Division, Eastern District of New York; **Kent Anderson**, Western District of Oklahoma; **Bernard Bell**, Southern District of New York; **Howard Borg**, Northern District of Texas; **John Facciola**, **Richard Reback**, and **Mark Nebeker**, District of Columbia; **Gerald Frank**, District of Arizona; **Mike Johnson**, Central District of California; **Paul Justice**, Southern District of Georgia; **Debra Prillaman**, Eastern District of Virginia; and **James Shively**, Eastern District of Washington. From the Criminal Division: **Candice Will**, Deputy Chief, General Litigation Section. From the Civil Division: **Jeffrey Axelrad**, Director, Torts Branch; **Helene Goldberg**, Director, Torts Branch; **Joe Sher**, Senior Trial Counsel. From the Bureau of Prisons: **Wallace H. Cheney**, General Counsel; **Harlan Penn**, Deputy General Counsel; **Carolyn Sabol**, Deputy General Counsel; **Jeff Campbell**, Associate General Counsel; **Joyce Zoldak**, Associate General Counsel; **Scott Bomson**, Deputy Associate General Counsel; **Bill Burlington**, Regional Counsel, Mid-Atlantic Regional Office; **Doug Curless**, Regional Counsel, Western Regional Office; **Mike Hood**, Regional Counsel, South Central Regional Office; **John Shaw**, Regional Counsel, North Central Regional Office; **Sherree Sturgis**, Regional Counsel, Southeast Regional Office; **Daryl Koslask**, Deputy Regional Counsel, North Central Regional Office; **Hank Sadowski**, Deputy Regional Counsel, Northeast Regional Office; **Valerie Stewart**, Deputy Regional Counsel, Western Regional Office; **Van Vandivier**, Deputy Regional Counsel, Southeast Regional Office; and **Paul Loyer**, Assistant Regional Counsel, Mid-Atlantic Regional Office.

Advanced Freedom Of Information Act (Washington, D.C.)

From the Office of Information and Privacy: **Daniel Metcalfe** and **Richard Huff**, Co-Directors, and **Melanie Ann Pustay**, Senior Counsel. **Elizabeth A. Pugh**, Assistant Director, Federal Programs Branch, Civil Division. **Ann Harkins**, Chief Counsel, Committee on the Judiciary, Subcommittee on Technology and the Law, United States Senate; **Jane E. Kirtley**, Executive Director, Reporters Committee for Freedom of the Press; **Gayla D. Sessoms**, Assistant Director for Information Services, Securities and Exchange Commission; and **Charlie Y. Talbott**, FOI Specialist, Office of the Secretary of Defense, Department of Defense.

Privacy Act (Washington, D.C.)

Phillip A. Kesaris, Deputy Assistant General Counsel for Inspector General and Administrative Proceedings, Department of Housing and Urban Development. **Jeff Corzatt**, Staff Attorney, Office of General Counsel, Department of Veterans Affairs. **Johanna Bonnelycke**, Privacy Act Officer, Public Health Service, Department of Health and Human Services. **John Sanet**, Privacy Act Advisor, Office of Workforce Information, Office of Personnel Management; and **Kirsten J. Moncada**, Attorney-Advisor, Office of Information and Privacy.

Examination Techniques (Denver, Colorado)

Roger D. Burke, Jr. and **Richard Roberts**, District of Columbia; **Daniel M. LaVille** and **Jeanine N. LaVille**, Western District of Michigan; **Paul Johns**, District of Colorado; **Jan Luymes**, Central District of California. **Marshall Caggiano**, Assistant Staff Judge Advocate, Air Force Materiel Command Law Center, Wright-Patterson AFB, Ohio. **Cary Pollak**, Section Chief, Civil Division, Office of Corporation Counsel. **Debra Stephanik**, Attorney, National Labor Relations Board, Peoria, Illinois. From the Civil Division: **Jill Martindell**, Trial Attorney, Torts Branch; **Stephen Doyle**, Trial Attorney, Environment and Occupational Disease Litigation Section, Torts Branch.

Child Sexual Abuse and Exploitation Prosecution Seminar (Arlington, Virginia)

Kenneth E. Melson, United States Attorney, Eastern District of Virginia; **Thomas Hannis**, Chief, Child Abuse Task Force, **Gary Husk**, Special Assistant U.S. Attorney, **W. Allen Stooks**, **Elizabeth Farr**, and **Mary Murgula**, all from the District of Arizona. **Patricia Riley**, Chief, Sex Crimes Unit, and **Julleanne Himmelstein**, District of Columbia; **Miriam W. Duke**, Chief, Criminal Division, and **Dixie A. Morrow**, Middle District of Georgia; **Beth Binstock**, LECC/Victim-Witness Coordinator, District of Montana; **Diana Ryan** and **Michelle Tapken**, District of South Dakota. From the Child Exploitation and Obscenity Section, Criminal Division: **Carl Alexandre**, **J. Robert Flores**, **Elizabeth Homer**, **Janis Kockritz**, **Bruce A. Taylor**, and **William Wagner**, all Senior Trial Attorneys. **Donna Enos**, Acting Director, LECC/Victim-Witness Staff, Executive Office for United States Attorneys. From the Federal Bureau of Investigation: **Blaine McIlhwaile**, Special Agent, Flagstaff, Arizona; and **Mary Ellen O'Toole**, Special Agent, San Francisco. **Marti Speights**, Division Director, Federal Crime Victim Assistance Division, Office for Victims of Crime. **Karen Spinks**, Victim-Witness Coordinator, Eastern District of Virginia. From the Department of Interior, Bureau of Indian Affairs: **Theodore Quasula**, Director, Division of Law Enforcement, and **Judy Baggett**, Director, Office of Child Protection.

Asset Forfeiture Curriculum Planning Group. (Washington, D.C.)

Eric S. Honig, Chief, Asset Forfeiture, Central District of California; **John A. Houston**, Chief, Asset Forfeiture, Southern District of California; **Virginia M. Covington**, Chief Asset Forfeiture, Middle District of Florida; **Laurie J. Sartorio**, District of Massachusetts (presently serving as Assistant Director, Executive Office for Asset Forfeiture); **Kathleen M. Brinkman**, Southern District of Ohio; **Sonia C. Jalpaul**, Chief, Asset Forfeiture, Eastern District of Pennsylvania; **Alice W. Dery**, Special Counsel, Asset Forfeiture Office, Criminal Division; **Araceli Carrigan**, Attorney-Advisor, Executive Office for Asset Forfeiture.

COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of July 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 E-mail 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.

July 1993

<u>Date</u>	<u>Course</u>	<u>Participants</u>
7-9	Criminal Chiefs-USAOs	Chiefs (Small USAOs)
12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
20-22	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

August 1993

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

August 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
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
<u>September 1993</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 E-mail 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 D 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 *).

July 1993

<u>Date</u>	<u>Course</u>	<u>Participants</u>
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

August 1993 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
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)
23-25	Basic Negotiations	Attorneys
26	Introduction to FOIA	Attorneys, Processors, Technicians
31	Appellate Skills	Attorneys
<u>September 1993</u>		
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

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

Address: Room 10332, Patrick Henry Bldg.
 601 D Street, N.W., Washington, D.C. 20530

Telephone: (202) 208-7574
 FAX: (202) 208-7235
 (202) 501-7334

Director.....	Donna Bucella
Deputy Director.....	David Downs
Assistant Directors:	
AGAI-Criminal.....	Charysse Alexander
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%	06-25-93	3.54%
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%		
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%		
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%		
11-17-89	7.69%	03-08-91	6.46%	06-26-92	4.11%		
12-15-89	7.66%	04-05-91	6.26%	07-24-92	3.51%		
01-12-90	7.74%	05-03-91	6.07%	08-21-92	3.41%		

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

UNITED STATES ATTORNEYS

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	Edward Vulevich, Jr.
Alaska	Joseph W. Bottini
Arizona	Janet Ann Napolitano
Arkansas, E	Richard M. Pence, Jr.
Arkansas, W	J. Michael Fitzhugh
California, N	Michael J. Yamaguchi
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.
District of Columbia	J. Ramsey Johnson
Florida, N	Gregory R. Miller
Florida, M	Douglas N. Frazier
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	Clifford J. Proud
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. Boitmann
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
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Michael A. Jones

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Montana	Lorraine I. Gallinger
Nebraska	Ronald D. Lahners
Nevada	Monte Stewart
New Hampshire	Peter E. Papps
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Gary L. Sharpe
New York, S	Mary Jo White
New York, E	Zachary W. Carter
New York, W	Patrick H. NeMoyer
North Carolina, E	James R. Dedrick
North Carolina, M	Benjamin H. White, Jr.
North Carolina, W	Jerry W. Miller
North Dakota	Gary Annear
Ohio, N	Emily M. 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.
Puerto Rico	Charles E. Fitzwilliam
Rhode Island	Edwin J. Gale
South Carolina	J. Preston Strom, Jr.
South Dakota	Ted L. McBride
Tennessee, E	David G. Dake
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 D. Wilmoth
West Virginia, S	Michael W. Carey
Wisconsin, E	Nathan A. Fishbach
Wisconsin, W	Grant C. Johnson
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

**DIVISION OF AUTHORITY AT THE DEPARTMENT OF JUSTICE
CONCERNING BOP CIVIL LITIGATION**

Panel Discussion:

Jeffrey Axelrad
Director
Torts Branch
Civil Division
Department of Justice
Washington, D.C.

Helene Goldberg
Director
Torts Branch
Civil Division
Department of Justice
Washington, D.C.

Candice Will
Deputy Chief
Gen. Litigation Section
Criminal Division
Department of Justice
Washington, D.C.

I. Jurisdiction of the Criminal and Civil Divisions

The jurisdiction of the Criminal Division is discussed at 28 C.F.R. (Subpart K) §§ 0.55 through 0.64-3.¹ The jurisdiction of

¹ In relevant part, Title 28 (Subpart K) of the Code of Federal Regulations provides:

28 C.F.R. § 0.55. The following functions are assigned to and shall be conducted, handled or supervised by, the Assistant Attorney General, Criminal Division:

(i) All civil proceedings seeking exclusively equitable relief against Criminal Division activities including criminal investigations, prosecutions and other criminal justice activities (including without limitation, applications for writs of habeas corpus not challenging exclusion, deportation or detention under the immigration laws and coram nobis), except that any proceeding may be conducted, handled, or supervised by another division by agreement between the head of such division and the Assistant Attorney General in charge of the Criminal Division.

(o) Resolving questions that arise as to Federal prisoners held in custody by Federal officers or in Federal prisons, commitments of mentally defective defendants and juvenile delinquents, validity and construction of sentences, probation and parole.

28 C.F.R. § 0.61. The following functions are assigned to and shall be conducted, handled or supervised by, the Assistant Attorney General, Criminal Division:

(d) Civil proceedings seeking exclusively equitable relief against laws, investigations or administrative actions designed to protect the national security (including without limitation personnel security programs and the foreign assets control program).

the Civil Division is discussed at 28 C.F.R. (Subpart I) §§ 0.45 through 0.49.²

The Criminal Division's jurisdiction is extremely limited when it comes to civil litigation. The Criminal Division has jurisdiction over all civil proceedings seeking exclusively equitable relief against (1) Criminal Division activities (e.g., criminal investigations and prosecutions), including writs of habeas corpus and coram nobis, and (2) laws, investigations or administrative actions designed to protect the national security. 28 C.F.R. §§ 0.55(i) and 0.61(d).

The Criminal Division also has the responsibility of "resolving questions" that arise as to (1) federal prisoners held in custody by federal officers or in federal prisons, (2) commitments of mentally defective defendants and juvenile delinquents, and (3) the validity and construction of sentences, probation and parole. 28 C.F.R. § 0.55(o). This section does not confer upon the Criminal Division jurisdiction over civil proceedings pertaining to the three enumerated items; it simply gives the Criminal Division the authority to "resolve questions" concerning these items.

The Civil Division, on the other hand, has broad, almost complete, jurisdiction over civil cases involving the federal government and its employees. The Civil Division is charged with the responsibility of defending (1) all tort cases arising under the Federal Tort Claims Act (FTCA), and (2) similar litigation brought against federal employees whose official conduct is involved. 28 C.F.R. § 0.45(g). Additionally, the Civil Division is responsible for all civil litigation (unless otherwise expressly assigned) brought against the United States, its

² In relevant part, Title 28 (Subpart I) of the Code of Regulations provides:

28 C.F.R. § 0.45. The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Division:

(g) Tort cases - defense of tort suits against the United States arising under the Federal Tort Claims Act and special acts of Congress; similar litigation against cost-plus Government contractors and Federal employees whose official conduct is involved (except actions against government contractors and Federal employees which are assigned to the Land and Natural Resources Division by § 0.65(a)) * * * .

(h) General civil matters - litigation by and against the United States, its agencies, and officers in all courts and administrative tribunals * * * to defend challenged actions of Government agencies and officers, not otherwise assigned, including, but not limited to, * * * .

agencies, and officers, to defend challenged actions of government agencies and officers. 28 C.F.R. § 0.45(h).

II. Brief Summary of Cases under Criminal and Civil Divisions

The following types of cases are under the jurisdiction and supervision of the Civil Division:

- 1) Bivens cases (i.e., allegation of constitutional tort with prayer for money damages) filed by inmates against the Bureau of Prisons and its employees.
- 2) Common law tort cases filed by inmates against the Bureau of Prisons and its employees.

The following types of cases are under the jurisdiction and supervision of the Criminal Division:

- 1) Purely injunctive actions (no money damage claims) filed to enjoin grand jury proceedings or to interfere with a criminal case/investigation or other criminal justice activities.
- 2) Purely injunctive actions (no money damage claims) filed to challenge the law, administrative action or investigation designed to protect the national security.
- 3) Petitions for writs of habeas corpus.
- 4) Petitions for writs of coram nobis.

III. Handling of Prison Litigation

The majority of prison litigation is handled in the field by the appropriate U.S. Attorney's Office.

Criminal and quasi criminal litigation: In most districts, the criminal assistant who prosecuted a particular defendant/case will continue to handle the case on appeal and in any collateral attacks (e.g., habeas corpus or coram nobis). Any questions that arise as to the validity of the defendant's sentence, probation, parole, the commitment of a mentally defective defendant, a juvenile defendant, prison administration, or concerning a petition for writ of habeas corpus or coram nobis, should be addressed/referred to the General Litigation Section of the Criminal Division.

Civil litigation: Common law torts, constitutional torts (i.e., Bivens), and what are commonly called "condition of confinement" civil cases are under the supervision of the Civil Division. By and large, these cases are actually handled by the appropriate U.S. Attorney's Office. The Civil Division, though,

has on-going responsibilities concerning these cases, including approving requests for representation and certain pre-litigation administrative claims, discussed below.

IV. Representation Request Process

When a federal employee is sued, the employee must request representation by the Department of Justice. The employee's representation request (which is to include Form DJ-399 (copy attached hereto), a factual statement from the employee concerning what happened and copies of all pleadings served upon the employee) is submitted by BOP, along with BOP's views on the propriety of DOJ representation, to the Civil Division.

The Civil Division then determines whether the employee was acting within the scope of his/her employment and whether representation is in the best interests of the United States. See 28 C.F.R. §§ 50.15 and 50.16. If the Civil Division finds that both conditions have been satisfied, it will approve DOJ representation for the BOP employee and so notify the assistant handling the case.

DOJ lawyers are not permitted to take action in representation of an individual federal defendant in advance of receiving approval from the Civil Division that representation is authorized for the employee. In emergency situations, oral approval can be obtained from the Civil Division.

The type of case at issue determines where within the Civil Division a representation request is to be forwarded. The Civil Division is divided into several branches (e.g., the Torts Branch, the Federal Programs Branch, the Commercial Litigation Branch). Prison litigation is assigned to the Torts Branch (though there may be an occasional case requiring the involvement of the Federal Programs Branch). Within the Torts Branch, there are two separate offices actively involved in prison litigation. They are the Federal Tort Claims Act Staff (headed by Director Jeffrey Axelrad) and the Constitutional Torts Staff (headed by Director Helene Goldberg). These offices' areas of responsibility concerning prison litigation are divided as follows:

Federal Tort Claims Act Staff: The FTCA Staff handles representation requests in:

(1) all cases (including Bivens cases) relating to the delivery or failure to deliver medical care. The contact person for these cases is Assistant Director Roger D. Einerson. (Where the complaint pleads a facially substantial constitutional violation, a copy of the complaint will be forwarded to the Constitutional and Specialized Torts Litigation Staff

(discussed below); if the Constitutional and Specialized Torts Staff desires to take responsibility for the medical case, the FTCA Staff will be notified and the case may be transferred to the Constitutional and Specialized Torts Litigation Staff.)

(2) all non-medical, common law tort cases. The contact persons for these cases are Deputy Director Paul Figley and Assistant Director Phyllis Pyles.

Constitutional and Specialized Torts Litigation Staff: The C&STL Staff handles representation requests in:

(1) all non-medical cases involving claims under the constitution (i.e., in all non-medical Bivens cases). The contact person is Director Helene Goldberg.

(2) certain medical cases raising constitutional issues (see procedures outlined above in paragraph 2 of the FTCA Staff discussion). The contact person is Director Helene Goldberg.

V. Administrative Claims

Pursuant to 28 C.F.R. § 0.172,³ the Director of BOP and the Commissioner of Federal Prison Industries have the authority to settle an administrative (pre-litigation) tort claim involving BOP and Federal Prison Industries, respectively, if the amount of

³ In relevant part, Title 28 (Subpart X) of the Code of Federal Regulations provides:

28 C.F.R. § 0.172

(a) The Director of the Bureau of Prisons [and] the Commissioner of the Federal Prison Industries * * * shall have the authority to adjust, determine, compromise and settle a claim involving the Bureau of Prisons [and] Federal Prison Industries, * * * respectively, under section 2672 of title 28, U.S. Code, relating to the administrative settlement of Federal tort claims, if the amount of a proposed adjustment, compromise, settlement or award does not exceed \$10,000. When in the opinion of [the Director or the Commissioner] such a claim pending before him presents a novel question of law or a question of policy, he shall obtain the advice of the Assistant Attorney General of the Civil Division.

(b) Subject to the provisions of § 0.160, the Assistant Attorney General in charge of the Civil Division shall have the authority to adjust, determine, compromise, and settle any other claim involving the Department under section 2672, of title 28, U.S. Code, relating to the administrative settlement of Federal tort claims.

the proposed settlement does not exceed \$10,000. If, in the opinion of the Director or the Commissioner, the claim presents a novel question of law or a question of policy, the advice of the Director of the Federal Tort Claims Act Staff (Jeffrey Axelrad) shall be obtained by BOP or the Federal Prison Industries.⁴

For administrative tort claims where the amount of the proposed settlement is greater than \$10,000, but not in excess of \$500,000, the Director of the Federal Tort Claims Act Staff (Jeffrey Axelrad) has the authority to settle the administrative claim.⁵

Administrative tort claims where the proposed settlement is greater than \$500,000, but less than \$2,000,000, may be settled only with the approval of the Assistant Attorney General for the Civil Division. Proposed settlements in excess of \$2,000,000 must be approved by the Associate Attorney General.

VI. Caveat

Please remember the division of authority and be sure to route your request to the appropriate Division. Although in the past the Criminal Division processed many Bivens representation requests, it will not do so in the future. The Criminal Division has limited authority in the area of civil litigation (only habeas corpus, coram nobis, equitable actions attacking the criminal process or relating to national security clearances and the resolution of questions pertaining to prison administration, sentencing, probation, parole, juvenile defendants and mentally defective defendants). When a tort case or a representation request is erroneously referred to the Criminal Division, the Criminal Division intake unit automatically assigns a Criminal Division DOJ number, which must subsequently be closed out, and the file then transferred to the Civil Division. This can delay the processing of the case or the representation request by several weeks.

⁴ Although 28 C.F.R. § 0.172(a) provides that the Director or Commissioner shall obtain the advice of the Assistant Attorney General of the Civil Division, most claims are acted upon by the Director of the Federal Tort Claims Act Staff pursuant to Civil Division Directive No. 176-91.

⁵ Although 28 C.F.R. § 0.172(b) provides that the AAG of the Civil Division has approval authority over all administrative tort claims in excess of \$10,000, the authority to settle claims in excess of \$10,000, but not in excess of \$500,000, was delegated to the Director of the FTCA Staff by Civil Division Directive No. 176-91.

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* Asterisk denotes separate enclosure

* * * * *



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.

VOLUME 5 • NUMBER 14 • JUNE 22, 1993

Departures

MITIGATING CIRCUMSTANCES

First Circuit revises standard of review for departures to give district courts more "leeway" in some situations. Joining two downward departure cases for purposes of appeal, the First Circuit revisited the issues of district court discretion in and appellate review of departures. One defendant was convicted of a drug offense and requested departure based on her circumstances, which included sole care of three young children, dependence on welfare, and no previous criminal record. The district court denied the departure, indicating it felt constrained by the guidelines. The other defendant embezzled from his union and received a departure to probation. The court reasoned that defendant would lose his job and the ability to pay restitution, and that imprisonment served no useful purpose.

The appellate court began by analyzing the four basic kinds of departures set forth in the Guidelines. There are "encouraged" departures, such as those in §5K that list specific factors that may warrant departure. There are departures that are "discouraged" but not prohibited, as in §5H where certain factors are listed as "not ordinarily" warranting departure: "Thus, a sentencing court, considering whether or not the presence of these 'discouraged' factors warrants departure, must ask whether the factors themselves are present in unusual kind or degree." There are also "forbidden" departures, prohibited for certain factors even if they make a case "unusual."

Then there are cases that fall outside the "heartland" of typical offense behavior. The Introduction to the Guidelines "makes clear that (with a few exceptions) a case that falls outside the linguistically applicable guideline's 'heartland' is a candidate for departure. It is, by definition, an 'unusual case.' . . . The statute says that the sentencing court considering a departure must ask whether the Sentencing Commission has 'adequately taken into consideration' the aggravating or mitigating circumstance that seems to make a case unusual. But, the Commission itself has explicitly said that (with a few exceptions) it did not 'adequately' take unusual cases 'into consideration.'" Thus, aside from the relatively few "forbidden" factors, "the sentencing court is free to consider, in an unusual case, whether or not the factors that make it unusual (which remove it from the heartland) are present in sufficient kind or degree to warrant a departure. . . . The court retains this freedom to depart whether such departure is encouraged, discouraged, or unconsidered by the Guidelines."

With this in mind, the court expressed concern that *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989), "suggested review that provides no 'leeway' for the district court" because it stated that review of "whether or not" the circumstances "are of a kind or degree" to warrant a departure is "essentially plenary." The court therefore modified the standard of review

to distinguish "certain decisions in this category where review should take place without 'leeway,' from others where, despite the technically legal nature of the question, we nonetheless should review with 'full . . . respect for' the sentencing court's 'superior "feel" for the case.' . . . Plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances . . . are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all. . . . Plenary review is also appropriate where the appellate court, in deciding whether the allegedly special circumstances are of a 'kind' that permits departure, will have to perform the 'quintessentially legal' function . . . of interpreting a set of words, those of an individual guideline, in light of their intention or purpose, in order to identify the nature of the guideline's 'heartland' (to see if the allegedly special circumstance falls within it)."

"In many other instances, not anticipated by *Diaz-Villafane*, the district court's decision that circumstances are of a 'kind,' or 'degree,' that warrant departure will not involve a 'quintessentially legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent. . . . [A]ppellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,' . . . not with the understanding that review is 'plenary.'"

With that, the appellate court remanded both cases. In the first case, most of the circumstances are of the kind for which departure is "discouraged," but not forbidden. The district court should determine whether they are unusual enough to merit departure. It may not be unusual for a drug offender to be a single mother with family responsibilities, "but, at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the 'ordinary' case of such circumstances into a case that is not at all ordinary."

In the other case, the court held that "the embezzlement guidelines encompass, within their 'heartland,' embezzlement accompanied by normal restitution needs and practicalities (i.e., the simple facts that restitution is desirable and that a prison term will make restitution harder)." Thus, "ordinary restitution circumstances . . . do not warrant departure." However, "a special need of a victim for restitution, and the surrounding practicalities, might, in an unusual case, justify departure." Here, for example, there was evidence that defendant would not lose his job if imprisoned no more than one year, which would only require a three-month departure, and the district court may consider this fact on remand.

U.S. v. Rivera, No. 92-1749 (1st Cir. June 4, 1993) (Breyer, C.J.).

See *Outline* at VI.C.1.e and X.A.1.

U.S. v. Aguilar, No. 90-10597 (9th Cir. May 12, 1993) (O'Scannlain, J.) (Hall, J., dissenting) (Affirming that downward departure may be based on "the additional punishment" a convicted federal judge "would suffer during the course of potential disbarment and impeachment hearings." Potential removal from life-tenured position, disqualification from future government appointments, and loss of pension rights, distinguish defendant's situation "both qualitatively and quantitatively, from the 'substantial pain and humiliation' suffered by criminal defendants who are 'well-known figures in the worlds of government and finance.' For that reason, we reject the suggestion that the additional punishment Judge Aguilar will suffer is not 'atypical.'" Also, "Judge Aguilar is the first convicted federal judge to be sentenced under the Guidelines. As such, his case does not appear to fall within the heartland of cases for which the Guidelines were designed." Case was remanded, however, for explanation of extent of departure.)

See *Outline* at VI.C.1.h, 3, and 4.

AGGRAVATING CIRCUMSTANCES

U.S. v. McAninch, No. 91-30433 (9th Cir. May 20, 1993) (Fletcher, J.) (Affirmed: Defendant, who pled guilty to mail fraud and mailing threatening communications, "waged a campaign of harassment and intimidation" against people whom he did not know but believed to be interracial married. The district court departed upward, in part because of the racist nature of defendant's offenses. "Because it is not otherwise treated in the guidelines, we . . . agree with the district court that a defendant's racist motivation is a valid ground for departure.")

See *Outline* generally at VI.B.1.

Criminal History

CAREER OFFENDER PROVISION

U.S. v. Hayes, No. 91-30432 (9th Cir. June 9, 1993) (Wright, J.) (Affirmed: Defendant was properly sentenced as a career offender because his instant offenses of being a felon in possession of a sawed-off shotgun and possessing an unregistered sawed-off shotgun "otherwise involve conduct that presents a serious potential risk of physical injury to another," § 4B1.2(1)(ii). "We have held that 'being a felon in possession of a firearm is not a crime of violence for purposes of applying the Career Offender guideline.' . . . Those cases, however, did not consider charged conduct involving sawed-off shotguns. . . . [S]uch weapons are inherently dangerous, lack usefulness except for violent and criminal purposes and their possession involves the substantial risk of improper physical force.")

See *Outline* at IV.B.1.b.

U.S. v. Wagner, No. 92-2011 (10th Cir. May 18, 1993) (Borby, J.) (Remanded: Instant conviction for possessing a listed chemical with intent to manufacture a controlled substance, 21 U.S.C. § 841(d), is not "a controlled substance offense" for career offender purposes. First, even though an "immediate precursor" of methamphetamine—P2P, which is classified as a controlled substance—was seized when defendant was arrested, "the definition of controlled substance for

purposes of the career offender section . . . refers to the charged offense" only, not to relevant conduct. Second, § 841(d) "is not, by its plain terms, a federal or state law that prohibits manufacture or possession of a controlled substance," and the Guidelines "specifically distinguish possession of a controlled substance from possession of a listed chemical with the intent to manufacture a controlled substance.")

See *Outline* generally at IV.B.1.a.

Offense Conduct

CALCULATION OF LOSS

U.S. v. Watkins, No. 92-5830 (6th Cir. June 1, 1993) (Engel, Sr. J.) (Remanded: District court improperly calculated loss under § 2F1.1 as face value of worthless checks in check-kiting scheme without making specific findings on intended and possible loss. "[T]hree factors must be present for an amount of loss to be relevant under section 2F1.1. First, as application note 7 instructs, the defendant must have intended the loss. Second, it must have been possible for the defendant to cause the loss. Third, the defendant must have completed or been about to complete but for interruption, all of the acts necessary to bring about the loss." For the last factor, the appellate court held that note 7 "must be read in conjunction with section 2X1.1(b)(1), which governs attempts. . . . If the defendant's conduct does not meet [that section's] requirements, that conduct qualifies only as an attempt, and section 2X1.1(b)(1) directs that the offense level be reduced accordingly.") Cf. *U.S. v. Frydenlund*, 990 F.2d 822, 825-26 (5th Cir. 1993) (affirmed: check-kiting would not be treated like fraudulently obtained loans, in which loss is reduced by whatever collateral bank may recover; here, amount of loss was properly calculated as bank's out-of-pocket loss because no repayment had been made at time of sentencing and future payments were speculative).

See *Outline* at II.D.2.a.

DRUG QUANTITY

U.S. v. Wagner, No. 92-2011 (10th Cir. May 18, 1993) (Borby, J.) (Remanded: Defendant pled guilty to possessing a listed chemical (phenylacetic acid) with intent to manufacture a controlled substance (methamphetamine). The only substance actually seized after arrest was a quantity of P2P, an "immediate precursor" of methamphetamine made from phenylacetic acid. The district court incorrectly set the base offense level by estimating the amount of methamphetamine that could have been produced from the P2P. The Guidelines have a two-step procedure when a listed chemical offense involves an attempt to manufacture a controlled substance. First, apply § 2D1.11 to the amount of phenylacetic acid involved (estimating if no amount was actually seized). Then, following the cross-reference in § 2D1.11(c)(1), use § 2D1.1(c) and comment.(n.10) to convert the P2P into its marijuana equivalent to get an offense level. Use the higher of the two resulting base offense levels.) Cf. *U.S. v. Hoster*, 988 F.2d 1374, 1380-82 (5th Cir. 1993) (discussing interaction of §§ 2D1.1 and 2D1.11 when controlled substance and listed chemical are both present) [5 *GSU* #11].

See *Outline* generally at II.B.4.b.

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