

# United States Attorneys' Bulletin

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Please send name or  
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## COMMENDATIONS

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

**Craig A. Benedict** (New York, Northern District), by Marc S. Gerstman, Deputy Commissioner and General Counsel, Department of Environmental Conservation, Albany, for his outstanding legal skill in obtaining a conviction in an illegal disposal of hazardous waste case, and for obtaining a favorable decision in the Second Circuit which sets a valuable precedent regarding the elements of RCRA and CERCLA criminal violations.

**Robert Cares** and **Christopher Yates** (Michigan, Eastern District), by Benjamin R. McMakin, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, Detroit, for their successful prosecution of Project Mercury, a major international money laundering operation involving five individuals, and resulting in forfeitures in excess of \$1.5 million.

**Frederick J. Dana** (Missouri, Eastern District), by Gary W. Easton, Superintendent, Jefferson National Expansion Memorial, National Park Service, Department of the Interior, St. Louis, for his outstanding contribution to the success of the Annual Law Enforcement Refresher Training (ALERT) session at the St. Louis County and Municipal Police Academy.

**George (Toby) Dilworth** and **Michael DuBose** (District of Maine), by Brigadier General Wilfred Hessert, Commander, Maine Air National Guard, 101st Air Refueling Wing (AMC), Bangor, for their successful prosecution of a civil litigation, and for obtaining an overruling of a previous First Circuit decision resulting in the establishment of a new bright-line rule regarding justiciability of §1983 and §1985 claims brought by Guard members where the claimed injury arose incident to military service.

**Charles Dobbs** (Texas, Northern District), by W. Bruce Beaty, U.S. Marshal, Dallas, for his valuable leadership in the debt collection effort in the Northern District of Texas, and for his major contribution to a strong working relationship between the two agencies.

**Joe Frattallone** and **Jorge Vega** (District of Puerto Rico), by Lois J. Schiffer, Acting Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, for their successful efforts in both the criminal and civil investigations of a barge oil spill, and for their assistance in developing a coordinated effort in anticipation of litigation.

**Alan M. Gershel** and **Staff** (Michigan, Eastern District), by Attorney General Janet Reno, in recognition of their dedication and professionalism as related to her by a Chief Judge during the Sixth and Eighth District and Circuit Court Judges Workshop held recently in Durham, North Carolina.

**Mary L. Grad**, **Solomon E. Robinson**, and **Elizabeth Price** (California, Eastern District), by Charles C. Masten, Inspector General, Department of Labor, Washington, D.C., for their excellent representation and successful results of two fraud cases involving the collection of Federal Employees' Compensation Act benefits.

**Christine B. Hamilton** (North Carolina, Eastern District), by Frederick K. Heineman, Chief of Police, Raleigh Police Department, for successfully prosecuting nine defendants who were indicted on ninety-six federal gun and drug charges, for obtaining guilty pleas from eleven individuals for distributing crack cocaine, and for her outstanding efforts to control the influx of narcotics and other violence into Raleigh.

**Ilona Holmes** (Florida, Southern District), by Tron W. Brekke, Chief, Public Corruption and Civil Rights Section, Criminal Investigative Division, FBI Academy, Quantico, Virginia, for her participation in an Undercover Agent Training Seminar at the Academy, and for her contribution to its overall success.

**Jane H. Jolly** (North Carolina, Eastern District), by Paul Lyon, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Charlotte, for her outstanding leadership of the Lenoir County Task Force, and for her successful prosecution of forty-four defendants arrested as a result of the task force efforts.

**Sharon Kimball** (District of New Mexico), by Phillip E. Jordan, Special Agent in Charge, Drug Enforcement Administration, Dallas, was presented a Certificate of Appreciation for her success in completely immobilizing a dangerous, well-established crack cocaine organization in northern Texas, and for obtaining a life sentence without parole for its leader.

**E. James King, David Portelli, Joseph Allen, Michael Buckley, Wayne Pratt, Ross Parker, and John Roth** (Michigan, Eastern District), by Dale W. Schuitema, Special Agent in Charge, Drug Enforcement Administration (DEA), Detroit, for serving as instructors at DEA's Law Enforcement Investigators School and DEA's In-Service Legal Update Class for Michigan and Ohio state and local police officers on proper enforcement of narcotics laws.

**Donald Kinsella, William Pericak, and Kim Zimmer** (New York, Northern District), by John J. O'Connor, Special Agent in Charge, FBI, Albany, for their prompt action in obtaining court ordered electronic surveillance and other services in response to a kidnapping investigation that occurred during the holiday season. (Their efforts resulted in the safe return of the kidnapping victim.)

**Jack Lacey and Richard Starrett** (Mississippi, Southern District), by John T. Orr, Chief, Antitrust Division, Department of Justice, Atlanta, for their valuable assistance and cooperative efforts in the "Mississippi Milk" investigations, a major bid-rigging conspiracy which affected many school systems and other institutions over a broad area of the state.

**Daniel M. LaVille and Michael L. Shiparski** (Michigan, Western District), by Mark S. Pendery, Assistant District Counsel, Internal Revenue Service, Grand Rapids, for their outstanding efforts in bringing a complex tax matter to a successful conclusion. **Mr. LaVille** also successfully negotiated a settlement in a bankruptcy matter on a tax liability of approximately \$400,000.00 resulting in a recovery for the government of \$172,340.00.

**Jan M. Mann and Michael W. Magner** (Louisiana, Eastern District), by Peter B. Mastin, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, New Orleans, for their successful prosecution of several individuals in an arson case in which a Chevrolet dealership in Marksville, Louisiana was destroyed, resulting in excess of \$1 million in damage.

**Raymond M. Meyer** (Missouri, Eastern District), by James W. Nelson, Special Agent in Charge, FBI, St. Louis, and Sergeant Robert J. Ceriotti, Jr., St. Louis Police Department, for his outstanding legal skill and successful prosecution of a complicated asset forfeiture case involving the seizure of a 1990 Chevrolet Corvette owned by a convicted narcotic violator.

**Stephen Miller** (Virginia, Eastern District), by Peter F. Gruden, Special Agent in Charge, Drug Enforcement Administration, Washington, D.C., for successfully prosecuting several co-conspirators for drug distribution, money laundering, and related offenses, and for his special efforts in dismantling one of the most significant "crack" trafficking organizations in the Richmond metropolitan area.

**Jan E. Mitchell** (District of New Mexico), by Colonel Raul F. Barbara, Chief, General Litigation Division, Air Force Legal Services Agency, Headquarters, U.S. Air Force, Washington, D.C., for her excellent litigation skills in a difficult and lengthy trial involving allegations of employment discrimination and reprisal.

**Joseph Moore and Staff** (Missouri, Eastern District), by Jerome F. Lawrenz, Chief, U.S. Probation Officer, U.S. District Court, St. Louis, for conducting a legal training seminar on the Federal Tort Claims Act as it applies to U.S. probation officers carrying concealed weapons during the performance of their duties.

**Paul Newby** (North Carolina, Eastern District), by Laura A. Frederick, U.S. Probation Officer, U.S. District Court, Raleigh, for his excellent presentation at a recent meeting of the probation staff, and for his contribution to the success of the program.

**Salvador Perricone** (Louisiana, Eastern District), by William R. Schroeder, Chief, Legal Forfeiture Unit, Legal Counsel Division, FBI, Washington, D.C., for his excellent lecture on the use of hearsay, authentication and identification of hearsay statements at the Forensic Accounting/Expert Witness Program for Special Agents.

**Mary S. Rigdon** (Michigan, Eastern District), by John J. Kelleher, Chief Counsel, U.S. Secret Service, for her extraordinary litigative efforts leading to a complete defense verdict in a Federal Tort Claims Act case.

**Virginia Rushton** (Missouri, Eastern District), by Frederick W. Kramer, Director, Organized Crime Drug Enforcement Task Force, Office of the Deputy Attorney General, Department of Justice, for her valuable assistance and significant contributions to the 1993 National Conference of the Organized Crime Drug Enforcement Task Force in New Orleans.

**Alan Soloway** (District of Connecticut), by Thomas H. McGhie, Regional Inspector General for Investigations, General Services Administration, Boston, for his outstanding legal skill in bringing a complex civil case to a successful conclusion. Also, by J. Merrill Turner, Counsel, Defense Contract Management Command, Defense Logistics Agency, East Hartford, for obtaining a favorable settlement of a civil case which will resolve other cases without long, protracted litigation.

**P. Alan Sprowls** (Florida, Northern District), by Richard A. Easley, Special Agent in Charge, Office of Assistant Inspector General for Investigations, Defense Criminal Investigative Service, Atlanta Field Office, Smyrna, Georgia, for his successful prosecution of a complex procurement and bank fraud case, which included the sale of explosives without a license, and environmental violations. (This is the first major contract fraud case prosecuted in the Tallahassee Division of the Northern District of Florida.)

**Stephen D. Taylor** (District of Colorado), by Joyce N. Fleischman, Acting Inspector General, Department of the Interior, Washington, D.C., for his outstanding success in a reverse Freedom of Information Act suit, which has set a precedent in responding to FOIA requests by the public and the press on the findings of the Office of the Inspector General.

**Jonathan Tukul** (Michigan, Eastern District), by Dale W. Schuitema, Special Agent in Charge, Drug Enforcement Administration, Detroit, for bringing a recent trial to a successful conclusion, and for his special efforts in several other cases involving illegal distribution of pharmaceutical drugs.

**Gina S. Washington** (Alabama, Southern District), by Mike Willis, Postal Inspector, U.S. Postal Service, Mobile, for her outstanding legal skill and expertise in the successful resolution of a case based largely on circumstantial evidence, involving a postal employee who repeatedly filed fraudulent workers' compensation claims, falsified sick leave documentation, and stole mail.

**Gregory A. West** and **Kevin E. McCormack** (New York, Northern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their successful prosecution of "Operation SYR-RIC," an organized crime case involving three Title III and nine search warrant affidavits, and a myriad of other crucial tasks, resulting in seventeen guilty pleas thus far. **Joanne E. Mentel** provided valuable clerical support, including typing the affidavits, more than 75 consensually recorded transcripts, and all of the multipage transcripts of over 250 Title III recordings.

**Solomon Wisenberg** (Texas, Western District), by Louis J. Freeh, Director, FBI, Washington, D.C., for his success in obtaining the conviction of four defendants in a complex bank fraud case, and for providing outstanding leadership of the prosecutive team during the lengthy trial.

**Julie Ann Woods** (Michigan, Western District), by Charles R. Sekerak, Acting Inspector General, U.S. Railroad Retirement Board, Chicago, for her outstanding efforts in the successful prosecution of two individuals accused of defrauding the Railroad Retirement Board, and for successfully recovering over \$5,000.00 in fraudulently obtained benefits.

**SPECIAL COMMENDATION FOR THE MIDDLE DISTRICT OF FLORIDA**

**Mark Jay Krum, Assistant United States Attorney for the Middle District of Florida,** was commended by John J. Adair, Inspector General, Resolution Trust Corporation (RTC), Washington, D.C., for his successful prosecution of a Federal Deposit Insurance Corporation bank examiner and real estate investor and his father who were found guilty, following a 7-day jury trial, of making false statements and conspiring to defraud the RTC by inappropriately obtaining property through an RTC Affordable Housing Disposition Program auction. This case was of particular significance to the RTC due to the widespread abuse in this important program. Mr. Adair stated that the deterrent effect of this conviction will be felt nationwide and will help deserving buyers to obtain affordable housing without unfair competition from investors.

**Tomasa Guzman-Michael,** a paralegal specialist, was also commended for her outstanding contribution to the success of this case, as well as another case involving an RTC contractor and his wife who defrauded RTC by submitting false invoices for payment. Ms. Guzman-Michael was especially effective in scheduling and dealing with numerous government witnesses, and in preparing government trial exhibits. Her efforts contributed to the successful outcome of both cases.

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**SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF LOUISIANA**

**Steven J. Irwin, Greg Guidry, Dorothy Taylor, and James B. Letten, Assistant United States Attorneys for the Eastern District of Louisiana,** were commended by Louis J. Freeh, Director, FBI, Washington, D.C., for their invaluable contributions to the successful prosecution of Sherman A. Bernard, former Louisiana Insurance Commissioner, who pled guilty in April 1993, to committing extortion and conspiracy to commit extortion while serving as Insurance Commissioner. Mr. Bernard's Deputy Commissioner of Insurance also pleaded guilty in federal court to acts of extortion. The criminal charges arose out of an investigation focusing on the final years of Bernard's last term as Insurance Commissioner which ended on March 14, 1988, with the inauguration of a successor. The federal investigation revealed that Bernard misused the power and authority of his position as Insurance Commissioner by demanding campaign contributions and cash in exchange for the granting of licenses to sell insurance as well as other favorable official action. In August, 1993, Mr. Bernard was sentenced to 41 months imprisonment and a fine of \$75,000.

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**SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF LOUISIANA**

**John (Jack) R. Halliburton, Assistant United States Attorney for the Western District of Louisiana,** was commended by Barry D. Hersh, Assistant Associate Regional Attorney, Office of the General Counsel, Department of Agriculture, Little Rock, for obtaining a favorable settlement in a significant Federal Crop Insurance Corporation (FCIC) litigation. In Crop Hail Management v. FCIC, Civil No. 92-0929, plaintiff, a reinsurance company, sued FCIC for \$581,000 in damages for indemnities paid to three insureds in Louisiana for 1985 soybean crop losses. FCIC counterclaimed for the \$581,000 it fully reimbursed plaintiff for the indemnities paid under the terms of a reinsurance agreement. After payment of the indemnities to the insureds, an audit was conducted by the Office of Audit of the Department of Agriculture. The agency determined that the indemnities to the three insureds by Crop Hail were improperly paid. On November 5, 1993, FCIC filed a motion for summary judgment and supporting brief claiming that the insureds farmed on ineligible land and that Crop Hail improperly indemnified them in violation of the reinsurance agreement. Thereupon, plaintiff offered to pay FCIC an amount of \$150,000 in compromise settlement of the litigation. FCIC approved and agreed to the settlement proposal.

This case is a significant crop reinsurance matter wherein FCIC was able to recover money damages from a plaintiff reinsurance company, and is the first litigation recovery ever made by the agency. This litigation serves as a nationwide precedent for FCIC recovery of damages and has already been followed in another case in a different jurisdiction.

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#### **SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**Lee Altschuler and Joanne Swanson, Assistant United States Attorneys for the Northern District of California**, were commended by Victor J. Ferlise, Deputy to the Commanding General, U.S. Army Communications-Electronics Command, Department of the Army, Fort Monmouth, for their successful efforts in bringing about a favorable resolution of civil and criminal cases against Aydin Corporation, a large manufacturer of electronics equipment. The corporation and several of its employees were convicted of making false statements concerning the required testing of sophisticated radios used in Operation Desert Storm. The disposition of the matter included the imposition of \$1 million in criminal fines and civil penalties.

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#### **SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF CALIFORNIA**

**Steve Lapham and Chris Nuechterlein, Assistant United States Attorneys for the Eastern District of California**, were commended by John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms (ATF), Washington, D.C., for their outstanding efforts in successfully prosecuting ATF's wine fraud cases. These investigations, which began in 1989, disclosed that sales of grapes led to the mislabeling of millions of gallons of wine and involved several major California wineries and wine brokers. Director Magaw stated that an important part of ATF's mission is to suppress consumer deception and other prohibited trade practices in the alcoholic beverage industry. Not only was the prosecution of these cases a major accomplishment in and of itself, but it also exerted tremendous influence on United States wine producers, restoring consumer confidence in the integrity of California wine and in the ability of the Bureau to regulate this industry.

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### **HONORS AND AWARDS**

#### **Organized Crime Drug Enforcement Task Force (OCDETF) Awards**

The following Assistant United States Attorneys were presented awards at the 1993 Organized Crime Drug Enforcement Task Force (OCDETF) National Conference held recently in New Orleans, Louisiana:

**Melissa J. Annis, Assistant United States Attorney and Section Chief in charge of the OCDETF Unit for the Southern District of Texas**, received the OCDETF Exceptional Service Award for her outstanding efforts in maintaining a full inventory of OCDETF cases, including the Juan Garcia Abrego Organization, which involved extensive multi-ton and multi-million dollar narcotics and money laundering activities in Colombia, Mexico, and the United States. The Abrego cases have led to the disposition of several life sentences, numerous 30-year sentences, more than thirteen tons of cocaine seized, and over \$33 million in cash seized. Ms. Annis has also demonstrated excellent leadership in the coordination efforts of the Drug Enforcement Administration, the U.S. Customs Service, the Internal Revenue Service, the Immigration and Naturalization Service, the U.S. Marshals Service, the Texas Department of Public Safety, as well as the Houston County Sheriff's Department in the field and all of the customary enforcement offices in Washington.

**Michael Fagan, Assistant United States Attorney for the Eastern District of Missouri,** received the OCDETF Exceptional Service Award for his leadership role in successfully destroying one of the most violent drug trafficking organizations ever seen in the South Central OCDETF Task Force region. Mr. Fagan and his dedicated team of investigators and prosecutors targeted the Moorish Science Temple of America which has been documented to have distributed over one third of all of the cocaine in the St. Louis area. Power and control for the region was maintained by a ruthless pattern of violence as demonstrated by the twelve acts of homicide charged in the indictment. The six-month trial, in which 1,500 pieces of evidence and 180 witnesses testified, resulted in RICO convictions for all of the key members of the Temple. Through Mr. Fagan's outstanding efforts, this major organization was totally dismantled.

**Stephen G. Nelson, Assistant United States Attorney for the Southern District of California,** received a Special OCDETF Award for serving as OCDETF Coordinator for the Southwest Border Region since the OCDETF Program originated eleven years ago. During this period, Mr. Nelson has provided quality legal advice, an exceptionally high degree of professionalism, leadership, and coordination among the agents and attorneys of the Southwest Border, as well as personnel of other OCDETF offices located throughout the country.

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#### District Of Connecticut

Awards and special commendations were presented to the following Assistant United States Attorneys in the District of Connecticut:

**Leslie Cayer Ohta** was presented the Milton S. Camilleri Distinguished Service Award by Captain James P. O'Hara, President of the Narcotic Enforcement Officers Association, Wallingford, Connecticut, for her major contributions to the teaching programs of the Association, and for other valuable services in the law enforcement community. (In 1991, Ms. Ohta was named "Prosecutor of the Year" by the Connecticut Association of Chiefs of Police. See, United States Attorneys' Bulletin, Vol. 39, No. 8, August 15, 1991, at p. 211.)

**Michael E. Runowicz** was presented a plaque from the U.S. Postal Inspection Service for his successful prosecution of a postal employee who stole over \$477,000 in cash and \$224,000 in checks from a registered mail room at a post office facility. The postal employee was arrested four days later and approximately \$185,000 in cash was recovered. As a result of the investigation, five individuals were charged with, and convicted of, federal criminal offenses. Approximately \$302,000 has been recovered and accounted for, including the seizure and forfeiture of an automobile, furniture, and jewelry that had been acquired with the proceeds of the theft.

**Ronald Apter and Mark Califano** were presented plaques of appreciation from Robert Weaver, Special Agent, U.S. Secret Service, for their outstanding prosecutive efforts in a well publicized fraudulent ATM case which involved the use of fraudulently obtained bank account information to produce counterfeit ATM cards.

**H. Gordon Hall, Amy Lederer, and James Genco** were awarded the Inspector General's Integrity Award by the Office of Inspector General of the Department of Health and Human Services, for their successful prosecution of a Medicare fraud case. Assistant United States Attorney Hall obtained an injunction pursuant to 18 U.S.C. §1345 freezing the assets of the defendant until the conclusion of the criminal prosecution. Assistant United States Attorneys Lederer and Genco obtained convictions of the corporation and its principal on 623 counts of mail fraud.

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**District Of Arizona**

**Reese V. Bostwick, Assistant United States Attorney for the District of Arizona**, was presented the Arizona Game and Fish Commission Award of Excellence by Larry Taylor, Chairman, Arizona Game and Fish Department, Phoenix, for his outstanding efforts in conservation law enforcement in the State of Arizona. Mr. Bostwick was referred to as "prosecutor deluxe for wildlife" and "a tireless advocate to the prosecution of those who violate wildlife laws."

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**Northern District Of Georgia**

**James R. Harper III, Assistant United States Attorney for the Northern District of Georgia**, was presented an Award of Excellence by Garfield Hammond, Special Agent in Charge, Drug Enforcement Administration, Atlanta, for successfully prosecuting the "Southern Light" marijuana conspiracy. The investigation and prosecution lasted over two years, involved nearly 200 search warrants, and resulted in approximately twenty-five indictments with plea and/or conviction disposal of more than forty-five defendants between May, 1993 and January, 1994.

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**Western District Of Pennsylvania**

**Mary McKeen Houghton, Assistant United States Attorney for the Western District of Pennsylvania**, was presented the 1993 Award of Achievement by the Allegheny County Bar Association for her leadership role as Chairperson of the Bankruptcy and Commercial Law Section, and for her outstanding contribution to the bar and the community. Under Ms. Houghton's leadership, the Section created and presented a full-day symposium on advanced bankruptcy issues, which was attended by over 225 bankruptcy and commercial litigation practitioners, and for which all four bankruptcy court judges served as panel members. In addition, the Section produced a monthly newsletter, which digested local bankruptcy decisions and pertinent legislative matters; formed a new State Court Committee to address issues related to state court and commercial practice; and made significant financial contributions and donated its members' time to support the Bar Association's pro bono service programs. Ms. Houghton also served as one of four section members who presented a series of lectures during 1993 on "Ethical Issues in Bankruptcy Practice" as part of Pennsylvania's Continuing Legal Education mandate.

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**DEPARTMENT OF JUSTICE LEADERSHIP**

**Deputy Attorney General**

On February 23, 1994, Attorney General Janet Reno announced that President Clinton intends to nominate Jamie S. Gorelick as Deputy Attorney General of the Department of Justice. Ms. Gorelick is General Counsel of the Department of Defense, where she oversees more than 6,000 lawyers and advises the Secretary and Under Secretary in such areas as international and intelligence issues, investigations, litigation and personnel and fiscal matters. Her responsibilities also include oversight of military Judge Advocates and legal advice to the Inspector General's office and its investigative agency, the Defense Criminal Investigative Service. Attorney General Reno said, "Ms. Gorelick is an accomplished lawyer and a proven leader. She will provide this Department with the management skill and legal talent needed to guide the critical divisions and components that are under the direction of the Deputy Attorney General."

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### Acting Deputy Attorney General

On February 10, 1994, Attorney General Janet Reno designated Jo Ann Harris, Assistant Attorney General for the Criminal Division to serve as Acting Deputy Attorney General. Ms. Harris will continue to perform her duties as head of the Criminal Division.

### United States Attorneys

On February 11, 1994, **Janice McKenzie Cole** was Presidentially appointed as United States Attorney for the Eastern District of North Carolina. Ms. Cole took the oath of office on February 17, 1994.

On February 25, 1994, **Mark T. Calloway** was Presidentially appointed as United States Attorney for the Western District of North Carolina.

On February 22, 1994, **Robert C. Bundy** was Presidentially appointed as United States Attorney for the District of Alaska.

A complete list of United States Attorneys as of February 28, 1994 appears at p. 118 of this Bulletin. If you have any questions, please call the Executive Office for United States Attorneys, at (202) 514-2121.

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## ATTORNEY GENERAL HIGHLIGHTS

### Balanced Budget Amendment

On February 15, 1994, Attorney General Janet Reno testified before the Committee on Appropriations of the United States Senate concerning S.J.Res. 41, the Balanced Budget Amendment. In her testimony, the Attorney General stated, "If the Balanced Budget Amendment took effect today, and we were asked to cut almost \$2 billion from our discretionary spending -- the effects would be immediate, and they would be dire. We would feel those cuts in the very areas we are now trying to strengthen in order to win back our streets, schools and homes against escalating crime and violence. Put simply, the Balanced Budget Amendment would put at risk the Justice Department's ability to fight crime. Passage of the Amendment would mean sharp reductions in all of the Department's crime fighting units. Every single component of the Department -- the FBI, the DEA, INS, the U.S. Attorneys' offices, the U.S. Marshal's office, the Bureau of Prisons, and other federal prosecutors -- has worked hard to meet the President's FY 1995 budget. To cut them further -- as the Balanced Budget Amendment would require -- would not only prevent us from meeting our ambitious goals, but might result in a significant retreat from our current capabilities."

Assistant Attorney General Walter Dellinger of the Office of Legal Counsel also testified before the Committee on February 16, 1994. Mr. Dellinger's testimony addressed the issue that is of central concern to the Department of Justice: the implications of such an amendment for the constitutional structure of our government and for the status of our Constitution as positive law. Should the measure be enforced by the Judiciary, it would produce an unprecedented restructuring of the balance of power between the branches of government. If it proves unenforceable, it would create a quite different, but equally troubling hazard: by writing an empty promise into the fundamental charter of our government, it would breed cynicism about our government and diminish respect for the Constitution of the United States and for the rule of law.

If you would like a copy of either testimony, please call the United States Attorneys' Bulletin staff, at (202) 514-4633.

[NOTE: On March 1, 1994, the United States Senate killed the proposed constitutional amendment by a vote of 63 to 37 -- four votes short of the two-thirds necessary to amend the Constitution. The future of the Amendment in the House of Representatives is uncertain.]

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#### **Attorney General Reno Comments On The CIA Espionage Case**

On February 22, 1994, Attorney General Janet Reno stated that the arrest of a CIA official and his wife on charges of conspiracy to commit espionage was the result of an excellent investigation by the Federal Bureau of Investigation that resulted from an extensive joint effort by the FBI and the Central Intelligence Agency. Ms. Reno said, "The FBI is to be commended for its tenacious efforts and the CIA for its complete support no matter where the difficult trail led. As the filed charges show, it is an extremely serious espionage case."

FBI Director Louis J. Freeh said, "FBI agents worked doggedly on this case -- not for months but for years -- with the CIA's unwavering assistance every step of the way."

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#### **The Waco Tragedy**

On February 26, 1994, Attorney General Janet Reno issued the following statement concerning the Waco verdict:

The jury in this case has spoken after seven weeks of trial. It is clear that the jury recognized in its verdict that the killings of the four ATF agents were not justified. The findings that these deaths were not justified makes clear that the government had a responsibility to act. The shooting of law enforcement officers doing their duty can never be tolerated. I am grateful for the excellent and professional efforts of the prosecutors Ray and LeRoy Jahn, Bill Johnston, John Phinizy and John Lancaster, and for the splendid efforts of the Texas Rangers and the Texas Department of Public Safety. This closes another chapter in the Waco tragedy.

[NOTE: The prosecutors referred to in Ms. Reno's statement are Assistant United States Attorneys for the Western District of Texas (San Antonio and Waco offices). Mr. Lancaster is a trial attorney in the Terrorism and Violent Crime Section of the Criminal Division, Department of Justice, Washington, D.C.]

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### **DEPARTMENT OF JUSTICE HIGHLIGHTS**

#### **World Trade Center**

On March 4, 1994, after a five-month trial and six days of deliberation, four defendants were convicted by a jury of eight women and four men in Federal Court for their participation in the worst terrorist attack on United States soil -- the February 26, 1993, bombing of the World Trade Center in New York City which killed six people and injured over 1,000.

The evidence, which included 1,003 exhibits and testimony from 207 witnesses, showed that the defendants -- Mohammed Salameh, Nidal Ayyad, Mahmud Abouhalima, and Ahmad Mohammad Ajaj -- conspired to detonate an explosive device in a garage area underneath the World Trade Center causing hundreds of millions of dollars in damage in addition to the deaths and injuries. The defendants, who were convicted on a wide variety of charges, including conspiracy, explosive destruction of property, interstate transportation of explosives, assault upon a federal officer, and using or carrying a destructive device during a violent crime, face maximum sentences of life in prison without parole. Sentencing is scheduled for May 4, 1994.

At a press conference following the jury's decision, Mary Jo White, United States Attorney for the Southern District of New York, said, "This verdict should send a clear and unmistakable message that we will not tolerate terrorism in this country." Ms. White also praised the efforts of the federal, state and local law enforcement agencies involved in the investigation and prosecution of the case.

The Assistant United States Attorneys who prosecuted the case are: Gilmore Childers, Henry J. DePippo, Lev L. Dassin, and Michael J. Garcia. Lillie Grant provided paralegal assistance.

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#### Communications With Represented Persons

On March 3, 1994, Attorney General Janet Reno issued a proposed rule on contacts with represented persons to be published for comment in the Federal Register. A copy of the press release is attached at the Appendix of this Bulletin as Exhibit A.

The Attorney General stated that her office, the Office of the Deputy Attorney General, and the Office of the Associate Attorney General worked closely with members of the Attorney General's Advisory Committee of United States Attorneys, and consulted with federal and state judges, bar counsel, organized bar representatives, legal ethicists, defense counsel, and other interested parties. Ms. Reno believes that this proposal represents a balanced and reasonable approach toward accommodating the fundamental principle served by Rule 4.2 of the Model Rules of Professional Conduct without adversely affecting legitimate law enforcement efforts. She further believes that this proposal reflects the current practice in an overwhelming majority of districts throughout the country and is consistent with most judicial precedents. The essential features of the proposal are:

- In pursuing criminal and civil law enforcement investigations, Department of Justice lawyers and agents may make, or cause to be made, contacts with any individuals, whether or not represented by counsel, for the purpose of developing factual information, until these individuals are arrested, charged with a crime or made parties to a civil law enforcement action.
- The proposal would prohibit Department of Justice attorneys at any time from attempting to negotiate plea agreements, settlements, statutory or non-statutory immunity agreements, or other dispositions of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with an individual who is known to be represented by counsel without the consent of the attorney.
- Once a represented person is arrested or indicted, the regulations preclude, with certain narrow exceptions, all contacts with that person without the consent of counsel.

• The principal exception is where the defendant voluntarily and knowingly initiates contact with the Department of Justice attorney in which case the regulation requires the Department of Justice attorney to go before a district court or magistrate judge for approval or appointment of separate counsel for the defendant.

• The proposal clearly provides that, with respect to employees of organizations, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees does not suffice to establish that those employees are individually represented under the regulation.

• The proposal provides that if an employee of a represented organization is a "controlling individual" -- that is, if he or she is known by the Department of Justice attorney to be participating as a decision maker in the determination of the organization's legal position in the underlying proceeding or investigation -- then a communication with that employee qualifies as a communication with the organization.

• The proposal explicitly provides that the Office of Professional Responsibility shall have exclusive authority to investigate alleged violations of the regulation. The proposal is intended to preempt the application of inconsistent state and local laws or rules to the extent they relate to contacts by Department of Justice attorneys with represented individuals.

• In addition to the proposed regulation, a new section of the United States Attorneys' Manual has been proposed that would, among other things, limit overt contacts by Department of Justice attorneys with represented targets of a criminal or civil enforcement investigation without the consent of counsel. This is subject to certain enumerated exceptions, including prior authorization by a high-level official, including a United States Attorney, that exceptional circumstances exist and that direct communication with a represented target is necessary for effective law enforcement.

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## **CRIME ISSUES**

### **National Anti-Violent Crime Initiative**

On March 1, 1994, an Executive Summary of the National Anti-Violent Crime Initiative was issued by the White House to identify crime problems, develop targeted strategies, build partnerships to implement them and use federal resources to bring this national epidemic of violence under control. The memorandum discusses the scope of the problem, utilization of federal and local resource, federal law enforcement strengths, implementation of strategy, and the framework of the Anti-Violent Crime Initiative. A copy is attached at the Appendix of this Bulletin as Exhibit B.

First, the Department of Justice will create a new Violent Crime Section of the Criminal Division to assist with the coordination of the national violent crime strategy. In part, it will disseminate information on successful strategies and deploy response teams of prosecutors to places that request them.

Second, United States Attorneys will appoint violent crime coordinators and will convene summits of all pertinent federal, state, and local law enforcement agencies within their districts to discuss the program. Together, they will form a violent crime working group or identify an existing group of like membership which is already focussing on violent crime.

Third, the working group will conduct a survey to identify the most critical violent crime problems facing their community that are susceptible to a coordinated inter-governmental attack, such as gang violence; prioritize these problems; determine the law enforcement programs and resources currently dedicated to these problems; and assess the results achieved by existing efforts.

Fourth, the Department of Justice, working in concert with the working groups, will use the results from the surveys to formulate the general parameters and goals of a national violent crime strategy. The districts will then create a plan to implement the strategy. Under their plan, operational task forces will be created to carry out day-to-day investigations. The groups will determine what federal law enforcement tools are necessary to deal with their identified problems and to decide which types of cases will be prosecuted under state or federal statutes.

Finally, the Criminal Division, where requested, will dispatch teams of federal prosecutors who are experienced in violent crime and enterprise-based prosecutions to assist authorities in developing and carrying out their enforcement programs.

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#### **Implementation Of The National Anti-Violent Crime Initiative**

In compliance with the Administration's directive, Attorney General Janet Reno issued a memorandum to all United States Attorneys concerning the implementation of the Anti-Violent Crime Initiative. A copy (without attachments) is attached at the Appendix of this Bulletin as Exhibit C.

The Attorney General stated that the problems posed by violent crime are difficult, but not intractable, and she is confident that, working together in a true partnership of federal, state and local law enforcement, we can make a substantial contribution toward reducing its devastating impact on our communities.

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#### **Resolution Of The Office Of Investigative Agency Policies**

FBI Director Louis J. Freeh, Office of Investigative Agency Policy, Department of Justice, issued a Resolution as part of the Attorney General's crime initiative.

Director Freeh stated that on a daily basis, the men and women of law enforcement fight courageously against violent criminals. The critical partnership in this effort is one between federal investigators and prosecutors and their state and local counterparts. To assist that partnership and to benefit the American people, we must consolidate and focus our collective efforts. This Resolution strengthens that partnership by maximizing the application of federal resources to complement and enhance the valiant and tireless efforts of those state and local authorities. State and local authorities best understand the problems of violence confronting their communities as well as the most efficient use of resources to address them. A copy of the Director's Resolution is attached at the Appendix of this Bulletin as Exhibit D.

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**Brady Handgun Violence Prevention Act**

On February 28, 1994, Jo Ann Harris, Assistant Attorney General for the Criminal Division, issued a memorandum to all United States Attorneys providing general information about the Brady Handgun Violence Prevention Act and the new prosecutorial opportunities which it creates. Ms. Harris explained that as of February 28, 1994, the "interim provisions" of the Brady law will obligate law enforcement officials in over thirty states, for the first time ever, to conduct background checks before someone can receive a handgun from a gun dealer. These interim provisions provide affected law enforcement officials five business days to conduct background checks. They will remain in effect until a national instant background check system is declared operational by the Attorney General, which must take place on or before November 30, 1998.

Assistant Attorney General Harris also discusses implementation of the interim provisions, some of the key provisions, crimes and the existing laws, investigative jurisdiction, and law enforcement initiatives. A copy of the memorandum is attached at the Appendix of this Bulletin as Exhibit E.

If you have any questions or would like further information, please call the Terrorism and Violent Crime Section of the Criminal Division, at (202) 514-0849.

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**"Three Strikes" Proposal**

On March 1, 1994, Jo Ann Harris, Assistant United States Attorney for the Criminal Division, testified before the Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, U.S. House of Representatives, concerning the "three strikes" proposal to require life imprisonment for persons convicted of three serious violent felonies. Ms. Harris explained that the proposal aims at the truly dangerous offenders in our society yet does not sweep so broadly as to include persons convicted of crimes that, while serious enough for significant sentences, should not result in mandatory life imprisonment. The program emphasizes both punishment and prevention and includes the following other major components:

- The Brady bill, now law, which will help save lives by keeping guns out of the hands of convicted felons;
- 100,000 more cops on the streets, engaged in community policing, trained to prevent crimes as well as to arrest criminals;
- Boot camps and other methods of ensuring the certainty of punishment for young offenders;
- A ban on the sale and manufacture of military-style assault weapons;
- An expansion of the federal death penalty;
- Provisions to keep guns away from children;
- Drug treatment for hard-core and crime-committing addicts;
- A safe schools program to combat crime, violence, and drugs in our children's schools.

Ms. Harris concluded that this proposal is a recidivism law: it is aimed at the offender who has had two chances to get "straightened out" but just cannot -- or will not -- end his violent behavior. Thus, a defendant who committed several bank robberies and then was arrested and prosecuted for all of them would be subject to the sentencing range established by tough sentencing guidelines, but not to mandatory life imprisonment under the amendment. Committing a serious violent crime after conviction for a prior such offense -- particularly when this pattern is established on more than one occasion -- evinces a greater degree of culpability and incorrigibility so as to warrant mandatory life imprisonment. An offender who engages in this conduct has demonstrated that he or she is not likely deterred by a past conviction (and in many cases a period of incarceration) from committing additional offenses. Ms. Harris further stated, "We need to be both tough and smart in our efforts to fight crime, and we believe the above program, along with the 'three strikes' proposal, will contribute substantially to making America a better and safer place in which to live."

If you would like a copy of the testimony, please call the United States Attorneys' Bulletin staff, at (202) 514-4633.

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#### Firearm Violence Statistics

On February 26, 1994, the Bureau of Justice Statistics of the Office of Justice Programs issued a report stating that while the overall violent crime rate decreased during the last decade, the rate of offenses committed with pistols and revolvers rose from 9.2 percent in 1979 to 12.7 percent in 1992.

According to a recent National Crime Victimization Survey, from 1987 through 1992 there was an annual average of 858,000 rapes, robberies and assaults with firearms of all types. The FBI reported 16,000 firearm murders during 1992, and the number of all violent crimes with firearms reported to the FBI grew 55 percent from 1987 through 1992 -- from 365,709 to 565,575.

Young people from 16 through 19 years old were the most frequent victims of firearm violence. During 1992, this age group had a per capita firearm victimization rate 21 percent higher than those 20 through 24 years old; three times the rate for those aged 35-49; almost eight times higher than those aged 50-64; and 15 times higher than those 65 years old or older. Other statistics from the report entitled "Selected Highlights on Firearm Crimes and Victimitizations" are:

- Between 1987 and 1992 there were 415 law enforcement officers murdered -- 91 percent with firearms -- 73 percent handguns, 19 percent rifles and 8 percent shotguns (excluding those cases in which the officer's own gun was used).
- In a nationally representative sample of state prison inmates, 16 percent said they were carrying a firearm during the commission of the offense for which they were serving time, and one-half of those said they fired the weapon during the crime.
- Among state prison inmates with a prior adult criminal record who possessed handguns, 23 percent said they bought the weapon from a retail store.
- An estimated 5,000 murderers who were serving time in a state prison for committing a crime with a handgun had purchased their gun in a store or gun shop despite having had a prior record.
- More than 50 percent of the prison inmates who obtained a handgun illegally said they did so to avoid a background check or a waiting period.

• From 1987 through 1991, the number of firearm homicides among young people 15 to 19 years old grew 66 percent for white females, 32 percent for black females, 108 percent for white males, and 137 percent for black males.

Additional information and other publications may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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## **DRUG ISSUES**

### **1994 National Drug Control Strategy**

On February 9, 1994, President Clinton and Lee Brown, Director, Office of National Drug Control Policy, unveiled the Administration's 1994 Drug Strategy and the largest federal drug budget ever. The 1994 Strategy --

- Focuses on the most difficult facet of America's drug problem -- hardcore drug use and the violence that surrounds it -- the heart of the Nation's current drug crisis.
- Proposes a new \$355 million treatment initiative to get 74,000 hardcore addicts off the streets and into treatment where they belong.
- Calls for passage of a tough and smart crime bill that will help treat an additional 65,000 addicts in the criminal justice system.
- Calls for passage of the Health Security Act to make the first-ever guarantee of drug treatment services available to the more than 58 million Americans who have no coverage at all for some time each year.
- Establishes a goal to reduce hardcore drug use by an average annual rate of 5 percent, and the number of casual drug users at an average annual rate of 5 percent.
- Strengthens our drug prevention efforts and maintains the strong "no use" message required to keep children from experimenting with drugs in the first place.
- Proposes an increase of \$191 million in school-based drug and violence prevention -- Safe and Drug-Free Schools.
- Rejects the legalization of illegal drugs as a potential answer to the drug problem.
- Calls for a national meeting of substance abuse prevention experts to help turn children around who have a new-found interest in certain illegal drugs.
- Recognizes the need to empower communities with an integrated plan of education, prevention, treatment and law enforcement -- and explicitly rejects the false choice between law enforcement and treatment programs.
- Proposes a dramatic increase in community policing programs to help neighborhood residents take back their streets.

- Proposes an overall FY 1995 budget increase of more than 300 percent for state and local law enforcement.
- Goes hand-in-hand with the Administration's other community-based efforts, such as National Service and Empowerment Zones and Enterprise Communities -- to ensure that crime, drugs and violence are addressed at the grass roots level.
- Expands our international drug control efforts by not simply waiting for drugs to come to our border, but by going right to the source countries where illegal drugs are produced.

In his Message to Congress, President Clinton said, "We must prevent drug use by working to eliminate the availability of illicit drugs; treating those who fall prey to addiction; and preventing all our citizens, especially our children, from experimenting in the first place. This is the plan we offer to all Americans."

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## **ENVIRONMENT AND NATURAL RESOURCES**

### **Acting Assistant Attorney General Offers New Partnership With United States Attorneys**

On March 2, 1994, Lois J. Schiffer, Acting Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, issued a memorandum to all United States Attorneys reaffirming her previous commitment to work with all United States Attorneys to enforce federal environmental laws vigorously, defend environmental cases when government agencies are sued, and carry out the government's trust responsibility for Indian Tribes.

In order to enhance civil and criminal enforcement and to better coordinate case activities with the United States Attorneys, Ms. Schiffer has requested Division staff to keep the United States Attorneys informed of all Division activities in their districts, and in particular, to the best extent possible, any major and/or controversial litigation or settlements in their districts before any action is undertaken. As a starting point, Ms. Schiffer has established a "hotline" to respond to United States Attorneys' questions and problems, including any bottlenecks that they may be experiencing in working with the Environment and Natural Resources Division. To resolve any problems with Division staff, of any nature whatsoever, please call Ignacia Moreno, Special Assistant to the Acting Assistant Attorney General, at (202) 514-5243. In addition, bi-weekly reports, prepared by the Division's Section Chiefs, are available. If you are interested in receiving these reports, please advise Ms. Moreno.

Ms. Schiffer stated that she looks forward to an open and productive relationship with the United States Attorneys, and welcomes any ideas on how we can further open up the lines of communication.

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### **Agreement Reached In High Priority Superfund Case**

On February 25, 1994, the Department of Justice announced that unrecovered response and oversight clean-up costs for one of the nation's highest priority hazardous waste sites near Flint, Michigan will be paid by ninety-three companies. Much of the clean-up work has already been done at Berlin & Farro Liquid Incineration Site in Swartz Creek, Michigan, listed as the 13th highest priority superfund site in the 1983 National Priorities List. Under two previous agreements, many of the companies have spent more than \$14 million over the last ten years to clean up the facility. The facility operated for seven years and in 1980 filed for bankruptcy.

The consent decree filed in the U.S. District Court in Flint, Michigan, resolved a suit filed in 1989 by the Department on behalf of the EPA, and also litigation among the settling parties. The companies who used the facility agreed to pay more than \$2 1/2 million to the United States for the remaining unrecovered clean-up cost and interest incurred by the Environmental Protection Agency (EPA). Fifteen of the major users agreed to pay EPA's future costs for overseeing the clean-up of soil and sediments contaminated with volatile organic chemicals such as vinyl chloride, dichlorethene and benzene, and the extraction and treatment of contaminated groundwater. This final stage of the clean-up is already underway. The 85 *de minimis* parties, those that contributed less than 105,000 gallons of waste to the site, paid their fair share of the costs and will not be responsible for future payments. Another company, Laro Coal & Iron, did not join the settlement. The Department will continue to pursue litigation against Laro for the remaining nearly half million dollars of unrecovered clean-up costs.

Lois Schiffer, Acting Assistant Attorney General of the Environment and Natural Resources Division, stated, "This agreement demonstrates the United States' commitment to reach superfund case settlements which minimize litigation and transaction costs, and completely settle the liability of businesses and local governments that have a smaller role in the superfund clean up."

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#### **Major Parrot Smuggling Conviction In The Western District Of Texas (Austin)**

On February 18, 1994, the Department of Justice announced that, after a week-long trial and three and a half days of jury deliberations, an Austin, Texas exotic bird dealer was convicted of illegal possession, transportation, and attempted sale of seventy baby yellow-naped Amazon parrots, a bird native to Central America and protected by international law with a market value of more than \$1,000 each. The bird dealer was apprehended by Austin police during a routine stop for a moving violation when the arresting officer discovered the featherless parrots, many of which were less than four weeks of age, in the rear of the defendant's vehicle. The defendant claimed that he had bred the exotic parrots in captivity at his aviary, but the joint investigation by the U.S. Fish and Wildlife Service and U.S. Customs Service showed that the parrots were actually smuggled into the United States and that the aviary was a front for the defendant's unlawful importations.

Due to declining populations in the wild, federal law now bans the importation of these and other exotic birds under the Wild Bird Conservation Act, passed by Congress in 1992. The Bird Act imposed a moratorium on the import of rarer species of birds protected under the convention of International Trade in Endangered Species of Flora and Fauna (CITES), under which the yellow-naped parrots are protected. Federal law also limits the importation of exotic birds to curb the spread of a devastating avian disease. Exotic Newcastle Disease, a destructive avian disease lethal to domestic poultry flocks, has been eradicated from the United States. However, the disease is often carried by imported exotic birds and can spread rapidly once in the United States. Smuggled birds pose a serious threat because they are not quarantined as required by law, allowing the disease to enter the United States undetected. A major epidemic of Exotic Newcastle Disease in southern California in the early 1970s resulted in the destruction of 12 million birds, mostly laying hens, at a cost to U.S. taxpayers of \$56 million. Since then, the Department of Agriculture spends an average of \$1 million each year to stop outbreaks resulting from smuggled birds.

The defendant was taken into custody and was refused bail because he was considered a flight risk. He faces a statutory maximum of five years imprisonment and a \$250,000 fine. Sentencing is scheduled for April 28, 1994. The parrots are being held in cages until the final disposition of the case, at which time they will probably be sold at auction to exotic bird breeders and private pet owners. Inasmuch as the birds could not now survive outside captivity, they cannot be returned to their natural habitat.

The attorneys who handled the successful prosecution of this case are: Gerald C. Carruth, Assistant United States Attorney, Western District of Texas (Austin office) - (512) 482-5858 - and Trial Attorneys Kevin M. Plunkett and John T. Webb with the Wildlife and Marine Resources Section of the Environment and Natural Resources Division, Department of Justice - (202) 272-9883.

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## **CIVIL RIGHTS DIVISION**

### **Progress Report**

With the active involvement of the Attorney General and the Associate Attorney General, 1993 was a year of high activity and high achievement for the Civil Rights Division. Four of the seven litigating sections filed a record number of cases or launched a record number of investigations. They were the Housing and Special Litigation Sections, and the two sections that enforce the Americans with Disabilities Act (ADA). Priority concerns of the Justice Department were reflected in some of the following actions:

- The first employment discrimination case under ADA to provide disabled workers with equal retirement and disability benefits.
- The first lawsuits against dentists who refused to treat AIDS victims.
- The first settlement forcing City Halls to make physical alterations to accommodate the handicapped.
- A major voluntary compliance (Shawmut) to end and correct mortgage lending discrimination. (This also marked the first joint investigation with the Federal Trade Commission.)
- Continued challenges to gender discrimination in state-financed education (Virginia Military Institute and The Citadel).
- A record housing discrimination settlement (Detroit) involving the Department's first use of testers.
- Agreements to bring eighteen Mississippi county jails up to Constitutional standard. Four will be closed. (An investigation continues into several disputed jailhouse suicides.)
- A reinvigorated investigation into the Crown Heights (Brooklyn, N.Y.) incident in which two people were killed.
- The civil rights trial of Los Angeles police officers accused of beating Rodney King.
- A major Supreme Court victory (Harris Forklift) establishing the principle that it is unnecessary to prove psychological injury in a sex harassment case.
- Support of the creation of two minority districts in Louisiana despite the adverse effects of Shaw v. Reno.
- The filing of a complaint against banks that discriminated against Native Americans.

- Support for legislation to protect abortion clinic access.
- The first case litigated under the Civil Rights of Institutionalized Persons Act (CRIPA) requiring a facility for developmentally disabled persons in Tennessee to remedy substandard living conditions.

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#### **Empire State Building More Accessible For People With Disabilities**

On March 3, 1994, the Department of Justice announced that people with disabilities will have an easier time visiting the Empire State Building in New York City. The agreement resolves a complaint filed with the Department alleging that the 102-story skyscraper failed to provide proper access, in violation of the Americans with Disabilities Act (ADA), to the public areas of the building. Under Title III of the ADA, existing places of public accommodation, like the Empire State Building, must remove architectural barriers where it is readily achievable to do so.

The agreement mandates changes to the lobby, entrance, and observation decks, but does not cover any privately leased office space in the building. Under the agreement the owners and operators of the New York landmark will install automatic doors at the Fifth Avenue entrance and provide adequate curb cuts at that location; lower portions of the tourist ticket counter and lobby concierge desk to make them accessible to people who use wheelchairs; renovate the 86th and 102nd floor observation decks by providing ramps, installing accessible "periscopes", modifying the rest rooms, and lowering the public telephones and drinking fountains; adjust the elevator control panels so that they are accessible to people who use wheelchairs and people who are visually impaired; and train their employees on the location of accessible routes and amenities in the building.

Attorney General Janet Reno stated, "No persons with disabilities should ever be denied the chance to view the wondrous historic sites that this country offers. Our Department's continued vigorous enforcement of the ADA will ensure that many more historic sites will become accessible."

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#### **Sixth Housing Discrimination Case Settled In The Detroit Area**

On February 17, 1994, the Department of Justice announced that a suburban Detroit apartment complex will pay \$150,000 for allegedly discriminating against blacks seeking apartments. In addition to paying \$150,000 to compensate the victims of discriminatory practices, the owners of the 136-unit complex must also advertise to locate possible victims of discrimination and institute a training program on fair housing. This settlement resolves the sixth case brought in the Detroit metropolitan area under a nation-wide fair housing testing program. The six cases alleging violations of the Fair Housing Act to date have resulted in settlements totalling \$750,000 for victims of housing discrimination.

Under the testing program, trained pairs of black and white "testers" posing as prospective tenants inquire about available apartments to detect unlawful rental practices. According to the complaint in this case, the owners of an apartment complex in Fraser, Michigan falsely informed blacks that apartments were unavailable while telling whites that they were available.

James P. Turner, Acting Assistant Attorney General for the Civil Rights Division, said, "Our suits should send a message to every housing provider in this country that the Justice Department will continue to prosecute violators of fair housing laws."

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**Second Largest Employment Discrimination Case Settled In New Jersey**

On February 17, 1994, the Department of Justice announced that the State of New Jersey will pay over \$7 million for allegedly discriminating against blacks and women. The settlement, the second largest obtained by the Justice Department in an employment discrimination case against a state or local government, resolves a suit filed in 1988. The suit alleged that New Jersey engaged in discriminatory testing and selection practices on the basis of race and sex in violation of Title VII of the Civil Rights Act of 1964.

According to the complaint, New Jersey's Department of Personnel administered state-developed written tests that disproportionately excluded minorities from consideration for employment and that were not predictive of successful job performance. The results of the tests, which were used for entry-level law enforcement and corrections positions, were relied upon by the state, counties and municipalities to fill jobs for entry-level correction, police and sheriff's officers. The United States also alleged that the state unfairly excluded women from entry-level police jobs by administering a physical agility test that women failed in disproportionate numbers and that was not related to success on the job. Finally, the United States claimed that New Jersey discriminated against female applicants for correction officer positions by creating "male only" lists from which to hire.

In settling the case, the state has agreed to use only tests and other selection devices that are demonstrably relevant to successful job performance and comply with federal law. The state has also changed its gender-restricted assignment policies for correction officer jobs to comply with federal law and has stopped using male-only lists to hire correction officers. In addition, the state will distribute the \$6.5 million in the form of back pay to black and female applicants adversely affected by the alleged discriminatory practices and provide priority offers of employment to approximately 450 victims. A \$625,000 fund will be set up to provide retroactive pension benefits to those individuals who receive priority employment and who successfully complete a probationary period for the job they receive. In a related case, the state also agreed to pay \$350,000 to several private plaintiffs who claimed they were victims of discrimination.

Acting Assistant Attorney General James P. Turner stated, "The Justice Department is committed to the vigorous enforcement of our anti-discrimination laws. We are pleased that our litigation and settlement with New Jersey has torn down these artificial barriers to employment and will provide relief to those aggrieved."

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**Status Report Of The Investigation Of Mississippi Jails**

On March 1, 1994, the Department of Justice announced that Jones County Jail in Laurel, Mississippi, one of eighteen Mississippi jails under investigation following a series of prisoner suicides over the past five years, was found unfit for human habitation. Launched pursuant to the Civil Rights of Institutionalized Persons Act, the investigations revealed that the conditions at all of the jails failed to meet constitutional standards. A separate investigation into the individual suicides remains a pending matter within the Criminal Section of the Civil Rights Division.

In the case of Jones County Jail, the Justice Department criticized the facility for its pervasive filth, serious state of longstanding neglect and significant deterioration. That investigation, which began in May 1993, consisted of on-site inspections, reviews of the jail's records and interviews with inmates and staff. In September, after discovering the jail's deficiencies, the Justice Department intervened in a private lawsuit filed by inmates alleging unconstitutional conditions of confinement. Under a consent decree filed in U.S. District Court in Hattiesburg, Mississippi, Jones County will construct a new jail by March, 1995, train its staff, develop better fire safety procedures, ensure adequate medical care, create safe and sanitary conditions, and provide appropriate security and supervision for the inmates. It also mandates the county to implement a suicide prevention program in the jail.

Acting Assistant Attorney General James P. Turner, of the Civil Rights Division, said, "When conditions are as deplorable as our investigation revealed, we must act to correct them. I applaud the cooperative efforts of both federal and local officials in reaching this agreement."

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### **ANTITRUST DIVISION**

#### **Department Of Justice Approves Plan To Form Purchasing Group To Buy Health Care Benefits**

The Antitrust Division of the Department of Justice approved a plan proposed by San Francisco Bay Area businesses to seek health care coverage at a lower price. The Bay Area Business Group on Health is a non-profit corporation which will ask several health maintenance organizations (HMOs) to bid on two standard benefit plans and negotiate prices. Sixteen California companies have expressed interest in joining the purchasing group. This action is part of an Administration effort, unveiled in September, to encourage innovative arrangements to make health care available to more employees at a reasonable cost. The Justice Department is available to state its enforcement intention concerning proposed business conduct with antitrust implications. Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, said that the proposal has the potential to create efficiencies in the delivery of HMO services that could result in lower health care costs.

Under the Department's business review procedure, an organization may submit a proposed action to the Antitrust Division and receive a statement whether the Division will challenge the action under the antitrust laws. A file containing the business review request and the Department's response may be examined in the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530. After a 30-day waiting period, the documents supporting the business review will be added to the file.

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#### **Department Of Justice Approves New Jersey Hospital Association Proposal For Survey**

The Antitrust Division of the Department of Justice has approved a proposal by a New Jersey hospital association to produce a survey and report of employee wages and salaries paid by hospitals in New Jersey since the proposal falls substantially within a safety zone established in the Antitrust Enforcement Policy Statements for the Health Care Industry. The New Jersey Hospital Association's proposed wage and salary survey and report met substantially all of the antitrust safety zone conditions for hospital participation in exchanges of price and cost information. Under the Department's policy statement, an information exchange among hospitals that falls within the antitrust safety zone will not be challenged under the antitrust laws, absent extraordinary circumstances. The Antitrust Enforcement Policy Statements were issued jointly with the Federal Trade Commission on September 15, 1993. (See, United States Attorneys' Bulletin, Vol. 41, No. 10, dated October 15, 1993, at p. 338.)

Under the proposal, the survey and report would be conducted by an independent third party who would compile and publish aggregated averages of wage and salary data that is at least three months old. Assistant Attorney General Anne K. Bingaman cautioned, however, that the Department would be concerned with information exchanges among competing hospitals, including wage and salary surveys and reports, if the exchanges would likely facilitate collusion or otherwise have the purpose or effect of reducing competition prices or compensation.

The same business review procedure applies as stated above.

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**Department Of Justice Will Not Challenge Credit Association Proposal**

The Antitrust Division of the Department of Justice will not challenge a proposal by a national credit association to create its own department to disseminate to businesses in the leasing industry credit information specifically designed to combat fraud within the industry. The National Association of Credit Management, whose 39,000 members are business creditors to manufacturing, wholesaling, service industries and financial institutions, asked the Department for a statement of its enforcement intention if the association carried out its proposal to create the Leasing Industry Loss Prevention Department to distribute credit information. The Department said that the proposal will not be anticompetitive since the credit history information will be used only to assist members in implementing unilateral credit policies.

The Department's business review letter, by Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, noted that, while serious competitive concerns would be raised by any agreement among the National Association of Credit Management members regarding credit terms or conditions, its proposed department will only provide credit history information to assist members in implementing unilateral credit policies. Ms. Bingaman also stated that such a program does not present competitive problems.

The same business review procedure applies as stated above.

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**CIVIL DIVISION**

**\$2 Million Partial Settlement Reached In Fuel Oil Theft Case**

On February 23, 1994, the Department of Justice announced that a Japanese company, Nippon Building Service Kabushiki Kaisha (NBS) will pay the United States \$2 million in restitution to settle claims for fuel oil stolen from the U.S. Embassy in Tokyo from 1977 through 1990. Frank W. Hunger, Assistant Attorney General for the Civil Division, said the agreement partially settles a civil action filed by the Department in May, 1992 in the Civil Section of Tokyo District Court against NBS, PAE International, and three individuals seeking compensation for the loss to the United States. Under Japanese law, employers are liable for damages caused by their employees in the course of their employment. The suit is based on extensive investigations into the conspiracy conducted by the Tokyo police and the Office of the Inspector General of the Department of State.

The defendants in the action gained access to the Embassy through their employment with NBS and PAE International, which had maintenance contracts with the Embassy. They disabled monitoring instruments in the Embassy's fuel oil delivery system which enabled them to order more oil than needed. The excess fuel was transported from the Embassy in a truck, and then sold. The Civil Division has settled with a number of individual defendants, and will continue to pursue its suit against the remaining defendants, PAE International and the two major conspirators.

Mr. Hunger said, "The suit demonstrates that the Department of Justice is committed to aggressively pursuing claims for restitution on behalf of American taxpayers -- wherever the claims arise."

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## **POINTS TO REMEMBER**

### **Disclosure Of Grand Jury Information To the Resolution Trust Corporation**

On February 7, 1994, Anthony C. Moscato, Director, Executive Office for United States Attorneys, advised all United States Attorneys and Financial Institution Fraud Coordinators that a recent court order in the Eastern District of Virginia includes a finding that disclosure of grand jury material pursuant to 18 U.S.C. §3322 does not cover disclosure of grand jury information to the Resolution Trust Corporation (RTC). The RTC has instructed its field offices not to make §3322 applications directly to the United States Attorneys' offices, but to submit them first to RTC headquarters for consideration. The Fraud Section of the Criminal Division will be notified by the RTC of the receipt of any application, and they in turn will then contact the involved United States Attorney's office about the proposed motion.

Attached at the Appendix of this Bulletin as Exhibit F is a Notice Concerning the Use of 18 U.S.C. §3322, which was prepared by the Fraud Section. If you have any questions, or require further information, please contact John Arterberry, Deputy Chief, at (202) 514-0890, or Allen Carver, Principal Deputy Chief, at (202) 514-7027.

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### **Honoraria Ban**

On January 19, 1994, the Department of Justice filed a petition for certiorari asking the Supreme Court to review the decision of the Court of Appeals for the District of Columbia Circuit in NTEU v. United States, 990 F.2d 1271 (D.C. Cir. 1993). The Court of Appeals previously denied the Government's request for a rehearing en banc of an earlier panel's decision affirming a District Court ruling which invalidated the statutory ban on acceptance of honoraria by Executive Branch employees for speeches, articles or appearances unrelated to their duties.

The Department has determined that it will not prosecute employees who receive honoraria between September 29, 1993, and the date on which the Supreme Court issues its decision in this case (expected in the Spring, 1995). Therefore, employees are free to accept an honoraria for speeches, articles or appearances unrelated to their official duties until such time.

If you have any questions, please contact Donna Henneman, Ethics Program Manager, Legal Counsel Office, Executive Office for United States Attorneys, at (202) 514-4024.

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### **Office Of Special Counsel For Immigration-Related Unfair Employment Practices**

On February 15, 1994, the Department of Justice announced the settlement of a case against Wards Cove Packing Company of Seattle brought by the Department's Office of Special Counsel for Immigration-Related Employment Practices. The suit alleged that Wards Cove routinely asked new employees for a picture identification card and social security card to prove they were authorized to work in the United States, an illegal practice under the Immigration Reform and Control Act of 1986 (IRCA). Although IRCA permits employers to examine documents presented by new employees to show they are authorized to work, employers cannot specify which of the various legally acceptable documents an employee must present. Wards Cove will pay a \$15,000 civil penalty, and has also agreed to change its practice and train key personnel in proper employment authorization procedures.

Special Counsel William Ho-Gonzalez said, "This case points out how even well-intentioned employers may run afoul of the law if they do not pay sufficient attention to the requirements of the employment authorization verification program. Employers need to remember that IRCA prohibits them from requesting more or different documents than are required or from refusing to accept valid documents. Taking short cuts in this area will invariably lead to trouble."

For further information, please contact the Office of Special Counsel for Immigration-Related Unfair Employment Practices, P.O. Box 27728, Washington, D.C. 20038-7728.

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## **SENTENCING REFORM**

### **Guideline Sentencing Updates**

A copy of the Guideline Sentencing Update, Volume 6, No. 9, dated February 14, 1994, is attached as Exhibit G at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

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## **AFFIRMATIVE CIVIL ENFORCEMENT PROGRAM (ACE)**

### **Meetings And Conferences To Discuss ACE Goals**

On January 27-28, 1994, a meeting with Department of Housing and Urban Development (HUD) Inspector General Susan Gaffney and her Staff was held in Alexandria, Virginia. Assistant United States Attorneys in attendance were: Jim Bickett, Northern District of Ohio; Alleen Castellani, Western District of Missouri; Bob DeSousa, Middle District of Pennsylvania; Ken Dodd, Eastern District of Texas; Connie Frogale, Eastern District of Virginia; David McComb, Eastern District of Pennsylvania; Susan Poswistilo, District of Massachusetts, and Paula Parker, Western District of Missouri. David Gottesman, a trial attorney with the Commercial Litigation Branch of the Civil Division, also attended. The main topic of discussion centered around fraud in HUD programs, particularly equity skimming, and the referral of cases for ACE prosecutions. HUD has expressed an interest in presenting cases for civil prosecutions to United States Attorneys.

On January 28, 1994, Assistant United States Attorney Bob DeSousa, Middle District of Pennsylvania, on temporary duty with the Financial Litigation Unit of the Executive Office for United States Attorneys, met with Inspectors in the Agency for International Development. This agency, which administers U.S. programs abroad and also does substantial contracting in the United States is a potential source of ACE cases.

Mr. DeSousa also met with the Counsels for all of the Inspectors General to discuss ACE goals, the management of criminal/civil litigation cases, and two upcoming seminars.

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**Affirmative Civil Litigation Seminar**

The Office of Legal Education, Executive Office of United States Attorneys, has scheduled an Affirmative Civil Litigation Seminar in Clearwater, Florida on June 14-16, 1994, and in Salt Lake City on July 26-28, 1994. The Seminar will provide Assistant United States Attorneys and representatives from various federal agencies an opportunity to work together in Breakout groups on a variety of issues regarding the most effective means of successfully discovering, investigating, and pursuing cases, and locating and recovering assets for the United States. The format will involve numerous small group sessions in which each participant will be encouraged to bring up particular questions and problems, and also to share successful techniques and lessons learned in a highly interactive format. The Seminar should benefit all agencies dealing with fraud cases in any area involving misuse of federal government funds. Please refer to the Office of Legal Education section of this Bulletin, at p. 109, for further information concerning registration for either of the Seminars.

If you have any questions, please call Linda Gray, Program Manager, Office of Legal Education, at (202) 616-6700, or Bob DeSousa, Financial Litigation Unit, Executive Office Executive Office for United States Attorneys, at (202) 501-7017.

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**Westlaw -- A New Resource**

William Gillmeister, Assistant United States Attorney, Western District of New York, reports that there are files available in the new Westlaw that are particularly helpful to ACE prosecutors. For example:

- A 1993 Practicing Law Institute monograph on qui tam litigation (456 PLI-LIT 7). The monograph includes a short survey of False Claims Act cases and evaluates whether they involve theories that may be fruitful grounds for False Claims Act recoveries.
- An article on using the HCFA Form 1500 to detect health care fraud written by Jim Sheehan, Civil Chief, Eastern District of Pennsylvania (456 PLI-LIT 573).
- The legislative history of the 1986 amendments to the False Claims Act (FALSECLM-LH).
- Daily updates on federal contracts issues (BNA-FCD); health care issues (BNA-HCD); and federal civil practice and procedure (WTH-FPP), among other topics.
- An overview of the Medicare program and other public health care reimbursement programs that will help anyone prosecuting health care fraud cases acquire a general understanding of these programs (699 PLI-COMM 151).
- Public records filings are on line for several states, including abstracts of incorporation and partnership filings (e.g., PH-NYCORP).
- The new Westlaw also contains a feature permitting automatic updating of research requests (PDQ), and permitting automatic cite checking (WestCheck 2.1).

For further information, please call Mr. Gillmeister at (716) 846-4811 -- E-Mail- ANYW01 (WGILLMEI)

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

Elder v. Holloway, No. 92-8579 (decided February 23)

In this case, the Court held that a court of appeals reviewing a denial of qualified immunity must consider all relevant precedents in deciding whether the defendant violated a clearly established right. The Court also clarified the holding of Davis v. Scherer, 468 U.S. 183 (1984). The Court explained that qualified immunity is defeated only when the defendant has violated a clearly established duty under the federal right on which the claim for relief is based, and that the violation of a clearly established duty coming from another source would not defeat the qualified immunity claim.

FDIC v. Meyer, No. 92-741 (decided February 23)

In this case, the Court held that the "sue-and-be-sued" clause in the Federal Savings and Loan Insurance Corporation's organic act constitutes a waiver of sovereign immunity for constitutional torts committed by that agency, and that such torts are not cognizable under the Federal Tort Claims Act. The Court also held, however, that a Bivens action for damages cannot be brought against a federal agency, but only against an individual officer.

United States Dep't of Defense v. Federal Labor Relations Authority, No. 92-1223 (decided February 23)

In this case, the Court held that the Privacy Act of 1974, 5 U.S.C. 552a, forbids the disclosure of employee addresses to collective bargaining representatives pursuant to information requests made under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135.

**Selected Cases Recently Argued****Civil Cases**

United States v. Carlton, No. 92-1941 (argued February 28)

In this case, the government argues that the Due Process Clause is not violated by retroactive application of tax legislation serving a legitimate legislative purpose.

Dalton v. Specter, No. 93-289 (argued March 2)

In this case, the government argues that allegations of procedural violations in the formulation of recommendations by the Department of Defense and the Base Closure Commission under the Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note, are not reviewable under the Administrative Procedure Act.

**Criminal Cases**

United States v. Alvarez-Sanchez, No. 92-1812 (argued March 1)

In this case, the government argues that a suspect's arrest by state authorities on state-law charges is not an "arrest or other detention" under 18 U.S.C. 3501(c), and that a pre-presentment delay caused by state officers does not require the suppression in a federal proceeding of a confession obtained while the suspect was in state custody.

Custis v. United States, No. 93-5209 (argued February 28)

In this case, the government argues that, in sentencing repeat offenders under the Armed Career Criminal Act, the Due Process Clause does not require district courts to consider collateral attacks upon predicate convictions, unless the alleged errors were structural defects in the trial process which would undermine confidence in the reliability of those convictions even without a showing of actual prejudice to the defendant.

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

**Criminal Cases**

United States v. Shabani, No. 93-981 (granted February 22)

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

Tome v. United States, No. 93-6892 (granted February 22)

Whether out-of-court statements of a child sexual abuse victim were properly admitted at trial pursuant to Fed. R. Evid. 801(d)(1)(B).

United States v. X-Citement Video, No. 93-723 (granted February 28)

Whether the provision of the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that materials at issue show minors engaging in sexually explicit acts.

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**CASE NOTES**

**CIVIL DIVISION**

**Second Circuit Holds That Plea Agreement Bars Penalties Portion Of Sanctions Imposed Under The Civil Monetary Penalties Law Against A Doctor Who Submitted False Medicare Claims**

Dr. Stern provided acupuncture services to patients. Because he knew that acupuncture services were not covered by Medicare, he described the services provided as local nerve blocks or office visits when he submitted Medicare claims forms. Dr. Stern pleaded guilty to a federal criminal offense in connection with these false Medicare claims and was suspended from participating in the Medicare program for five years as a result of his criminal conviction. Thereafter, the Department of Health and Human Services (HHS) instituted a proceeding against Dr. Stern under the Civil Monetary Penalties Law for submitting 687 claims (in addition to the ones covered by the criminal conviction) to Medicare that he knew, had reason to know, or should have known were not provided as claimed. Sanctions imposed against Dr. Stern as a result of this proceeding were: (a) an assessment of \$70,648 (twice the amount wrongfully claimed); (b) penalties of \$345,000 (penalties of up to \$2000 per false claim are permitted by the statute); and (c) suspension from participating in the Medicare program for 10 years.

The Second Circuit (Newman, Oakes, Cardamone) ruled that the penalties portion of the sanctions is barred by the plea agreement that Dr. Stern entered into in his criminal case. That plea agreement provided that "Claims of the Medicare program will be determined in a separate civil proceeding," but both the district court in accepting the guilty plea and the Assistant United States Attorney in a letter explained the separate civil proceeding as one to recover disputed losses of \$190,000 by the Medicare system. The court of appeals ruled that Dr. Stern reasonably understood that he would only be subject to a civil proceeding in which the Medicare system could recover its actual losses. The court therefore held that the plea agreement barred the \$345,000 in penalties since they do not relate to actual losses incurred by Medicare. The court, however, allowed the assessment of \$70,648 to stand, although that amount represents twice the amount improperly claimed by Dr. Stern and the government proved only that Dr. Stern wrongfully obtained about \$9,000 from Medicare.

Stern v. Shalala, No. 93-4100 (Jan. 10, 1994) [2d Cir.]. DJ # 137-53-343.

Attorneys: Anthony J. Steinmeyer - (202) 514-3388  
John C. Hoyle - (202) 514-3469

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**Third Circuit Reverses District Court's Refusal To Substitute Government As Defendant Under Westfall Act**

A group of former employees of the Pennsylvania Office of Auditor General filed a damages action under 42 U.S.C. §1983 alleging that their firing by Auditor General Barbara Hafer deprived them of their civil rights under color of state law and that United States Attorney James West was also liable because he had conspired with Hafer to help her gain election as Auditor General and to dismiss plaintiffs from their jobs. Plaintiffs also alleged that, because West leaked to Hafer the names of persons investigated by the U.S. Attorney's office as part of a job buying scheme, he was liable under state tort law for defamation and for interference with plaintiffs' employment relationships. The district court dismissed the civil rights claims against both defendants and the Third Circuit affirmed the dismissal of plaintiffs' federal law claims against West. As to plaintiffs' state law claims against West, the Third Circuit reversed and remanded on the grounds that the district court had erroneously given the Attorney General's scope of employment certification binding effect and substituted the United States as defendant under the Westfall Act based on that certification. On remand, the district court denied the government's renewed motion to substitute itself for West as defendant on the grounds that it was required to accept as true plaintiffs' factual allegations concerning what acts West committed.

On appeal, the Third Circuit (Stapleton, Greenberg, Roth) has reversed and remanded for further proceedings. It held that, in determining whether a government employee was acting within the scope of his employment under the Westfall Act, the Attorney General need not accept a plaintiff's factual allegations regarding the employee's conduct if she determines that those acts did not occur. Where the Attorney General certifies that the employee was acting within the scope of his employment and moves that the government be substituted as defendant, the plaintiff, after an opportunity for reasonable discovery, must come forward with competent evidence to support the facts that would justify imposing liability against the employee. Where the plaintiff meets that burden, the parties are entitled to an evidentiary hearing. Following that hearing, the district court will resolve all issues of fact and law relevant to the scope of the employment issue and permit substitution where appropriate. Where plaintiff does not meet his initial burden, the district court must substitute the United States as defendant. The Third Circuit's decision rejects the position adopted by the First Circuit in Wood v. United States, 995 F.2d 1122 (1st Cir. 1992) (en banc), that, in determining whether the government should be substituted under the Westfall Act, a court must accept the complaint's factual allegations concerning the occurrence of some kind of injury causing incident.

James Melo v. Barbara Hafer and James West, No. 93-1193 (Jan. 11, 1994)  
[3d Cir.; E.D. Pa.]. DJ # 157-62-2893.

Attorneys: Barbara L. Herwig - (202) 514-5425  
Peter R. Maier - (202) 514-3585

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**Fourth Circuit Upholds Justice Department's Authority To Withdraw Scope Certification Under Westfall Act**

A federal employee filed a tort suit against her supervisor in state court. Proceeding under the Westfall Act, the Justice Department certified that the supervisor was acting within the scope of his employment and removed the case to a federal district court, which substituted the United States as defendant. Subsequently, however, the Department determined that its scope certification had been improvident. The Department withdrew the certification and discontinued its representation of the supervisor. The district court then made an independent determination, based on an evidentiary hearing, that the supervisor had been acting outside the scope of his employment. Based on that determination, the district court resubstituted the supervisor as defendant and remanded the case to state court.

The supervisor appealed, challenging the resubstitution and remand orders. He argued, *inter alia*, that the Justice Department lacked authority to withdraw its original scope certification. We opposed the supervisor on this issue, while taking no position on the correctness of the district court's scope determination or the remand order. The Fourth Circuit (Phillips, Niemeyer, Williams) has now issued a decision that affirms the supervisor's resubstitution but reverses the remand order. The Fourth Circuit's opinion sustains the Justice Department's authority to withdraw scope certifications under the Westfall Act. The opinion also contains useful law on appellate review of Westfall Act remand orders and district court removal jurisdiction under 28 U.S.C. §1442(a)(1), the general "federal officer" removal provision.

Jamison v. Wiley, No. 92-1628 (Jan. 13, 1994) [4th Cir.; W.D. Va.].  
DJ # 157-80-316.

Attorneys: Barbara L. Herwig - (202) 514-5425  
Scott R. McIntosh - (202) 514-4052

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**Ninth Circuit Reaffirms Validity Of Its Heightened Pleading Rule In Immunity Cases And Rejects Argument That The Supreme Court's Leatherman Decision Vitiates The Rule**

The Ninth Circuit in this case had occasion to revisit the rule it announced in Branch v. Tunnell. The rule imposes on individuals making Bivens and Section 1983 claims a requirement that, where motive is an element of the constitutional tort alleged, the plaintiff must plead facts with specificity. In this case, the Ninth Circuit (Thompson, Rymer; Lay (8th Cir.)) not only affirmed the application of this rule to plaintiff's complaint against a federal officer (and thus affirmed the dismissal of the complaint), but adopted our argument that the Supreme Court's decision in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993), did not overrule the Ninth Circuit's heightened pleading rule. The Ninth Circuit recognized that Leatherman (which concerned municipal liability under Section 1983) is "closely on point," but also recognized that the decision did not address qualified immunity, and indeed that the Court had specifically reserved ruling on that question.

On a procedural point, the Court adopted a rule of the First Circuit, that "documents whose contents are alleged in a complaint and whose authenticity no party questions," may be considered in ruling on a Rule 12(b)(6) motion to dismiss.

Branch v. Tunnell, No. 93-35144 (Jan. 12, 1994) [9th Cir.; D. Mont.].  
DJ # 157-44-593.

Attorneys: Barbara L. Herwig - (202) 514-5425  
Richard A. Olderman - (202) 514-1838

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**Tenth Circuit Affirms Dismissal Of Bivens Action For Failure To Serve The Defendants Individually**

Agents from the Bureau of Alcohol, Tobacco & Firearms (ATF), in cooperation with Salt Lake City officers, executed an arrest warrant for a known gang member. Salt Lake City officers provided a home address to the federal agents. Unbeknownst to the ATF agents, the gang member had moved away from the address seven months earlier; Ronald DeSpain and his family had moved into the apartment in the interim. Immediately upon entering the apartment, ATF officers handcuffed DeSpain and his companion. Upon learning of their mistake, the officers released them. The officers spent no more than ten minutes in the apartment. No physical injuries or property damage resulted from the agents' entry. DeSpain then filed a Bivens action seeking \$2 million in damages.

The district court dismissed the action for insufficient service of process. The Tenth Circuit (Moore, Brorby; Vratil, D.J.) has now affirmed. The court held that, because this was a Bivens action, service on the Bureau was insufficient; the named defendants must be individually served. The court also held that Rule 4(j)'s "good cause" exception must be construed narrowly. None of the explanations offered by plaintiff's counsel -- actual notice, the absence of prejudice to the defendants, attorney error, or the running of the statute of limitations -- amounts to "good cause."

Ronald DeSpain, et al. v. Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms, No. 93-4051 (Jan. 10, 1994) [10th Cir.; D. Utah].  
DJ # 157-77-621.

Attorneys: Barbara L. Herwig - (202) 514-5425  
Patricia A. Millett - (202) 514-3688

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**Eleventh Circuit Holds That Feres Doctrine Does Not Bar FTCA Claim Against The Army By A Soldier Who Was Injured While On Leave And Watching Television In His On-Base Apartment**

David Elliott, a staff sergeant in the U.S. Army, lived with his wife in an apartment provided for them by the Army on post at Fort Benning, Georgia. He was on two weeks of leave. One night in his on-base apartment, he was injured when he inhaled dangerous amounts of carbon dioxide as he watched television. His wife, a civilian, also was injured. The Army denied administratively their tort claims on the basis of the Feres doctrine, which bars suits by servicemen for injuries incident to military service. The Elliotts then filed this FTCA suit in the district court. The district court denied the government's motion to dismiss and, after trial, granted judgment for both plaintiffs. The district court found that the carbon dioxide had been emitted from a defective hot water heater vent pipe that the Army had negligently failed to inspect, maintain, and repair.

The government appealed, on Feres grounds only, with respect to Mr. Elliott's claims for his injuries and his wife's claims for the loss of consortium. The Eleventh Circuit (Hatchett, Godbold, Fay) has now affirmed. The Court of Appeals concluded that the accident was not incident to service because Mr. Elliott was on leave and was not pursuing any military activity or under orders at the time of the accident.

Elliott v. United States, No. 93-8027 (Feb. 15, 1994) [11th Cir.; M.D. Ga.].  
DJ # 157-19M-566.

Attorney: Robert S. Greenspan - (202) 514-5428  
Lowell V. Sturgill, Jr. - (202) 514-3427

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### TAX DIVISION

#### Third Circuit Affirms Tax Court Decision Concerning Whether A Cash Basis Corporation Could Deduct Its Accrued But Unpaid Taxes In Computing Its Earnings And Profits

On January 28, 1994, the Third Circuit affirmed the Tax Court's favorable decision in Mazzocchi Bus Co., Inc. v. Commissioner. The question presented in this case was whether the taxpayer, a cash basis corporation, could deduct its accrued but unpaid taxes in computing its earnings and profits. Taxpayer sought to reduce its earnings and profits in order to shield its shareholder from ordinary income taxation on over \$700,000 of corporate monies diverted to his personal use. (Amounts received in excess of such earnings and profits may be treated as a return of capital or capital gain income.)

The Third Circuit, adhering to the rule announced in Treas. Reg. §1.312-6 requiring a corporation to use the same accounting method in computing both income and earnings and profits, held that a cash basis taxpayer could not deduct this amount in computing its earnings and profits. In reaching this result, the Third Circuit followed two decisions by the Eighth Circuit. Helvering v. Alworth Trust, 136 F.2d 812 (8th Cir. 1943), cert. denied, 320 U.S. 784 (1943); Webb v. Commissioner, 67 T.C. 1008, 1018 (1977), aff'd on other grounds, 572 F.2d 135 (1978). The Third Circuit's decision is in direct conflict with decisions of the Second, Sixth and Seventh Circuits. Demmon v. United States, 321 F.2d 203 (7th Cir. 1963); Drybrough v. Commissioner, 238 F.2d 735 (6th Cir. 1956); Hadden v. Commissioner, 49 F.2d 709 (2d Cir. 1931).

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#### Sixth Circuit Affirms District Court Decision In Summons Enforcement Case Concerning Disclosure Of Information Pursuant To Section 6050I Of The Internal Revenue Code

On February 3, 1994, the Sixth Circuit affirmed the District Court's decision in United States v. Robert W. Ritchie, a summons enforcement case involving a summons issued to the law firm, Ritchie, Fels & Dillard, P.C., seeking the disclosure of information identifying clients who paid cash fees in excess of \$10,000 pursuant to Section 6050I of the Internal Revenue Code. While the District Court ordered enforcement of the summons, it also found that the Internal Revenue Service was not conducting an investigation into the law firm's compliance with the reporting requirements of Section 6050I, but rather, that it was "making a general search for the identities of cash-paying clients." Accordingly, it held that the summons was a "John Doe" summons under Section 7609(f) of the Internal Revenue Code, which requires court authorization before the summons could be served. Despite the lack of prior court authorization, the District Court found that the requirements of Section 7609(f) had been satisfied because it had reviewed the summons in a prior proceeding involving a motion to quash the summons.

On appeal, the Sixth Circuit affirmed the District Court's decision, relying on United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992) and United States v. Goldberger & Dubin, 935 F.2d 501 (2d Cir. 1991), where the Eleventh Circuit and Second Circuit enforced similar summonses. Even though on appeal Ritchie apparently abandoned the argument that the attorney-client privilege protected the disclosure of the information sought by the summons, the court of appeals went out of its way to state that "virtually every court to consider this issue has concluded that client identity and payment of fees is not privileged information." The Sixth Circuit also noted that "there is no reason to grant law firms a potential monopoly on money laundering simply because their services are personal and confidential." The Tax Division contended on appeal that the summons was not a "John Doe" summons, but the court of appeals rejected this argument, finding that the District Court's analysis of the IRS's purpose for issuing the summons was not clearly erroneous.

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**Seventh Circuit Affirms Favorable Decision Of The Tax Court In Case Involving \$185 Million**

On February 22, 1994, the Seventh Circuit affirmed the favorable decision of the Tax Court in Sundstrand Corp. v. Commissioner. Taxpayer contended that some \$185 million in payments it had made to the Government to settle both criminal and civil claims arising out of its admittedly illegal contracting practices (to which it entered two guilty pleas) constituted "excessive profits" repaid as the result of a "renegotiation". Under that theory, the taxpayer would be entitled to exclude these payments from income in the years earned, instead of deducting them in the year paid. This would be advantageous to taxpayer to the tune of at least \$27 million, since income tax rates had decreased dramatically over the years. The Seventh Circuit disagreed with the taxpayer's argument, finding that it conflicted with the history and purpose of the statute at issue.

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**Ninth Circuit Hands Down Double Decision In Case Involving False Bankruptcy Petition To Obtain Release Of Levies Imposed By The Internal Revenue Service**

On February 10, 1994, the Ninth Circuit in United States v. Huebner reversed Huebner's convictions for aiding and abetting the attempted evasion of the payment of income tax and affirmed his conviction, as well as that of his co-conspirator, for conspiring to defraud the United States by impeding and impairing the collection of income taxes. The charges against the defendants arose from their involvement in a scheme to file a false bankruptcy petition in order to obtain the release of levies imposed by the Internal Revenue Service.

The court of appeals held that the filing of a false petition in bankruptcy for the purpose of causing the release of an IRS levy on wages cannot constitute an attempt to evade payment of income taxes because the filing of a false bankruptcy petition could not wipe out the income tax liability. Rather, it constituted only an act which caused temporary delay in collection and not an attempt to evade or defeat the tax due. The Court went on to uphold convictions for conspiracy to defraud the United States because it found that the filing of a false and fraudulent bankruptcy petition "supplied the element of dishonesty required for a conspiracy to defraud even if the intent to use the automatic stay to obstruct collection, without more, did not."

Judge Wiggins dissented from that portion of the opinion which held that the scheme constituted merely a postponement of disclosure or payment of tax. In his view, the filing of the fraudulent bankruptcy forms had the immediate effect of releasing to the taxpayer wages which had been seized by the Internal Revenue Service and that such a release effectively evaded the payment of taxes. The Tax Division is considering whether to seek further review of this adverse decision.

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**OFFICE OF LEGAL EDUCATION****COMMENDATIONS**

Donna A. Bucella, 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 personnel, and federal agency personnel for their outstanding teaching assistance and support during courses conducted from January 16 - February 14, 1994. Persons listed below are AUSAs unless otherwise indicated:

**Freedom Of Information Act For Attorneys And Access Professionals (Washington, D.C.)**

**Stuart Frisch**, Acting General Counsel, Justice Management Division. **Margaret Ann Irving**, Acting Deputy Director, **Melanie Ann Pustay**, Senior Counsel, **Gerald B. Roemer**, **Scott A. Hodes**, **Paul-Noel Chretien**, **Anne D. Work**, and **Janice Galli McLeod**, Attorney-Advisors, Office of Information and Privacy. **Constance J. Ahrens**, Paralegal Specialist, Federal Bureau of Investigation. **Matthew M. Collette**, **John F. Daly**, and **Michael S. Raab**, Staff Attorneys, Appellate Staff, Civil Division. **Frank R. Newett**, Assistant Director, Office of Enforcement Operations, Criminal Division.

**Civil Federal Practice Seminar (Columbia, South Carolina)**

**Norman Acker**, Eastern District of North Carolina; **Juliet Eurich**, Chief, Civil Division, District of Maryland; **Paul Madgett**, District of Nebraska; **Steve Mason**, Senior Litigation Counsel, Eastern District of Texas; **Beth McGarry**, Northern District of California; **Raymond A. Nowack**, First Assistant-Civil Division, Western District of Texas; **John Seibert**, Chief, Organized Crime and Drug Enforcement Task Force, District of Hawaii; **James Sheehan**, Chief, Civil Division, Eastern District of Pennsylvania; **Judy Whetstine**, Senior Litigation Counsel, Northern District of Iowa. **Lawrence Klinger**, Assistant to the Director, **Joseph Sher**, Senior Trial Counsel, and **Daniel Unumb**, Trial Attorney, Torts Branch, Civil Division. **Michael Bailie**, Deputy Director, Administrative Services, Executive Office for United States Attorneys. **Melanie Ann Pustay**, Senior Counsel, Office of Information and Privacy. **Charles Brooks**, Trial Attorney, Wildlife and Marine Resources Section, Environment and Natural Resources Division.

**Attorney Supervisors Seminar (Houston, Texas)**

**Patrick Molloy**, Southern District of Texas. **Brian Jackson**, Assistant Director, Evaluation and Review Staff, and **Paul Ross**, Chief, Labor and Employee Relations Branch, Executive Office for United States Attorneys.

**Civil Paralegal Course (Washington, D.C.)**

**Joan Garner**, Eastern District of Pennsylvania; **Debra J. Prillaman**, Eastern District of Virginia; **Marianne Tomecek**, Southern District of Texas; **David Orbuch**, **Jim Layton**, and **Mark Nagel**, District of Columbia; **Kathleen Massarotto**, Paralegal Specialist, Northern District of New York; **Robert DeSousa**, Chief, Civil Division, **Jacque Bartlett**, Paralegal Assistant, and **Chris VanHine**, Assistant Systems Manager, Middle District of Pennsylvania. **Lawrence Klinger**, Assistant to the Director, and **Larry Lange**, Paralegal Specialist, Torts Branch, Civil Division. **John White**, Case Management Specialist, Environment and Natural Resources Division. **Stephen D. Gladis**, Special Agent and Chief, Publications Unit, Federal Bureau of Investigation. **Bonnie Gay**, Chief, Freedom of Information Act Unit, and **Victor Painter**, Information Management Staff, Executive Office for United States Attorneys.

**Trial Preparation (Washington, D.C.)**

**Rachel C. Ballow, Paula Newett, and Richard Parker**, Eastern District of Virginia. **Stephen M. Doyle**, Trial Attorney, Environment and Occupational Disease Litigation Section, Torts Branch, Civil Division. **Virginia Buckles**, Senior Associate General Counsel, United States Marshals Service.

**National Environmental Policy Act, Ecosystem Analysis, And Environmental Impact Assessment Seminar (Washington, D.C.)**

**Gerald Torres**, Counselor for Environmental Affairs, Office of the Attorney General. From the Environment and Natural Resources Division: **Lois Schiffer**, Assistant Attorney General Designate, **William M. Cohen**, Chief, General Litigation Section, **Charles Findlay, Al Ferlo, and Gary Randall**, Staff Attorneys. **Peter Hsaio**, Central District of California; **Mark Nagle**, District of Columbia;

**Complex Prosecutions And Advanced Grand Jury Seminar (San Diego, California)**

**Gloria Bedwell**, Southern District of Alabama; **Alice Hill**, Central District of California; **Rory Little**, Northern District of California; **William Hayes, Carol C. Lam, Amalia Meza, Greg Vega, Ed Weiner, and Shane Harrigan**, Southern District of California; **Michael O'Leary**, Chief, Fraud Section, Northern District of Georgia; **Kurt Shernuk**, District of Kansas; **Thomas Swaim**, Eastern District of North Carolina; **Ted McBride**, District of South Dakota; **J. Russell Dedrick**, First Assistant, and **Michael E. Winck**, Eastern District of Tennessee; **John Lenoir and Charles Lewis**, Southern District of Texas; **Ronald Sievert**, Chief, Austin Branch, Western District of Texas; **Kenneth Melson**, First Assistant, **Joseph Aronica, Jack Hanly, and Michael Smythers**, Eastern District of Virginia; **Robert Westinghouse**, Western District of Washington. **Stephen T'Kach**, Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations, Criminal Division. **David Farnham**, Senior Trial Attorney, Southern Criminal Enforcement Section, Tax Division.

**Criminal Federal Practice Seminar (San Diego, California)**

From the Southern District of California: **Gonzalo Curiel, David Curnow, Roger Haines, George Hardy**, Chief, Special Prosecutions Section, **John Houston**, Chief, Asset Forfeiture Unit, **Patrick O'Toole**, Special Assistant, **Stephen Peterson**, and **Yesmin Saide**, Chief, Criminal Intake Section. **J. Russell Dedrick**, First Assistant, Eastern District of Tennessee; **Richard Glaser, Jr.**, Middle District of North Carolina; **Jane Graham**, Eastern District of Kentucky; **Rory Little**, Northern District of California; **Loretta Lynch**, Chief, Long Island Office, Eastern District of New York; **Victoria Major**, Southern District of West Virginia; **Quincy Ollison**, Southern District of Texas; **Bruce Riordan**, Central District of California; **Ron Sievert**, Chief, Austin Branch, Western District of Texas. **Steve T'Kach**, Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations, Criminal Division. **Rusty Burress**, Principal Training Advisor, United States Sentencing Commission.

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

**David Williams**, District of New Mexico; **Claire Phillips and Mary Sedgwick**, Central District of California; **Joe Newman**, Southern District of Georgia; **Kathy Salyer**, Southern District of Florida; **Fritz Stine**, Eastern District of Kentucky; **Mike Ivory**, Western District of Pennsylvania; **Sheldon Light**, Eastern District of Michigan; **Phil Police**, Western District of Texas; **Jeff Babcock**, Southern District of Texas. From the Civil Division: **Bruce Forrest, Edward Himmelfarb, Patricia Millett, Marleigh Dover, Michael Robinson, Mary Doyle, and John Schnitker**, all Staff Attorneys, Appellate Staff; **David Schanzer**, Staff Attorney, Federal Programs Branch. **Chris Yates**, Attorney-Advisor, Office of Legal Counsel.

**Federal Administrative Process (Washington, D.C.)**

**Margaret Smith**, Eastern District of Virginia.

**Advanced Asset Forfeiture Seminar (San Antonio, Texas)**

**Janet C. Hudson**, Central District of California; **Virginia M. Covington**, Asset Forfeiture Chief, and **Patricia Kerwin**, Middle District of Florida; **Esteban F. Sanchez**, Central District of Illinois; **Thomas Swaim** and **Steve West**, Eastern District of North Carolina; **Sonia C. Jaipaul**, Financial Litigation Chief, Eastern District of Pennsylvania; **Joseph Florio**, Asset Forfeiture Chief, Western District of Texas; **Gordon D. Kromberg**, Eastern District of Virginia. From the Criminal Division: **Lee Radek**, Director, **James I.K. Knapp**, Deputy Director, **Harry Harbin**, Assistant Director, **Karen P. Tandy**, Litigation Chief, **Alice Dery**, Special Counsel, and **Stefan Cassella**, Trial Attorney, all from the Asset Forfeiture Office. **Lester M. Joseph**, Deputy Director, Money Laundering Section. **James Griffis**, Regional Manager, United States Marshals Service.

**Ethics For Litigators (Washington, D.C.)**

**Connie Frogale** and **Paula Newett**, Eastern District of Virginia. **Stephen J. Csontos**, Senior Legislative Counsel, Tax Division. **George Pruden**, Associate General Counsel for Employment Law and Information, Office of General Counsel, Federal Bureau of Prisons.

**COURSE OFFERINGS**

The staff of OLE is pleased to announce OLE's projected course offerings for the months of April through June 1994 for both the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**. AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel, and to paralegal and support personnel in United States Attorneys' offices.

**AGAI Courses**

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

**April 1994**

<b><u>Date</u></b>	<b><u>Course</u></b>	<b><u>Participants</u></b>
5-7	Employment Discrimination	AUSAs
6-8	Attorney Supervisors	AUSAs
12-14	Asset Forfeiture-Criminal	AUSAs
12-15	Health Care Fraud	AUSAs
18-22	Advanced Criminal Trial Advocacy	AUSAs, DOJ Attorneys



**EXHIBIT**  
**A**

# Department of Justice

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FOR IMMEDIATE RELEASE  
THURSDAY, MARCH 3, 1994

AG  
(202) 514-2007  
TDD (202) 514-1888

## NEW RULE ANNOUNCED ON CONTACT WITH REPRESENTED PARTIES

WASHINGTON, D.C. -- The Department of Justice today issued a proposed rule clarifying when its attorneys may seek factual information during a law enforcement investigation directly from individuals who are represented by counsel without the knowledge or consent of their lawyers.

The proposed regulation would permit federal prosecutors to contact represented individuals prior to arrest or indictment except in connection with matters at the core of the attorney-client relationship such as plea bargain discussions or settlement negotiations. In negotiating legal agreements, the prosecutor's legal training and specialized knowledge could be used to the detriment of an un-tutored lay-person.

Contact without the consent of defense counsel would not normally be allowed once an individual has been arrested or indicted. The one major exception to the rule of "no-contact" after arrest or indictment involves a defendant who voluntarily and knowingly initiates a contact. In such a circumstance, the prosecutor will be required to take the matter before a federal

(MORE)

judge or magistrate judge for approval or the appointment of separate counsel for the defendant. This exception would permit the "fearful defendant" to escape the control of an attorney who may owe his first loyalty to others.

Attorney General Janet Reno said the proposal met two requirements. "First, it ensures that government prosecutors will be able to enforce federal law vigorously without the fear that they may inadvertently be putting their licenses at risk. Second, it reflects the Department's commitment to respect the role of the state courts in defining and enforcing high ethical standards." Willful violations of the Department's proposed regulations would be subject to sanctions by the state and District of Columbia courts, which license all attorneys, including government attorneys.

The new proposal, which will remain open for comment for 30 days, resulted from extensive consultation with bar organization, academics, ethicists, defense counsel, former Justice Department officials, and state federal judges.

In addition to the proposed regulation, the Attorney General announced proposed guidelines which will further limit contacts with those who are "targets" of law enforcement investigations. The guidelines would allow a target to be contacted without the consent of counsel when the communication was initiated by the target, when necessary to prevent death or physical injury, when related to a different or on-going crime, when a senior

(MORE)

Department official had expressly determined that the contact was necessary for effective law enforcement, or in other limited circumstances.

Corporations would be treated like individuals under the proposed regulations. Where government lawyers would be limited in making contacts with represented individuals, government lawyers would be similarly precluded from contacting "controlling individuals" of the represented corporation without the consent of the company's counsel. A "controlling individual" is defined as one who is a high-level executive responsible for directing the legal strategy of the company in the matter under investigation or in litigation.

The need for regulation grew out of developments in federal law enforcement over the past two decades. Prior to that, criminal and other law enforcement investigations were considered the nearly exclusive province of police and federal agents. Accordingly, lawyers ethics codes, including the no contact rules, were not applicable. Over the past two decades, however, federal prosecutors have played an ever larger role in investigations, supervising electronic surveillance and undercover operations and other complex techniques used to penetrate sophisticated criminal activity. According to Attorney General Reno, "Nearly everyone involved in law enforcement agrees that the early involvement of prosecutors during investigations has led to more effective and efficient law enforcement efforts

(MORE)

and has helped to insure that police investigations comply with high legal and ethical standards."

One by-product of this salutary development has been increased uncertainty about whether the traditional professional limitation on attorney contacts with represented parties restricted the involvement of federal prosecutors in investigations. Some state and federal courts have interpreted some state ethical codes to limit communications once an attorney joined the investigative team. A lack of uniformity among the state rules made the issue even more difficult. Most states, however, permit contacts when "authorized by law." The Attorney General's regulation would constitute a law for purposes of these state codes and thus permit contacts within the meaning of the state rules.

Attorney General Reno said, "The new regulations will not supplant state discipline. Normal bar discipline will apply to any federal prosecutor who willfully violates the regulations. But we also must continue to involve federal prosecutors in pre-indictment investigations in which their participation has elevated compliance with legal and ethical requirements, and advanced the cause of law enforcement."

###

## **NATIONAL ANTI-VIOLENT CRIME INITIATIVE Executive Summary**

### **I. Overview**

Violent crime is tearing away at the fabric of our society. Americans consistently list violent crime as one of the most significant concerns facing our nation. As a result, their fundamental right to live their lives free from fear of violence has been placed in peril.

Federal, state and local law enforcement possess considerable weapons to fight the battle against crime, but when they work unilaterally they are not always sufficiently armed. A key part of law enforcement's response to the nation's violent crime problem lies in forging a partnership of federal, state and local law enforcement that draws upon each of their particular strengths and takes advantage of the investigative and prosecutorial resources uniquely available to each of them. Together, they can bring to bear resources to systematically and more effectively attack violent crime.

This memorandum proposes a National Anti-Violent Crime Initiative to identify crime problems, develop targeted strategies, build partnerships to implement them and use federal resources to bring this national epidemic of violence under control. Since our violent crime problem has been decades in the making, it is deeply rooted and will not be solved quickly.

### **II. The Scope of the Problem**

#### **A. Increase of Violent Crime**

The FBI's Uniform Crime Report concludes that the violent crime rate has increased 41% in the past 10 years, and 81% in the past 20 years. Additionally, the report suggests that while violent crime continues to afflict larger urban areas, it also has increased in smaller cities, suburban communities, and rural counties.

Law enforcement professionals attribute much of the increase in violent crime to the growth of gang violence. This violence has also led to the rise in the public's perception of vulnerability and a resulting feeling of fear. The criminal acts of many gang members are both extraordinarily violent in nature and seemingly indiscriminate. A killing may be motivated by nothing more than the victim's presence in a particular neighborhood, choice of apparel, or facial expression.

### **C. Federal Law Enforcement Strengths**

The federal government has a strong arsenal of crime fighting weapons that are often not available to state or local investigative agencies. When used in concert with the strengths of local law enforcement, they can have substantial impact.

The tools that the federal agencies can bring to bear in most cases are particularly useful in fighting violent crime, and especially gang violence. (See attached) They include monitoring suspects through Title III court-authorized electronic surveillance; convening investigative grand juries to examine witnesses (a tool utilized in relatively few states) to acquire testimony that cannot be easily retracted during trial; and offering immunity to witnesses to secure needed testimony against more serious offenders. (which the vast majority of states can use only on a very limited basis) Federal law enforcement agencies also are not constrained by state or local jurisdictional boundaries and therefore, are able to follow criminals, and migrating gangs, wherever they may go.

Additionally, the federal agencies offer support services such as their Witness Protection Program; funds for undercover buys, which localities often lack; and cash rewards for information on criminal activity. Federal agencies can also detain suspects prior to trial to prevent them from fleeing and protect the public from danger -- especially important in fighting gangs.

Federal laws can also be brought to bear. Many federal statutes carry mandatory minimum sentencing provisions, which provide investigators and prosecutors leverage in eliciting the cooperation of gang members. The federal government, for instance can rely on a host of firearms, narcotics, racketeering, and car-jacking statutes to prosecute violent criminals, as well as asset forfeiture laws to force criminals to relinquish their ill-gotten gains. The federal government also can rely on immigration laws that permit the arrest and detention of illegal aliens. This may be particularly useful in addressing ethnic gang problems.

Finally, under current federal sentencing laws, defendants are required to serve approximately 85% of their prison sentence, in stark contrast to most states.

## **IV. Implementation of Strategy**

### **A. Recognition of Local Needs**

The success of this strategy in any particular jurisdiction will depend on the extent to which it is refined to meet specific community needs. The strategy must account for local police capabilities and resources, as well as the nature of the local violent crime problem. There is no one formula that fits all jurisdictions.

Although most gangs can be traced to major urban areas, they have migrated throughout the country. By 1992, 72 of the nation's 79 largest cities reported experiencing gang violence, and ATF reports the presence of Bloods and Crips in 35 states and 58 cities across the United States. But, small and mid-sized cities-- even in relatively rural states-- have not been spared the problem of gang violence.

Keeping up has been difficult. While the percentage of violent crime has risen, the percentage of persons incarcerated for violent crime in both state and federal prisons has remained the same or decreased.

According to a Bureau of Justice Statistics study in May 1993, the percentage of state prisoners jailed for violent crime declined steadily since 1980, dropping from slightly under 50% to slightly under 30%. The percentage of prisoners incarcerated in federal prisons for violent crime has not increased since 1970. Recognizing that violent crime continues to escalate, these figures suggest that more needs to be done to keep pace with this problem, on both a federal and state level.

### **III. The Utilization of Federal and Local Resources**

#### **A. Federal and Local Law Enforcement Cooperation**

The goal of this initiative should be to forge a partnership of all pertinent federal, state and local law enforcement entities to fully utilize each of the law enforcement tools available at each level. Federal law enforcement tools cannot supplant, but will complement, the law enforcement tools offered by local authorities. In the end, citizens will not care who reduced violent crime, but only whether it is reduced.

#### **B. Local Law Enforcement Strengths**

The strengths of local law enforcement agencies may vary from jurisdiction to jurisdiction, but generally they are better equipped than federal agencies to play the primary role in addressing violent crime in our communities.

According to 1992 statistics, state and local law enforcement organizations were staffed by 532,583 full-time sworn police officers. In contrast, the FBI has approximately 10,000 agents, and most other agencies have less than 2,000 each. As a result, local agencies are able to place a significant law enforcement presence throughout the community; quickly respond to particular acts of violent crime; process and prosecute a high volume of criminal cases stemming from reactive street crime arrests; and identify local criminals and criminal activity, which is especially critical in targeting gang violence.

## **B. Framework of National Anti-Violent Crime Initiative**

First, the Department of Justice will create a new Violent Crime Section of the Criminal Division to assist with the coordination of the National Violent Crime Strategy. In part, it will disseminate information on successful strategies and deploy response teams of prosecutors to places that request them.

Second, United States Attorneys will appoint violent crime coordinators and will convene summits of all pertinent federal, state, and local law enforcement agencies within their districts to discuss the program. Together, they will form a violent crime working group or identify an existing group of like membership which is already focussing on violent crime.

Third, the working group will quickly conduct a survey to identify the most critical violent crime problems facing their community that are susceptible to a coordinated inter-governmental attack, such as gang violence; prioritize these problems; determine the law enforcement programs and resources currently dedicated to these problems; and assess the results achieved by existing efforts.

Fourth, the Department of Justice, working in concert with the working groups, will use the results from the surveys to formulate the general parameters and goals of a national violent crime strategy. Then the districts will create a plan to implement the strategy. Under their plan, operational task forces will be created to carry out day-to-day investigations. The groups will determine what federal law enforcement tools are necessary to deal with their identified problems and to decide which types of cases will be prosecuted under state or federal statutes.

Finally, the Criminal Division, where requested, will dispatch teams of federal prosecutors who are experienced in violent crime and enterprise-based prosecutions to assist authorities in developing and carrying out their enforcement programs.

## **V. Conclusion**

The proposed National Anti-Violent Crime Initiative should serve as the first step toward more effectively addressing violent crime and reducing the level of violence that plagues our society. Federal law enforcement agencies possess many tools to help assist local law enforcement to combat violent crime. By joining together in this systematic, nation-wide, inter-governmental approach, we will be better able to combat violent crime.

## **FEDERAL LAW ENFORCEMENT TOOLS**

Under the Administration's National Anti-Violent Crime Initiative, federal law enforcement will be able to complement local law enforcement by:

### **Utilizing Investigative Procedures**

- **Monitoring suspects through electronic surveillance;**
- **Convening investigative grand juries to examine witnesses, and acquiring testimony that cannot be easily retracted during trial;**
- **Offering immunity to obtain useful testimony for trial.**

### **Providing Support Resources**

- **Offering refuge in the Witness Protection Program;**
- **Providing funds for undercover buys; making payments to informants; and offering awards for information on criminal activities, such as gang violence.**

### **Ensuring Pretrial Detention**

- **Detaining suspects prior to trial to prevent them from fleeing.**

### **Enforcing Immigration Laws**

- **Arresting and detaining illegal aliens under federal laws.**

### **Providing Expansive Reach**

- **Relying on federal law enforcement agencies that are not constrained by state or local jurisdictional boundaries.**

### **Enforcing Federal Criminal Statutes**

- **Targeting criminal enterprises to undermine organized criminal activities; and forcing criminals to relinquish ill-gotten gains through asset forfeiture laws.**
- **Ensuring substantial prison sentences through use of federal statutes that carry mandatory-minimum sentences;**

### **Providing Tougher Sentencing**

- **Guaranteeing truth-in-sentencing through rules requiring defendants to serve approximately 85% of their sentence.**



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

**TREASURY DEPARTMENT CONTRIBUTIONS TO ANTI-GANG AND  
ANTI-VIOLENT CRIME EFFORTS**

- Key player in the nation's efforts to combat violent and gang-related crime through ATF's jurisdiction over firearms, explosives and arson crimes.
- ATF traces more than 50,000 firearms per year that are used in crimes. Traces not only solve individual crimes, but reveal patterns of activity leading to the discovery of illegal gun suppliers.
- ATF has jurisdiction over some of the toughest, most effective statutes on the books aimed at violent crime. Armed drug traffickers, violent offenders, and career criminals face mandatory sentences up to life imprisonment with no parole.
- Treasury Law Enforcement has formed effective task forces with local police. Since 1987, the efforts of these task forces against armed drug traffickers and armed violent offenders have resulted in the sentencing of over 4,000 such offenders to a cumulative 24,000 years of mandatory confinement.
- Enjoying an exceptional working relationship with state and local law enforcement, ATF has participated in nearly 200 gang task forces around the United States.
- ATF manages one of the most innovative intervention programs in the country in its Gang Resistance through Education and Training (GREAT) program. Thousands of seventh graders have received help in making positive decisions to avoid gang activity and in resolving conflicts without resort to violence.

## **CONNECTICUT ANTI-VIOLENT CRIME INITIATIVE**

### **RESULTS**

- **Murder rate was cut by 1/3 in New Haven in 1993**
- **18 members of a New Haven street gang were convicted of federal crimes and sentenced--some to more than 20 years in prison**
- **Other gangs in Connecticut are facing similar prosecutions**

### **HOW IT WAS DONE**

-- In 1991, federal, and Connecticut state and local law enforcement authorities met to discuss the effective utilization of federal resources and programs to investigate and prosecute violent crime in the New Haven area.

-- The task force, which became fully operational in 1992, is comprised of federal agents from the FBI, DEA, ATF, U.S. Marshals Service, the Connecticut State Police and New Haven police, and the U.S. Attorneys office.

-- Since half of all those arrested in New Haven for homicide in 1990 and 1991 were members of the five major gangs in New Haven, the task force identified gang related violence as the most significant violent crime problem in the area. The task force developed a coordinated strategy to combat the problem.

-- In February 1992, the task force began an intensive investigation into drug dealing and violence associated with a local street gang.

-- The law enforcement agencies mounted joint investigations, shared resources and information, and brought to the table their different law enforcement tools.

-- State and local officials provided necessary personnel and gang intelligence.

-- Federal agents provided expertise in electronic and physical surveillance, undercover operations, the execution of search warrants, training and funding.

-- Federal prosecutors utilized federal criminal laws including pretrial detention, mandatory minimum sentences and criminal enterprise statutes.

**The National Anti-Violent Crime Initiative replicates this effective multi-dimensional approach and expands it on a nationwide basis.**



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

March 1, 1994

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Implementation of  
National Anti-Violent Crime Initiative

As all of us are aware, violent crime is a primary concern of Americans around the country. Most concerning is that the level of viciousness seems to have increased in the past few years, as exemplified by the drive-by shootings and random killings associated with gang rivalries and fueled by the prevalence of guns and drugs.

Traditionally, violent crimes have been investigated and prosecuted by dedicated state and local law enforcement officials. In many communities, their ability to be effective in stemming violent crime has diminished because they lack the resources and tools, and in some cases the jurisdiction, to conduct proactive investigations and to develop cases against gang members and armed career criminals who cross jurisdictional lines. As a result, increasingly state and local prosecutors have sought the assistance of federal prosecutors and agents.

Over the past several months, the law enforcement components of the Department of Justice have been working together, and with their colleagues at the Treasury Department, to develop a national anti-violent crime initiative to bring federal resources to bear on this national problem. The Criminal Division, the Attorney General's Advisory Committee of United States Attorneys, the FBI, DEA, INS and U.S. Marshals Service have been participants in this process. The Bureau of Alcohol, Tobacco and Firearms has been an important participant as well, with the wholehearted assistance and cooperation of Secretary Bentsen and Assistant Secretary Noble.

At the United States Attorneys' National Conference in January, several panels described the initiative in a preliminary way. The purpose of this memorandum is to provide you with written guidance concerning its implementation. I have asked the Criminal Division to coordinate this initiative, and you will be receiving additional correspondence from the Assistant Attorney General of the Criminal Division in that regard.

I would ask you to keep in mind two important points concerning this strategy. First, I am not suggesting that you create a new task force or bureaucracy to address violent crime if you already have mechanisms in place that are working in your district. The initiative contemplates that you may use or build upon any existing component that has proven to be effective, or that has a strong potential for success.

Second, the goal of the initiative is to complement, not supplant, the efforts of state and local prosecutors. If any of your counterparts in your district has an effective violent crime strategy in place that can -- or does -- take into account the need for coordination and cooperation among federal, state, and local law enforcement officials, you should consider building the strategy around that existing state or local violent crime component. The key is to develop a strong partnership in this effort with state and local officials in a way that will be most productive.

In order to implement the anti-violent crime initiative in your district, please undertake the following steps:

- ▶ By March 10, 1994, designate a senior Assistant United States Attorney to be a Violent Crime Coordinator to serve as a contact in your office with the Criminal Division. Forward by e-mail the coordinator's name, telephone number, and fax number to Mary Incontro, Deputy Chief, Terrorism and Violent Crime Section [CRM04(incontro)].
- ▶ By April 1, 1994, each United States Attorney should meet with all pertinent federal, state, and local law enforcement agencies in his or her district to form a new, or strengthen an existing, violent crime working group.
- ▶ In support of the working group, your Violent Crime Coordinator should immediately seek to undertake a survey that will identify a number of issues, including:
  - ▼ your district's most critical violent crime problems that are susceptible to a coordinated federal/state/local attack, with violent gangs and armed career criminals as two likely areas;
  - ▼ the relative priority of these problems;
  - ▼ the law enforcement programs and resources currently dedicated to the investigation and prosecution of these problems;

- ▼ the results achieved to date from these efforts;  
and
- ▼ any multi-district or multi-jurisdictional aspects of these problems.

The Criminal Division will send your Violent Crime Coordinator an outline of the entire list of issues that the survey should address.

- ▶ By May 1, 1994, please forward the results of your survey to the Criminal Division, by faxing it to James Reynolds, Chief, Terrorism and Violent Crime Section, or to Mary Incontro, at fax number (202) 514-8714.

Under the auspices of the Office of Investigative Agency Policies, the FBI, DEA, INS and U.S. Marshals Service will issue guidance to their field offices to assist your working groups in undertaking this survey. A copy of that guidance is attached. The Bureau of Alcohol, Tobacco, and Firearms will issue an analogous guidance to its field offices as well.

The Assistant Attorney General of the Criminal Division and your representatives on the Attorney General's Advisory Committee will quickly analyze the results of the surveys from all the districts. You will then be provided with any needed assistance to develop an appropriate prosecutive strategy for your district. Thereafter, you will be asked to take the following steps:

- ▶ Using the new or existing working group as a mechanism, develop a single district plan to implement the national initiative consistent with your local needs and the available law enforcement resources in your district.
- ▶ Specify in the plan a prosecutive strategy for attacking the problems you have identified as most susceptible to a coordinated federal/state/local effort. Again, possible examples include an attack on violent gangs, or the development of a targeted list of the district's most dangerous violent offenders. The plan should include the use, as appropriate, of federal tools, such as wiretapping, pretrial detention, federal statutes aimed at criminal organizations, and real-time sentencing under the sentencing guidelines. The Criminal Division will send your Violent Crime Coordinator a sample operations plan which you may wish to use in developing a plan for your district.

- ▶ Assist law enforcement agencies in your district in developing or enhancing an operational task force or other working group that will carry out the day-to-day investigations of your highest priority violent crime problems. Where appropriate, existing task forces and other successful joint federal-state-local efforts should be preserved. In other instances, it may be appropriate for existing task forces or other working groups to be combined, expanded, or redirected.

The Criminal Division will support your efforts by disseminating successful enforcement strategies, facilitating the interchange of information relating to interstate criminal activities, providing training, and responding to requests of U.S. Attorneys to assist in the design of investigations and, where needed, the prosecution of resulting cases. The Terrorism and Violent Crime Section is updating its federal firearms manual and is developing a comprehensive gang prosecution manual for federal prosecutors. Working with the Attorney General's Advocacy Institute (AGAI), the Criminal Division also is assisting in the planning of a violent crime training conference to be held in May 1994.

The problems posed by violent crime are difficult, but not intractable. I am confident that, working together in a true partnership of federal, state and local law enforcement, we can make a substantial contribution toward reducing its devastating impact on our communities. I am grateful for your cooperation in this most critical endeavor.



Washington, D.C. 20530

### RESOLUTION

Pursuant to the Attorney General's Order Number 1814-93, dated November 18, 1993, and in my capacity as Director of Investigative Agency Policies, I hereby issue the following resolution concerning violent crime in America.

#### Background

Random and senseless acts of violence, combined with organized criminal enterprises engaging in violence motivated by greed, pose a direct threat to our Nation's domestic security. Indeed, acts of violence routinely occur in rural areas and small towns, as well as in our major cities and their suburbs.

The staggering dimension of this violence strikes fear in the hearts of decent people everywhere. At present, many Americans are held hostage in their homes, because they do not feel safe to venture outside. Unabated, our country's epidemic of violence, which strikes at the very fabric and values of our society, threatens future generations of Americans.

State and local investigative and prosecutive resources are primarily responsible for stemming the tidal wave of violence sweeping across this country. Federal investigators and prosecutors are fewer in number, but, similarly contribute to this major effort. Nevertheless, it is necessary to ensure that this federal contribution is made in a coordinated and focused manner, consistent with the needs of state and local authorities, in order to maximize law enforcement's effect upon those persons and organizations responsible for this plague.

The Attorney General ordered the Office of Investigative Agency Policies ("OIAP") to address this critical issue. As the Director of Investigative Agency Policies, I requested that the Executive Advisory Board ("EAB") provide me with consensus recommendations designed to unify the federal response to violent crime in America. The EAB has thoroughly and rapidly addressed this issue in a most professional manner, consistent with the best interests of America and the law enforcement professionals who serve and protect our citizens.

## Discussion

Violence in America demands a coordinated and massive response, employing the collective resources of state, local, and federal authorities. To utilize limited federal personnel and logistical resources effectively, law enforcement must identify and prioritize, on a regional basis, the violent crime problem in America. Federal law enforcement executive management<sup>1</sup> in conjunction with the United States Attorneys, guided by dialogue with appropriate state and local law enforcement executives, must provide a current analysis of the violent crime problem in each federal judicial district. This violent crime analysis should include an overview of the individuals and organizations posing the greatest threat to our society, as well as their methods of operation.

In order to address aggressively the violent crime problem defined in each judicial district, executive management of federal law enforcement agencies,<sup>2</sup> working in conjunction with the United States Attorneys, shall submit a single investigative and prosecutive strategy designed to maximize the federal response. This strategy shall be designed in partnership with state and local enforcement authorities, dedicated to the investigation and prosecution of violent organizations and individuals. This strategy shall include a well-defined utilization of resources, including the establishment, enhancement and refocusing of existing task force operations. To a large degree, the success in addressing the ever-changing nature of violent crime depends upon sustained, cooperative and long-term commitments, which each agency brings to this coordinated effort. Specific attention shall be directed to the commitment of personnel and logistical resources toward this common goal, as well as establishing and implementing a prosecutive strategy based upon the documented violent crime problems. Creativity and innovation in designing these strategies are encouraged, drawing upon the vast array of talent, technical resources, and statutory authorities which the many law enforcement agencies and offices offer.

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<sup>1</sup> Specifically, I refer to the Special Agents in Charge of Drug Enforcement Administration Field Divisions, Special Agents in Charge of Federal Bureau of Investigation Field Offices, United States Marshals throughout the Nation, and Immigration and Naturalization Service District Directors and Chief Patrol Agents.

<sup>2</sup> See footnote 1, above.

## Conclusion

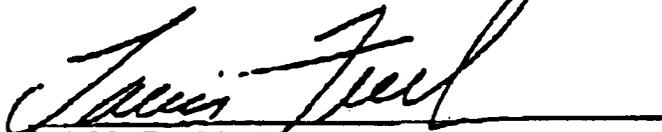
Consistent with this resolution, field-based federal law enforcement executive management and the United States Attorneys, working in conjunction with their state and local counterparts, shall identify and analyze the violent crime problems in each of the federal judicial districts. In addition, those authorities shall submit a single investigative and prosecutive strategy for each federal judicial district in order to maximize the federal response there. The investigative portion of each strategy shall include a detailed statement of federal resource and personnel commitments to address the identified violent crime problems. In addition, the investigative portion of each strategy shall be subject to oversight by the respective federal agencies' headquarters in order to ensure compliance with investigative authorities and priorities. The identification of the violent crime problems and the creation of the aforementioned strategies shall commence promptly and be completed by April 18, 1994.

In order to ensure that the resolutions contained herein are implemented, a meeting of the EAB will be held on April 4, 1994 at 10:00 a.m. At that time, I will request oral briefings from each EAB member agency concerning its compliance with the terms of this resolution.

As I noted above, this resolution ratifies consensus recommendations of the EAB. Nevertheless, if any agency wishes to appeal this resolution, or any portion thereof, it must provide written notice of its decision to appeal to James R. Bucknam, OIAP Chief of Staff, by 5:00 p.m. on March 4, 1994. That notice shall specify the nature of the appeal and the basis for it. Failure to provide such timely written notice shall constitute a waiver of the right to appeal.

On a daily basis, the men and women of law enforcement fight courageously against violent criminals. The critical partnership in this effort is one between federal investigators and prosecutors and their state and local counterparts.

To assist that partnership and to benefit the American people, however, we must consolidate and focus our collective efforts. This resolution strengthens that partnership by maximizing the application of federal resources to complement and enhance the valiant and tireless efforts of those state and local authorities. Indeed, those state and local authorities best understand the problems of violence confronting their communities as well as the most efficient use of resources to address them.



Dated: March 1, 1994  
Washington, D.C.

LOUIS J. FREEH  
Director of Investigative  
Agency Policies



U.S. Department of Justice

EXHIBIT  
E

Criminal Division

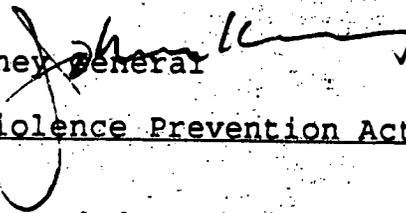
Assistant Attorney General

Washington, D.C. 20530

February 28, 1994

MEMORANDUM

TO: All United States Attorneys

FROM: Jo Ann Harris  
Assistant Attorney General 

SUBJECT: Brady Handgun Violence Prevention Act

This memorandum is intended to provide general information about the Brady Handgun Violence Prevention Act, including the new prosecutorial opportunities which it creates. I encourage you to review it, circulate it, and use it as one tool in preparing your office to take advantage of the Brady law as another means of keeping guns out of the hands of those who shouldn't have them.

I. Overview

As of today, the "interim provisions" of the Brady law will obligate law enforcement officials in over 30 states, for the first time ever, to conduct background checks before someone can receive a handgun from a gun dealer. Dealers in states with an existing background check falling within parameters described in the Brady law have no new obligations stemming from Brady. (See attached chart for state break-downs.) There are also exemptions from the statute for individuals for special reasons enumerated in the statute.

These interim provisions provide affected law enforcement officials five (5) business days to conduct background checks. They will remain in effect until a national instant background check system is declared operational by the Attorney General, which must take place on or before November 30, 1998.

Getting the instant check system operational is an extraordinary undertaking given the unfortunate state of computerized criminal histories and other relevant records. Throughout the national instant check development period, law enforcement officials will rely heavily on the time afforded

them to conduct background checks to fill in the gaps in computerized record systems.

The time between February 28, 1994 and November 30, 1998 will be used to improve computerized criminal record systems throughout the country as well as to gather information about other categories of persons prohibited from owning handguns (e.g. - those who have been involuntarily committed to a mental hospital, those dishonorably discharged from the armed forces, etc.) At the time the instant check system is activated, background checks will be required for all gun transfers by dealers, not just for handguns.

## II. Implementation of the Interim Provisions

The key issues associated with the implementation of the background check on February 28 are matters within the jurisdiction of the Treasury Department and its Bureau of Alcohol, Tobacco and Firearms (BATF). A range of statutory interpretation and application decisions have been made over the course of the last two months, including determinations about which state statutes qualify as alternatives to Brady and how certain logistical elements of the checks should be accomplished.

BATF has worked to communicate to the gun dealer community and the law enforcement community their respective new obligations under the Brady law. Treasury regulations instructing gun dealers about their duties were published in the Federal Register on February 14 and have been distributed by BATF. A mass mailing and hundreds of local meetings arranged by BATF have undoubtedly done much to get the word out to the law enforcement community. Nonetheless it is important that you know that BATF and Treasury have determined that they lack authority to issue regulations providing direction or guidance to the law enforcement community. Further guidance will come from BATF circulars and all of you.

## III. A Few Key Provisions

### A. Initiating the Check

Checks will be based upon information provided in a written statement (ATF Form 5300.35) from a proposed purchaser listing certain personal identifying information and answering certain questions relating to whether the proposed purchaser falls within any of the categories of prohibited purchasers, including convicted felons or fugitives. The dealer must verify the proposed purchaser's identity with an appropriate piece of photo identification. Next, the dealer must provide

notice of the content of the statement (by phone, fax, mail, or whatever means is dictated by the responsible law enforcement agency) and submit the statement to the appropriate responsible law enforcement agency within one day. The law enforcement agency then has five (5) business days in which to advise the dealer if the transaction is prohibited.

B. Who is responsible for conducting the check?

The chief law enforcement officer of the residence of the purchaser is responsible for conducting the background check. In each state, BATF has worked with the law enforcement community to determine who is the most appropriate law enforcement officer is, given the varying law enforcement structures in states throughout the country (see attached chart). The responsible law enforcement officer must make a "reasonable effort" to determine whether the prospective buyer is prohibited from obtaining the handgun. The Attorney General has designated the National Crime Information Center as the national criminal history records system for law enforcement agencies to check as part of their search.

C. How is the background check period calculated?

The law affords law enforcement officers five (5) business days in which to conduct the background check. Business days are defined as days on which State offices are open. If five (5) business days have elapsed since the responsible law enforcement officer was notified of the buyer's intention to purchase a handgun, and there has been no indication that the buyer is prohibited from owning the handgun, the buyer may pick the handgun up on the next day. If the responsible law enforcement officer notifies the dealer in less than five days that the individual is not prohibited from owning the handgun, the transfer may proceed at that time.

IV. Crimes

Brady creates a new "unlawful transfer" offense and provides proof or support for prosecutions under a number of existing laws.

A. Unlawful Transfer

"It shall be unlawful for any ... licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under [18 U.S.C.] section 923, unless [there is compliance with the Brady Bill waiting period]. 18 U.S.C. §922(s)(1). \* \* \* "Whoever knowingly violates subsec-

tion (s)... of section 922 shall be fined not more than \$1,000, imprisoned for not more than 1 year or both". 18 U.S.C. §924(a)(5).

## B. Existing Laws

### 1. Armed Career Criminal Act, 18 U.S.C. 924(e)

Any person who possesses a firearm after having been convicted of three or more violent felonies or serious drug trafficking offenses shall be punished by imprisonment for no less than 15 years and no more than life.

### 2. Possession of a Firearm By a Convicted Felon, 18 U.S.C. 922(g)

Any person who possesses a firearm after having been convicted of a felony shall be punished by imprisonment for no more than 10 years.

### 3. False Statement in Acquisition of a Firearm, 18 U.S.C. 922(a)(6) and 924(a)(1)(A),(B)

Any person who makes a false statement to a licensed dealer in connection with the acquisition of a firearm shall be punished by imprisonment for no more than 5 years. [Note: **Every time a Brady background check establishes that a handgun should not be sold to the prospective purchaser, the prospective purchaser has falsified their form and, accordingly, this statute has been violated.**]

### 4. Continuing Restrictions on Dealer Transfers, 18 U.S.C. 922(b) and 922 (d)

Any dealer who transfers a firearm or ammunition having reasonable cause to believe that the prospective purchaser is restricted shall be punished by imprisonment for no more than 5 years under 922(b) (e.g., transfer to a juvenile) or no more than 10 years-under 922(d) (e.g., transfer to a person under indictment).

## V. Investigative Jurisdiction

Investigative jurisdiction for these offenses lies generally with ATF. However, federal prosecutors are free to accept direct referrals from state and local agencies and may charge these offenses based on investigations conducted by other agencies.

## VI. Law Enforcement Initiatives

When a person falsely completes a Brady form and a timely check determines that the person is ineligible to purchase a handgun, in the discretion of the prosecutor and police, an effort may be made to arrest and prosecute the person. This may involve inviting the person to pick up the handgun and arresting the person as s/he picks it up or even staking out the dealership at which the gun is scheduled to be picked up in the case of a dangerous fugitive. In the case where the handgun is actually transferred to a prohibited person because the criminal history data check is untimely, seeking a search and/or arrest warrant and prosecuting the individual should be considered.

Federal prosecutors ought to pay particular attention to intelligence information known to state and local law enforcement agencies in this regard. When individuals suspected of other violent and/or drug trafficking conduct are attempting to purchase handguns and are ineligible to do so, the investigation and prosecution of such individuals ought to be regarded as a priority.

## VII. Consultation

AUSAs with questions about Brady law enforcement should contact the Terrorism and Violent Crime Section of the Criminal Division.

# Brady Implementation Chart

STATE	CATEGORY	BRADY CLEO	MULTIPLE SALE CLEO
Alabama	Brady	County Sheriff	Same as Brady CLEO
Alaska	Brady	Chief of Police in areas having a Police Department or the Alaska State Troopers in areas without a Chief of Police.	Same as Brady CLEO.
Arizona	Brady	Chief of Police in incorporated areas and the County Sheriff in unincorporated areas. However, in Maricopa County, the Phoenix Police Chief is the CLEO for both the City of Phoenix and all other municipalities in the metropolitan Phoenix area, and the County Sheriff is the CLEO for the unincorporated areas of the County.	Chief of Police in incorporated areas, County Sheriff in unincorporated areas. However, in the City of Phoenix and all other municipalities in the metropolitan area, the Phoenix Chief of Police is designated.
Arkansas	Brady	Arkansas State Police	Same as Brady CLEO
California	Alternative		
Colorado	Brady		Colorado Bureau of Investigation.
Connecticut	Alternative		
Delaware	Alternative		
Florida	Alternative		
Georgia	Brady	County Sheriff	Same as Brady CLEO.
Guam	Alternative		
Hawaii	Alternative		
Idaho	Brady	Idaho Department of Law Enforcement, Bureau of Criminal Identification.	The Chief of Police in incorporated areas, the County Sheriff in unincorporated areas.
Illinois	Alternative		
Indiana	Alternative		
Iowa	Alternative		
Kansas	Brady	County Sheriff, except for incorporated cities and towns in Johnson County where the Chiefs of Police are Brady CLEOs.	Kansas Bureau of Investigation.
Kentucky	Brady	Chief of Police in incorporated areas, County Sheriff in unincorporated areas.	Same as Brady CLEO.
Louisiana	Brady	The Sheriff, except in Orleans Parish where the Superintendent of Police for New Orleans is the Brady CLEO.	Same as Brady CLEO.
Maine	Brady	Chief of Police in areas having municipal police department and State Police in all other areas.	Same as Brady CLEO.
Marianas Islands	Brady		
Maryland	Alternative		
Massachusetts	Alternative		
Michigan	Alternative		
Minnesota	Brady	Municipal Police Chief. However, where there is no local police agency, the County Sheriff will be the Brady CLEO.	Same as Brady CLEO.
Mississippi	Brady +	Chief of Police in incorporated areas, County Sheriff in unincorporated areas.	Same as Brady CLEO.
Missouri	Alternative		
Montana	Brady	Chief of Police in incorporated areas or the County Sheriff in unincorporated areas.	Same as Brady CLEO
Nebraska	Alternative		
Nevada	Brady	Department of Motor Vehicles and Public Safety Nevada Highway Patrol	Same as Brady CLEO
New Hampshire	Brady	Chief of Police or County Sheriff in areas not covered by Chief of Police	Same as Brady CLEO
New Jersey	Alternative		
New Mexico	Brady	Chief of Police in incorporated areas and County Sheriff in unincorporated areas.	Same as Brady CLEO
New York	Alternative		
North Carolina	Brady	County Sheriff	Same as Brady CLEO

# Brady Implementation Chart

STATE	CATEGORY	BRADY CLEO	MULTIPLE SALE CLEO
North Dakota	Brady +	County Sheriff	Same as Brady CLEO.
Ohio	Brady	Attorney General's designated representative who is Superintendent of the Bureau of Criminal Identification and Investigation.	Same as Brady CLEO.
Oklahoma	Brady	Chief of Police in incorporated cities and towns, County Sheriff is CLEO in incorporated cities and towns having no police authority of their own. In unincorporated areas, CLEO is County Sheriff.	Same as Brady CLEO.
Oregon	Alternative		
Pennsylvania	Brady +	County Sheriff except in Philadelphia County where Commissioner of Philadelphia Police Department is CLEO.	Same as Brady CLEO.
Puerto Rico	Brady	Police Superintendent, Firearms Bureau Chief.	Same as Brady CLEO.
Rhode Island	Brady	Chief of Police	Rhode Island State Police Detective Division
South Carolina	Brady	South Carolina Law Enforcement Division.	South Carolina law prohibits sale of more than one handgun during any 30-day period to a nonlicensee.
South Dakota	Brady +	County Sheriff	Same as Brady CLEO.
Tennessee	Brady	Chief of Police in municipalities or County Sheriff in other areas.	Same as Brady CLEO.
Texas	Brady	Chief of Police in incorporated cities and towns; County Sheriff in unincorporated areas.	Same as Brady CLEO.
Utah	Brady +	Utah Department of Public Safety, Bureau of Criminal Identification.	Same as Brady CLEO.
Vermont	Brady	Chief of Police or County Sheriff, or State Police depending on the area.	Same as Brady CLEO.
Virginia	Alternative		
Virgin Islands	Alternative		
Washington State	Brady	Chief of Police in incorporated areas or the County Sheriff in unincorporated areas.	Same as Brady CLEO.
West Virginia	Brady	West Virginia State Police.	Same as Brady CLEO.
Wisconsin	Alternative		
Wyoming	Brady	Chief of Police in other areas, County Sheriff.	Same as Brady CLEO.

This chart reflects all available data from the Bureau of Alcohol, Tobacco & Firearms as of February 25, 1994.

### Categories:

- "Brady" - State in which the Brady law controls the background check process
- "Brady +" - State in which the Brady law controls the background check process except that the Brady process does not apply to the transfer of handguns to those holding valid permits to carry handguns
- "Alternative" - State in which state law controls the background check process

**Brady CLEO** - The Chief Law Enforcement Officer responsible for conducting Brady background checks.

**Multiple Sale CLEO** - The Chief Law Enforcement Officer designated to receive reports of multiple handgun sales.

## Notice Concerning Use of 18 U.S.C. § 3322

A United States District Judge in the Eastern District of Virginia has issued an order which includes a finding that 18 U.S.C. § 3322 does not cover disclosures of grand jury information to the Resolution Trust Corporation (RTC). The court's order is under seal. A government motion for reconsideration is pending before the court. A hearing on the motion has not been scheduled, but is likely to occur in mid-January 1994.

18 U.S.C. § 3322(b) provides that, upon motion by an attorney for the government (defined to mean a Department of Justice attorney), under specified circumstances, and upon finding of a substantial need, a court may direct disclosure of grand jury information to identified personnel of a financial institution regulatory agency. The district judge found that the RTC is not a "financial institution regulatory agency."

The term "financial institution regulatory agency" is not defined in § 3322, which was part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The section was intended, in part, to overcome case law prohibiting disclosing grand jury information to Federal financial regulatory agencies for their use in administrative enforcement efforts.

The legislative history of § 3322(b) indicates, but does not directly state, that Congress intended § 3322 to apply to matters under the jurisdiction of the RTC. Statutes and legislative history concerning the RTC are less definitive, and to some extent contradictory, as to the RTC's specific regulatory nature. Recognizing that the RTC has varied functions and responsibilities, the RTC has contended that it is a regulatory agency for the purposes of § 3322. It should be noted, however, that in different forums, concerning entirely different issues, the RTC has argued, without success, that it is not a regulatory agency.

Because of the district court's action, the RTC has instructed each of its field offices not to make § 3322 applications directly to a United States Attorney's office, but to submit them to RTC headquarters first for consideration. The RTC will notify the Fraud Section of the Criminal Division upon receipt of an application from the field. This procedure is designed to ensure that no United States Attorney's office accepts a field office's application and proceeds to file a motion for a § 3322(b) order unaware of the case pending in the Eastern District of Virginia.

# Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT

G

*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.

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

VOLUME 6 • NUMBER 9 • FEBRUARY 14, 1994

## Offense Conduct

### DRUG QUANTITY—RELEVANT CONDUCT

**Ninth Circuit holds that drugs held solely for personal use should not be used to set offense level for possession with intent to distribute.** Defendant pled guilty to possession of cocaine with intent to distribute. He admitted to possessing 80–90 grams, but claimed most of the cocaine was for his personal use and only the 5–6 grams he intended to distribute should be used in sentencing. The district court appeared to agree that personal use amounts should not be used, but determined those amounts could not be distinguished and used the full amount.

The appellate court remanded: "Drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution. Accordingly, we hold that in calculating the base offense level for possession with intent to distribute, the district court must make a factual finding as to the quantity of drugs possessed for distribution and cannot include any amount possessed strictly for personal use."

*U.S. v. Kipp*, 10 F.3d 1463 (9th Cir. 1993).

See *Outline* at II.A.1.

*U.S. v. Roederer*, 11 F.3d 973 (10th Cir. 1993) (Affirmed): Following interpretation of "same course of conduct" set out in *U.S. v. Perdomo*, 927 F.2d 111 (2d Cir. 1991), court agreed that defendant's cocaine sales in conspiracy that ended in 1987 were relevant conduct for instant offense of cocaine distribution in May 1992. "We hold that the evidence, when viewed in its entirety, establishes that Roederer was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. Roederer's conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate."

See *Outline* at I.A.2 and II.A.1.

### DRUG QUANTITY—OTHER ISSUES

*U.S. v. Tavano*, No. 93-1492 (1st Cir. Dec. 29, 1993) (Selya, J.) (Remanded: District court erred when it "formulated a per se rule" that evidence presented at trial controls and refused to consider defendant's evidence regarding drug quantity that differed from the testimony at trial. The appellate court held that "both Fed. R. Crim. P. 32(c)(3)(D) and U.S.S.G. § 6A1.3 require a sentencing court independently to consider proffered information that is relevant to . . . the sentencing determination.")

See *Outline* at II.A.3, IX.D.3.

### CALCULATING WEIGHT OF DRUGS

*U.S. v. Crowell*, 9 F.3d 1452 (9th Cir. 1993) (Affirmed: "[W]e join the other Circuit Courts . . . which have held that the weight of the dilaudid tablet, rather than the weight of the hydromorphone, is the proper measure of drug quantity. . . . We find that use of the gross weight of the tablet is entirely

consistent with" *Chapman v. U.S.*, 111 S. Ct. 1919 (1991)). *Accord U.S. v. Young*, 992 F.2d 207, 209–10 (8th Cir. 1993). See *Outline* at II.B.1.

*U.S. v. Coohy*, 11 F.3d 97 (8th Cir. 1993) (Remanded: Defendant was sentenced for an LSD offense before, but his appeal came after, the Nov. 1993 amendment to § 2D1.1(c) (providing new method to determine weight of LSD). He challenged the old method of including the carrier medium and also challenged the new method, claiming it was arbitrary and violated the Sentencing Commission's statutory grant of authority. The appellate court reaffirmed prior precedent that upheld use of the carrier medium and also upheld the new method. The case was remanded, however, for the district court to consider whether it should retroactively apply the new method pursuant to § 1B1.10(a).)

See *Outline* at II.B.1.

## Adjustments

### VULNERABLE VICTIM

**Sixth Circuit holds that relevant conduct should not be used for § 3A1.1 adjustment.** Defendant was convicted of conspiracy to defraud the IRS by filing false tax returns and claiming fraudulent tax refunds. He convinced several people to assist him, and the government claimed that some of these people were "particularly vulnerable in some way" and that defendant "prey[ed] on their vulnerabilities in recruiting them to his scheme." The district court agreed and imposed § 3A1.1's two-level enhancement.

The appellate court remanded, holding "that the language of section 3A1.1 requires that individuals targeted by a defendant be victims of the conduct underlying the offense of conviction." Here, the victim of the offense of conviction was the government, and while some of the others "may have been 'victimiz[ed]' by Wright in the sense that he may have taken advantage of them, we do not believe they were victims of the offense."

In addition, because "section 3A1.1 applies only in cases where there is a victim of the offense of conviction, we further hold that a court cannot apply the adjustment based upon 'relevant conduct' that is not an element of the offense of conviction. Section 1B1.3 has no application in a section 3A1.1 adjustment."

*U.S. v. Wright*, No. 93-3055 (6th Cir. Dec. 14, 1993) (Kennedy, J.).

See *Outline* at III.A.1.b.

### OBSTRUCTION OF JUSTICE

*U.S. v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (Reversed: It was error to give § 3C1.1 enhancement for allegedly threatening prosecutor and attempting to influence witness. "Neither the factual findings made nor the actual record below support an 'obstruction' enhancement" for attempting to influence the witness. As to the alleged threat, § 3C1.1 "must be interpreted and determined on the basis of the language in

[§] 1B1.3(a)(1)," which holds a defendant responsible for conduct "that occurred . . . in the course of attempting to avoid detection or responsibility for that offense." Thus, it would have to be shown "that the acts of the defendant alleged to obstruct or impede justice were done 'willfully' and with the specific intent 'to avoid responsibility' for the offense for which he was being tried. . . . [E]ven if there was a threat (as to which the record is unclear) it is obvious that such acts were not committed 'in the course of attempting to avoid responsibility for the offense of conviction.'"). See *Outline* at III.C.4.

*U.S. v. Acuna*, 9 F.3d 1442 (9th Cir. 1993) (Affirmed: Defendant's plea agreement required him to cooperate with government investigators and testify truthfully at a coconspirator's trial. The district court held that defendant gave false testimony that merited a § 3C1.1 enhancement. The appellate court affirmed, holding that "violation of a plea bargain warrants a sentence enhancement for obstruction of justice." See also *U.S. v. Duke*, 935 F.2d 161, 162 (8th Cir. 1991) (enhancement warranted where defendant did not provide truthful information as required by plea agreement). The court also agreed with the Tenth Circuit that § 3C1.1 "applies when 'a defendant attempts to obstruct justice in a case closely related to his own, such as that of a codefendant.' *U.S. v. Bernaugh*, 969 F.2d 858, 861 (10th Cir. 1992).") See *Outline* at III.C.2 and 4.

## Departures

### MITIGATING CIRCUMSTANCES

*U.S. v. Cantu*, No. 92-30211 (9th Cir. Dec. 27, 1993) (Reinhardt, J.) (Canby, J., concurring in part) (Remanded: District court erred in holding that Vietnam veteran suffering from post-traumatic stress disorder did not have "significantly reduced mental capacity" for purposes of § 5K2.13, p.s. "'Reduced mental capacity' . . . comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments. . . . Therefore, a defendant suffering from post-traumatic stress disorder, an emotional illness, is eligible for such a departure if his ailment distorted his reasoning and interfered with his ability to make considered decisions." The fact that defendant also had an alcohol problem did not disqualify him for departure. Under § 5K2.13, defendants "are disqualified only if their voluntary alcohol or drug use caused their reduced mental capacity. . . . If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure."

The court also joined other circuits that held "the disorder need be only a contributing cause, not a but-for cause or a sole cause, of the offense. . . . [Section 5K2.13] requires only that the district court find some degree, not a particular degree of causation. . . . [T]he degree to which the impairment contributed to the commission of the offense constitutes the degree to which the defendant's punishment should be reduced."

The court added: "Resolution of disputed facts concerning mental impairment requires more than simply a neutral process. The court's inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as § 5K2.13 implicitly recommends.' *U.S. v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993). Lenity is appropriate because the purpose of § 5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed to the commission of a crime." See *Outline* at VI.C.1.b.

*U.S. v. White Buffalo*, 10 F.3d 575 (8th Cir. 1993) (Affirmed: "Lesser harms" departure under § 5K2.11, p.s., was appropriate for defendant convicted of unlawful possession of an unregistered firearm (a .22 single-shot rifle with shortened barrel). Defendant lived in a remote area of an Indian reservation and used the gun solely to shoot animals that preyed on his chickens. He had been steadily employed for a few years and had no prior arrests or convictions. The appellate court affirmed the conclusion that defendant's actions "were not the kind of misconduct and danger sought to be prevented by the gun statute," and rejected the government's contention that § 5K2.11 should not be applied to possession of shortened unregistered weapons. Cf. *U.S. v. Hadaway*, 998 F.2d 917, 919-20 (11th Cir. 1993) (district court may consider § 5K2.11 departure for defendant convicted of possessing unregistered sawed-off shotgun) [6GSU #4].

The district court erred, however, in finding that departure was also justified under § 5K2.0 for the kind of personal and community factors upheld in *U.S. v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990). The facts were simply "not sufficiently unusual" to support departure. However, "§ 5K2.11 provided a legally sufficient justification for departure in this case," and "the district court reasonably exercised its discretion in imposing probation" after departing from offense level 15 to 8. Cf. *U.S. v. One Star*, 9 F.3d 60, 62 (8th Cir. 1993) (upholding departure to probation from 33-41-month range) [6GSU #8]. See *Outline* at VI.C.1.a, generally at VI.C.4, and X.A.2.

## General Application Principles

### STIPULATION TO ADDITIONAL OFFENSES

*U.S. v. Saldana*, No. 93-10050 (9th Cir. Dec. 20, 1993) (Nelson, J.) (Remanded: Defendant pled guilty to three drug counts; twelve food stamp counts were dismissed, but the stipulation of facts in the plea agreement provided evidence of the food stamp offenses. The district court held that it had discretion whether or not to consider the food stamp counts under § 1B1.2(c) and declined to do so. The appellate court held this was error: "Nothing in the Guidelines, the commentary, or prior decisions of this court support a conclusion that a district court is free to ignore the command of § 1B1.2(c) requiring it to consider additional offenses established by a plea agreement." Cf. *U.S. v. Moore*, 6 F.3d 715, 718-20 (11th Cir. 1993) (Affirmed: Under § 1B1.2(c), the district court "was required to consider Moore's unconvicted robberies, to which he stipulated in his agreement, as additional counts of conviction . . . under section 3D1.4 . . . . Even if the parties had agreed that these unconvicted robberies were to be used . . . in some other way, the district court was obligated to consider these unconvicted robberies as it did.").

To be included in *Outline* at I.B.

## Criminal History

### OTHER SENTENCES OR CONVICTIONS

*U.S. v. Kipp*, 10 F.3d 1463 (9th Cir. 1993) (Remanded: State deferred sentence that had no supervisory component, and was treated by the district court as a suspended sentence, did not warrant two criminal history points under § 4A1.1(d). "[A] suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence,' as that term is used in § 4A1.1(d).") Cf. *U.S. v. McCrary*, 887 F.2d 485, 489 (4th Cir. 1989) (because § 4A1.2 requires actual imprisonment to count as "sentence of imprisonment," improper to count suspended sentence with no imprisonment). See *Outline* at IV.A.5.

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<b>C O U R S E</b>	Course Name	Course Date(s)	Course Location
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<b>N O M I N E E</b>	Name	Title
	Office, Agency, or Department	Phone Number

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

<b>S U P E R V I S O R</b>	Name	Title
	Phone Number	Number of Nominees Submitted
		Order of Preference of this Nominee

**EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS**

**Bicentennial Building  
600 E Street, N.W.  
Washington, D.C. 20530**

**Counsel To EOUSA**

Richard DeHaan (202) 616-6772  
Room 7200

**Administrative Services**

Michael Bailie (202) 616-6600  
Deputy Director  
Room 8105

**Administrative and EOUSA**

**Personnel Staff**

Janis Harrington (202) 616-6900  
Administrative Officer  
Room 8104 Fax: (202) 616-6648

**Case Management Staff**

Eileen Menton (202) 616-6919  
Assistant Director  
Room 9200

**Evaluation & Review Staff**

Brian Jackson (202) 616-6776  
Assistant Director  
Room 7300 Fax: (202) 616-6481

**Facilities Management &  
Support Staff**

Dean Campbell (202) 616-6425  
Assistant Director  
Room 8300 Fax: (202) 616-6651

**Financial Litigation Staff**

Rick Sponseller (202) 616-6444  
Associate Director  
Room 8500 Fax: (202) 616-6647

**Financial Management Staff**

Michael McDonough (202) 616-6886  
Assistant Director  
Room 8000 Fax: (202) 616-6649

**FOIA Unit**

Bonnie Gay (202) 616-6757  
Attorney Advisor  
Room 7100 TDD: (202) 616-6479

**LECC/Victim Witness Staff**

Donna Enos (202) 616-6792  
Assistant Director  
Room 7400

**Office Automation Staff**

Carol Sloan (202) 616-6969  
Acting Assistant Director  
Room 9100 Fax: (202) 616-6679

**Office of Legal Education**

Donna Bucella (202) 616-6700  
Director  
Room 7600 (202) 616-6475  
(202) 616-6476

**Personnel Staff**

Gail Williamson (202) 616-6873  
Assistant Director  
Room 8017

**Security Programs Staff**

Paula Nasca (202) 616-6878  
Assistant Director  
Room 8200 Fax: (202) 616-6646

**Telecommunications &  
Technology Development**

Harvey Press (202) 616-6439  
Assistant Director  
Room 8515 Fax: (202) 616-6653

April 1994 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
19-21	Civil Chiefs	USAO Civil Chiefs (Large Offices)
25-30	Asset Forfeiture Advocacy	AUSAs

May 94

2-6	Appellate Advocacy	AUSAs
3-6	Public Corruption	AUSAs
17-20	Violent Crimes	AUSAs
24-26	Constitutional Torts	AUSAs

June 1994

1-3	First Assistants	FAUSAs (Small/Medium Offices)
7-10	Evidence for Experienced Litigators	AUSAs
7-10	Asset Forfeiture Financial Investigations	AUSAs
7-10	Asset Forfeiture Multi-Level Staff Training	USAO Support Staff
13-17	Complex Prosecutions/ Advanced Grand Jury	AUSAs
14-16	Affirmative Civil Litigation	AUSAs, IG Counsel
28-30	Attorney Supervisors	AUSAs

LEI Courses

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

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. A nomination form for LEI courses listed below (except those marked by an \*) is attached at the Appendix of this Bulletin as Exhibit H. 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 \*).

April 1994

<u>Date</u>	<u>Course</u>	<u>Participants</u>
5-8	Examination Techniques	Attorneys
11-12	Alternative Dispute Resolution for Agency Counsel	Attorneys
14-15	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals
18-22*	Criminal Paralegal	USAO Paralegals
27-29	Attorney Supervisors	Attorneys

May 1994

2-6*	Civil Paralegal	USAO Paralegals
3-5	Environmental Law	Attorneys
10	Computer Assisted Legal Research	Attorneys, Paralegals
10-12	Discovery	Attorneys
10-12	Basic Bankruptcy	Attorneys
13	Ethics for Litigators	Attorneys
16	Legislative Drafting	Attorneys, Legislative Assistants
16-20*	Support Staff Training	USAO Support Staff
23-24	Agency Civil Practice	Attorneys
24-25	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals

May 1994 (Cont'd.)

<u>Date</u>	<u>Course</u>	<u>Participants</u>
24-26	Special Problems in Bankruptcy	Attorneys
26	Privacy Act	Attorneys, Paralegals

June 1994

9	Advanced FOIA	Attorneys
13-14	Federal Acquisition Regulations	Attorneys
15	Fraud, Debarment, and Suspension	Attorneys
16	FOIA Forum	Attorneys
20	Statutes and Legislative Histories	Attorneys
20-22	Negotiation Skills	Attorneys
21-23	Advanced Bankruptcy	Attorneys
24	Legal Writing	Attorneys, Paralegals

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OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

<u>Address:</u>	Room 7600, Bicentennial Bldg.	Telephone: (202) 616-6700
	600 E Street, N.W.	FAX: (202) 616-6476
	Washington, D.C. 20530	(202) 616-6477

Director.....	Donna Bucella
Deputy Director.....	David Downs
Assistant Director (AGAI-Criminal).....	Charysse Alexander
Assistant Director (AGAI-Civil & Appellate).....	Mollie Nichols
Assistant Director (AGAI-Asset Forfeiture and Debt Collection).....	Nancy Rider
Assistant Director (LEI).....	Donna Preston
Assistant Director (LEI).....	Chris Roe
Assistant Director (LEI-Paralegal & Support).....	Donna Kennedy

\*\*\*\*\*

## **ADMINISTRATIVE ISSUES**

### **Executive Office For United States Attorneys**

Due to the renovation of the Patrick Henry Building, the Executive Office for United States Attorneys, located on the sixth floor and the tenth floor of that building, has moved. The new address is:

Bicentennial Building  
600 E Street, N. W.  
Washington, D.C. 20530

Attached at the Appendix of this Bulletin as Exhibit I is a current list of room numbers, telephone numbers, and Fax numbers.

\* \* \* \* \*

### **USA 5 Attorney Overtime Reporting Guidelines**

The USA-5 requests information on attorney time spent beyond the normal 40-hour work week in order to measure the true effort required to carry out the United States Attorneys' mission. The Case Management Office of the Executive Office for United States Attorneys has issued the following reporting guidelines in response to questions from Assistant United States Attorneys:

- Count any time over the 40-hour work week for full-time AUSAs or over the scheduled tour of duty for part-time AUSAs.
- Annual leave, sick leave, administrative leave, and holidays counts toward the forty-hour work week. E.g., if you take eight hours of annual leave on a Monday, and work the remaining four days, that is a forty-hour workweek. If you spend two days at a course and three days in the office, that is a 40-hour work week. Anything over 40 hours is overtime.
- Overtime can occur in the office, outside the office or while on travel status.
- If you work more than the eight hours (including leave) in a single workweek day, or anytime on a weekend or holiday, when your primary focus is on work-related matters, that work qualifies for 40+.
- During the week, if you work in the office while you eat lunch, you can claim that time as overtime.
- Work outside the office in excess of the 40-hour work week can also be counted as overtime if the primary focus is on office-related matters. Some examples:
  - Work-related telephone calls with agents and colleagues.
  - Writing briefs, motions or engaging in case preparation, e.g., reading slip opinions.
  - Attending CLE courses or preparing lectures for CLE courses.
  - Dictating correspondence.
  - Lecturing students or civic groups on drug education and awareness.

- Non-social bar association activities, e.g., serving on a disciplinary board or local rule review committee.
- Other job-related matters which would be appropriate to do during normal working hours.

(This does not include discussing a trial with family; thinking about a case when performing other tasks; being a duty Assistant United States Attorney--unless responding to a call or working on a duty matter outside normal office hours, on holidays, or on weekends; or thinking about work while driving home.)

- Travel to court outside the duty station can be counted if it is in excess of the eight-hour day. For overnight travel, the clock stops when you check into the hotel, unless you are working on work matters like briefs and motions.
- Travel to and from a course or office review should be counted as overtime if it is outside normal business hours.
- Travel to a detention facility on holidays should be counted as overtime.

#### 1994-1995 Education Scholarship Fund

The Federal Employee Education and Assistance Fund (FEEA) has announced its 1994-95 scholarship competition. FEEA offers scholarships of \$300 to \$1,200 per student, awarded on merit, to civilian Federal and postal employees and their dependent family members. Minimum requirements are at least three years of federal service and a 3.0 grade point average. Applicants may be high school seniors or students continuing their undergraduate or graduate college education. Selection criteria include academic achievement, community service, a recommendation, and an essay. The scholarship program is made possible, in part, by federal employee donations to FEEA, pledge #0415 in the CFC and by a contribution from the Blue Cross and Blue Shield Association. Since 1987, FEEA has awarded over \$590,000 in scholarships in every state and overseas.

The application deadline for the 1994-95 school year is June 3, 1994. In late February, the Personnel Staff of the Executive Office for United States Attorneys sent a memorandum to all District Administrative Officers attaching a brochure and an application form for this program.

FEEA also sponsors a loan program. Additional information about the loan program can be obtained by calling Pioneer Financial Bank on (617) 321-3700, Ext. 2292, or by writing to Pioneer Financial Bank, 350 Main Street, Malden, Massachusetts 02148.

\* \* \* \* \*

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

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

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 Attorneys' 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	Claude Harris, Jr.
Alabama, M	James Eldon Wilson
Alabama, S	Edward Vulevich, Jr.
Alaska	Robert C. Bundy
Arizona	Janet A. Napolitano
Arkansas, E	Paula J. Casey
Arkansas, W	Paul K. Holmes, III
California, N	Michael J. Yamaguchi
California, E	Charles J. Stevens
California, C	Nora Manella
California, S	Alan D. Bersin
Colorado	Henry L. Solano
Connecticut	Christopher Droney
Delaware	Richard G. Andrews
District of Columbia	Eric H. Holder, Jr.
Florida, N	Patrick M. Patterson
Florida, M	Larry H. Colleton
Florida, S	Kendall B. Coffey
Georgia, N	Kent B. Alexander
Georgia, M	James L. Wiggins
Georgia, S	Henry D. Dixon, Jr.
Guam	Frederick A. Black
Hawaii	Elliot Enoki
Idaho	Betty H. Richardson
Illinois, N	James B. Burns
Illinois, S	Walter C. Grace
Illinois, C	Frances C. Hulin
Indiana, N	Jon E. DeGuilio
Indiana, S	Judith A. Stewart
Iowa, N	Stephen J. Rapp
Iowa, S	Don Carlos Nickerson
Kansas	Randall K. Rathbun
Kentucky, E	Joseph L. Famularo
Kentucky, W	Michael Troop
Louisiana, E	Robert J. Boitmann
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Michael D. Skinner
Maine	Jay P. McCloskey
Maryland	Lynne Ann Battaglia
Massachusetts	Donald K. Stern
Michigan, E	Alan M. Gershel
Michigan, W	Michael H. Dettmer
Minnesota	David Lee Lillehaug
Mississippi, N	Alfred E. Moreton, III
Mississippi, S	George L. Phillips
Missouri, E	Edward L. Dowd, Jr.
Missouri, W	Stephen L. Hill, Jr.

<u>DISTRICT</u>	<u>U.S. ATTORNEY</u>
Montana	Sherry S. Matteucci
Nebraska	Thomas J. Monaghan
Nevada	Kathreyn E. Landreth
New Hampshire	Paul M. Gagnon
New Jersey	Michael Chertoff
New Mexico	John J. Kelly
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	Janice McKenzie Cole
North Carolina, M	Benjamin H. White Jr.
North Carolina, W	Mark T. Calloway
North Dakota	John T. Schneider
Ohio, N	Emily M. Sweeney
Ohio, S	Edmund A. Sargus, Jr.
Oklahoma, N	Stephen C. Lewis
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Vicki Miles-LaGrange
Oregon	Jack C. Wong
Pennsylvania, E	Michael R. Stiles
Pennsylvania, M	David M. Barasch
Pennsylvania, W	Frederick W. Thieman
Puerto Rico	Guillermo Gil
Rhode Island	Edwin J. Gale
South Carolina	J. Preston Strom, Jr.
South Dakota	Karen E. Schreier
Tennessee, E	Carl K. Kirkpatrick
Tennessee, M	John M. Roberts
Tennessee, W	Veronica F. Coleman
Texas, N	Paul E. Coggins, Jr.
Texas, S	Gaynelle Griffin Jones
Texas, E	Ruth Yeager
Texas, W	James H. DeAtley
Utah	Scott M. Matheson, Jr.
Vermont	Charles R. Tetzlaff
Virgin Islands	Hugh Prescott Mabe, III
Virginia, E	Helen F. Fahey
Virginia, W	Robert P. Crouch, Jr.
Washington, E	James P. Connelly
Washington, W	Katrina C. Pflaumer
West Virginia, N	William D. Wilmoth
West Virginia, S	Rebecca A. Betts
Wisconsin, E	Thomas P. Schneider
Wisconsin, W	Peggy Ann Lautenschlager
Wyoming	David D. Freudenthal
North Mariana Islands	Frederick Black