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COMMENDATIONS

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

James R. Allison and **James K. Bredar**, (District of Colorado), by Gary G. Lynch, Director, Securities and Exchange Commission, Washington, D. C., for their valuable assistance in prosecuting a criminal case.

Samuel A. Alter, Jr., (Florida, Northern District), by James Puleo, Assistant Commissioner, Adjudications, Immigration and Naturalization Service, Washington, D. C., for his participation in the naturalization activities in the Northern District of Florida.

Verne Armstrong and **Holly Taft Sydlow**, (Ohio, Northern District), by Col. Franklin Losey, Chief, Claims and Torts Litigation Staff, Office of the Judge Advocate General, U.S. Air Force, Washington, D.C., for their expertise in the litigation of a major case for the Air Force.

Christopher K. Barnes and **Dale Ann Goldberg**, (Ohio, Southern District), by Terence D. Dinan, Special Agent in Charge, FBI, Cincinnati, for their successful prosecution of a criminal case.

Bob Brooks and **Chris Mclean**, (District of Montana), by Donald MacPherson, District Counsel, Small Business Administration, Helena, for their professional manner in handling a large number of cases for the SBA.

Robert Chadwell, (District of Colorado), by Robert Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for his presentation at an annual education program for IRS special agents on grand jury investigations.

George Darragh, Jr., (District of Montana), by Major Jeffrey Grundtisch, Staff Judge Advocate, Malmstrom Air Force Base, Montana, for his exceptional legal representation in a complex medical malpractice case.

Thomas W. Dawson and **Alfred E. Moreton III**, (Mississippi, Northern District), by Wayne Taylor, Special Agent in Charge, FBI, Jackson, for their expert handling of the investigation and subsequent prosecution of numerous defendants in a coal fraud scheme.

John M. Facciola and **Michael Martinez**, (District of Columbia), by James A. Healy, Bureau of Reclamation, Department of Interior, Washington, D.C., for their successful resolution of a longstanding civil suit.

Holly B. Fitzsimmons, (District of Connecticut), by Richard T. Bretzing, Special Agent in Charge, FBI, Los Angeles, for her outstanding presentation at the Organized Crime Drug Enforcement Task Force Conference in Palm Springs in April.

John F. Gisla, (California, Eastern District), by Robert G. Reed II, County Supervisor, Farmers Home Administration, Yreka, California, for his valuable assistance in prosecuting a heavy bankruptcy caseload for the FHA.

Matthew L. Jacobs, (Wisconsin, Eastern District), by Elliott Lieb, Chief, Criminal Investigation Division, Internal Revenue Service, Milwaukee, for his success in the investigation and prosecution of an income tax evasion case.

Marcia W. Johnson and **Nancy Vecchiarelli**, (Ohio, Northern District), by Constant B. Chevalier, Regional Inspector General for Investigations, Department of Agriculture, Chicago, for their efforts in obtaining favorable settlements of several false claims lawsuits involving the Women, Infants, and Children's Program.

Samuel Longoria, (Texas, Southern District), by J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division, Washington, D.C., for his advice and assistance in reaching settlement of a major lawsuit.

David L. McGee, (Florida, Northern District), by William Sessions, Director, FBI, Washington, D. C., for his valuable assistance in the successful conclusion of a major undercover operation.

Gary M. Maveal, (Michigan, Eastern District), by Van Vandivier, Attorney Advisor, Bureau of Prisons, Sandstone, Minnesota, for his outstanding representation of a number of prison employees in a Bivens action brought by a prison inmate.

Christopher Milner and **Jack Wolfe**, (Texas, Southern District), by Claude Hill, Deputy Inspector General, Investigation Division, Texas Department of Human Services, Austin, for their skill and dedication in the investigation of Title XX day care fraud cases involving 117 defendants.

Susan Murnane, (Michigan, Eastern District), by Drew Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for her assistance in obtaining evidence in a matter involving the French government.

Craig H. Nakamura, (District of Hawaii), by Salvatore Martoche, Assistant Secretary for Labor-Management Standards, Department of Labor, Washington, D.C. for the prosecution and conviction of an embezzlement case.

Richard A. Poole, (Florida, Middle District), by Brigadier General Francis R. Dillon, Office of Special Investigations, Bolling Air Force Base, District of Columbia, for his leadership in a complex white collar crime investigation conducted in Lake City.

Richard Sarnacki, (Wisconsin, Western District), by Michael Dyer, Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his successful conclusion of a civil claim against a major medical provider.

Robert C. Seldon, (District of Columbia), by John Depenbrock, Associate Solicitor, Department of Labor, Washington, D.C. for his excellent representation in a sensitive civil case on behalf of the Department of Labor and the Department of Transportation.

Jane Shallal, (Michigan, Eastern District), by Timothy J. Babb, Prosecuting Attorneys Coordinating Council, Department of Attorney General, Lansing, for her outstanding contribution to the success of a basic training seminar for new prosecutors.

Linda K. Teal, (North Carolina, Eastern District), by Paul V. Daly, Special Agent in Charge, FBI, Charlotte, for her professionalism in representing the government in an Organized Crime Drug Task Force case resulting in a guilty plea on the part of a drug fugitive.

Barbara Van Gelder, (District of Columbia), by Renald P. Morani, Acting Inspector General, Veterans Administration, Washington, D. C., for her professionalism in negotiating settlement of a civil litigation matter. Also from James H. Thessin, Assistant Legal Adviser for Management, Department of State, Washington, D.C., for her professional representation of a matter involving the Foreign Service Grievance Board.

Andrew Vogt, (District of Colorado), by John M. Stuhldreher, General Counsel, National Transportation Safety Board, Washington, D. C., for his assistance in obtaining a favorable decision in the investigation of an aviation accident in Durango, Colorado.

Dale Williams, Jr., (Ohio, Southern District), by James D. Humphrey, Prosecuting Attorney, 7th Judicial Circuit, Lawrenceburg, Indiana, for obtaining a conviction on all counts of a kidnap and murder case.

William Yahner, (Texas, Southern District), by Deborah A. Conrad, Claims Officer, United States Recoveries, Export-Import Bank of the United States, Washington, D.C., for his valuable assistance in settling a collection matter for Eximbank.

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PERSONNEL

Effective June 17, 1988, **Dexter W. Lehtinen** took the oath of office as the Interim United States Attorney for the Southern District of Florida.

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POINTS TO REMEMBER

American Bar Association -- Management Programs

The American Bar Association is offering two new management programs: "57+ Ideas for Improving Government and Other Organized Legal Practices" and "Effective Management of a Public Sector Practice." Both of these programs have been developed by Deputy General Counsel J. Edwin Dietel of the Central Intelligence Agency.

The first program, "57+ Ideas for Improving Government and Other Organized Legal Practices," will be held in Toronto, Canada on August 5, 1988. A panel of experienced senior attorney managers will share with the participants more than fifty-seven concrete ideas that can be put to immediate use to improve a practice. Subjects to be covered include motivating attorneys, improving the practice, legal compliance programs, marketing legal services, improving the quality of services, recruiting, career development, and internal communications. Additional useful ideas will be developed during the program and will be mailed to the participants following the meeting. For further details, contact Kara Bismark, ABA Headquarters, Chicago, Illinois 60611, (312) 988-5644.

The second program, "Effective Management of a Public Sector Practice," will be held at the Park Terrace Hotel in Washington, D.C. on October 28, 1988. This full-day program will combine seminars and smaller workshops on the topics of administrating a public sector practice, client management, including marketing and improving the quality and timeliness of the legal services being delivered, recruiting, retaining, training, compensating and motivating attorneys and support staff, long-range planning, legal ethical considerations, and automation in the law office. Contact Jackie Baker, ABA Headquarters, Chicago, Illinois 60611, (312) 988-5652 for further information.

(Central Intelligence Agency)

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Career Opportunity

The Antitrust Division, Department of Justice, Washington, D.C. is seeking a trial attorney with at least four years experience in complex criminal litigation. Additional civil litigation experience is helpful. Responsibilities will include: litigation of antitrust violations arising out of organized crime activities and grand jury/civil investigations. Other responsibilities may involve participation in criminal/civil investigations of antitrust violations in the health care industry, motion picture industry, and by various professions. All applicants must possess outstanding academic and professional qualifications.

Please submit a resume or SF 171, together with references, to the Antitrust Division, Department of Justice, Room 3242, 10th Street and Pennsylvania Avenue, N.W., Washington, D. C. 20530.

(Antitrust Division)

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Defendants Claiming To Have Worked For The CIA

In the event that a defendant or any other person claims to have been employed by the Central Intelligence Agency in the past, or to have been asssociated with them in any way, verification may be obtained by contacting Steven W. Hermes, Chief, Operations Support Division, CIA, at (703) 482-7531.

(Central Intelligence Agency)

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Drug Testing

On September 15, 1986, President Reagan signed Executive Order 12564 which establishes the policy of the U.S. Government to achieve a Drug-Free Federal Workplace. The intent of the policy is to offer a helping hand to those who need it while sending a clear message that any illegal drug use is quite simply incompatible with federal service. Pursuant to the President's Order, on June 27, 1988, Assistant Attorney General for Administration Harry H. Flickinger issued a general notice of drug testing, to begin 60 days thereafter, with initial implementation in the Washington, D. C. area followed by the field offices.

The Department's plan has two main purposes: to deter illegal drug use through a scientifically accurate and fair drug testing program and to provide counseling and drug treatment through the Employee Assistance Program to employees who are found to use illegal drugs. The program will include: random testing, applicant and probationer testing, reasonable suspicion testing, accident or unsafe practice testing, voluntary testing, and follow-up testing. Testing will be conducted by laboratories that meet the strict mandatory standards established by the Department of Health and Human Services, and will include the following classes of drugs: marijuana metabolites, cocaine metabolites, opiates, PCP, and amphetamines. Employees likely to be selected for random drug testing are presidential appointees, those directly engaged in criminal law enforcement activities, those who are entrusted with custody of drugs, those who require security clearance of "top secret" or higher, those who are reasonably suspected of drug use, and those who wish to volunteer for the program.

For further details and information, please call the Justice Management Division, FTS 633-2233. For counseling and/or rehabilitation, please contact the Employee Assistance Program at FTS 633-1846.

(Justice Management Division)

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Guideline Sentences

Pending the Supreme Court's resolution of the constitutionality of the Sentencing Guidelines in United States v. Mistretta, (Nos. 87-1904 and 87-7028, cert. granted June 13, 1988), guideline sentences should be requested in all cases and contrary rulings ordinarily should be stayed. A model stay motion and information concerning governmental disclosure obligations and the availability of restitution are reprinted in the Appendix to this Bulletin.

(Criminal Division)

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Procedures To Be Followed For 18 U.S.C. § 3504 Electronic Surveillance Requests Seeking Wiretap Information

Procedures to be followed and information to be included in Electronic Surveillance (Elsur) requests are a matter of some confusion. Elsur requests should be submitted to the Office of Enforcement Operations, Criminal Division, Department of Justice, Washington, D. C. 20530. These requests should be made at the earliest opportunity in order to give the government agencies involved sufficient time to conduct a thorough and accurate search. The average time the agencies require to conduct an 18 U.S.C. § 3504 search is 6 to 8 weeks. However, you may expedite their responses by including all necessary identifying information, i.e., full name of the subject to be checked, all known aliases used by that individual, date and place of birth, race, sex, Social Security number, and an FBI number, if one is available. The time period for which the search is to be performed and all addresses and telephone numbers, both residential and commercial, in which the subject of the Elsur check had a proprietary interest during that period, should be included. Also, include the citations of the statutes involved in the investigation or charged in the indictment, your deadlines, and a signed motion or waiver if the Internal Revenue is one of the agencies to be surveyed. See also USAM 9-7.570.

If you have any questions, please contact David M. Simonson, Legal Support Unit, Office of Enforcement Operations, Criminal Division, at FTS 786-4987.

(Criminal Division)

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LEGISLATION

Anti-Drug Abuse

On June 30, 1988, the House Judiciary Committee completed three days of mark-up of H.R. 4916, the "Anti-Drug Abuse Amendments Act of 1988." The Committee voted to report out this omnibus drug bill 35 to 0, and floor action is anticipated before the August recess.

The Department is currently developing positions on this catch-all bill, which includes titles dealing with chemical diversion and trafficking, drug enforcement enhancements, money laundering, drug czar, increased roles for the Postal Service and the Forest Service, user accountability, interdiction of firearms, State and local assistance, and a waiting period for handgun purchases. As of this time, the Department has problems with the titles dealing with chemical diversion and trafficking, money laundering, drug czar, and increased law enforcement authority for the Forest Service. The views of the Department will be communicated to the Office of Management and Budget shortly.

While the House Republicans lost on a number of amendments, the Department sees some hope for future gains possibly on the House floor. The following amendments are therefore highlighted: the Gekas amendment calling for the death penalty for drug "King Pins" which lost 17-17, and the Lungren amendment on the "good faith exception" to the exclusionary rule. Senate Republicans, under the leadership of Senator Bob Dole, are expected to complete a drug plan of their own in the next few weeks. The Senate Democrats are also preparing a drug bill and Senator Byrd is anticipating action on it by the end of September. The House Republicans have introduced H.R. 4842, the "Comprehensive Anti-Drugs Act of 1988" as an alternative to the House Speaker's bill, H.R. 4916. Therefore, there are now four separate bills dealing with anti-drug abuse measures. The Department favors a legislative-executive summit where all of these measures can be worked out with a bipartisan consensus.

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Anti-Public Corruption Act Of 1988

On June 17, 1988, anti-corruption legislation was introduced by Senators Mitch McConnell (R-Ky) and Strom Thurmond (R-S.C.), and was referred to the Senate Judiciary Committee. This legislation represents an effort to reestablish prosecutorial authority affected by last year's Supreme Court decision in McNally v. United States. In that case, the Court held that federal mail and wire fraud statutes do not reach schemes to defraud citizens of honest and impartial government ("intangible rights"), but are limited to schemes to obtain property or money. The proposed legislation is a toughened and expanded federal proscription for corrupt and dishonest conduct on the state, local and federal levels, including some forms of election fraud, previously brought under the mail fraud "intangible rights" theory.

Attorney General Edwin Meese III praised the introduction of this legislation as "the first and most important step in restoring public trust and aiding federal efforts to combat public corruption schemes. Prosecution of public corruption cases has been one of the Department's highest priorities. This legislation will enable us to reassert the aggressive position on law enforcement we've taken in recent years." Citing the serious and harmful nature of such crimes, the Attorney General stated that it was "appropriate and within the legitimate interests of federalism" that the new legislation would expand the federal government's ability to prosecute public corruption beyond mail and wire fraud to include other areas, such as schemes affecting interstate commerce.

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Fair Housing

On June 29, 1988, by a margin of 376 to 23, the House passed H.R. 1158, a bill to toughen fair housing enforcement. A large number of Republicans joined a nearly solid Democratic majority in turning back nine of eleven attempts to amend the bill. An effort to recommit the measure with instructions met a similar fate. Final passage marked the end of a 4-hour session which had been preceded by two partial days of debate on June 22-23. The bill was amended on the second day to create what is, in essence, a right of removal to federal district court for a de novo jury trial and additional authority for housing providers to reject applicants who constitute a danger to property. An attempt to delete "familial status" as a protected class failed as members rejected the argument that the bill imperiled the rights of senior citizens to reside in buildings free of children.

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Federal Employee Liability Reform And Tort Compensation Act of 1988

On June 28, 1988, the House passed H.R. 4612, as amended, under Suspension of the Rules. The bill, which was drafted by the Department, provides that suit against the United States under the Federal Tort Claims Act shall be the exclusive remedy for common law torts committed by Federal government employees who are acting within the scope of their employment. The legislation, which was introduced by Congressman Barney Frank, Chairman of the Judiciary Subcommittee on Administrative Law and Governmental Relations, with bipartisan co-sponsorship, would over-

rule the Supreme Court decision in Westfall v. Erwin. The Department worked closely with Subcommittee staff throughout the hearing and mark-up process on this legislation.

Senator Grassley introduced the companion measure, S. 2500, on June 13, 1988, with Senators Heflin, Trible, Humphrey and Stevens as co-sponsors. The bill has been referred to the Judiciary Subcommittee on Courts and Administrative Practice, which is chaired by Senator Heflin. The Department is working with his staff to explore the possibility of polling the bill out of the Subcommittee where it may not be controversial. They are also endeavoring to resolve the minor language differences in the House and Senate versions in the hope that Senate passage of this important legislation will be achieved in the remaining days of this session.

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Grounds for Exclusion Of Aliens

On June 22, 1988, the House Committee on the Judiciary passed H.R. 4427 by a vote of 21-14. This bill is a substantial revision of the existing grounds for excluding aliens, and the Administration has opposed it for several reasons. One of its principal effects is to limit significantly the Government's ability to exclude individuals who are members of particular organizations, including terrorist groups and the Communist Party.

A number of amendments were accepted, which would: (1) modify the health-related grounds for exclusion based on physical or mental disorders; (2) add representatives or officials of the PLO as a category of excludable aliens; (3) include the admission of the commission of a crime, in addition to an actual conviction, as a basis for exclusion; (4) preclude a waiver of exclusion for individuals who have committed certain heinous offenses; (5) clarify the type of lesser offense excepted from the criminal offense exclusion ground; and (6) retain the exclusion ground in current law for individuals seeking to enter the United States to engage in unlawful commercialized vice in addition to prostitution.

Additional significant amendments which the Department supported but which were not accepted by the Committee include amendments which would: (1) retain the current ground for excluding, as immigrants, members of the Communist Party or other totalitarian parties; (2) provide for the exclusion of aliens who

advocate or teach, or belong to organizations which advocate, teach, or engage in, the overthrow of the government by force or violence or other types of subversive or violent activity; and (3) retain in its present form Section 235(c) of the Immigration and Nationality Act, which allows for the summary exclusion of aliens based on classified information. The current version of the bill would provide for an exclusion hearing for individuals now covered by the provisions of Section 235(c), and for an "unclassified summary" of the information to be provided to the alien.

Another significant defect in H.R. 4427 is the provision for a waiver of excludability in the case of aliens with communicable diseases, such as AIDS or HIV infection. The Department of Justice has urged that such cases continue to be addressed through the exercise of the Attorney General's parole authority, where deemed appropriate for humanitarian reasons. The Department is working with Congressional staff to urge that this provision of the bill be amended on the floor of the House.

A proposed Senate version of H.R. 4427 is being prepared by Senator Simpson's staff, which is likely to accommodate many, if not all, of the concerns that the Administration has raised in the House. Assuming that any legislation modifying the grounds for exclusion is passed during this Congress, it is anticipated that the final bill will likely incorporate the Administration's position on most of the significant issues, principally because of the less liberal climate in the Senate.

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International Securities Enforcement

On June 29, 1988, the Senate Banking Subcommittee on Securities held a hearing on S. 2544, the International Securities Enforcement and Cooperation Act of 1988. The bill was introduced on June 21, 1988 by Subcommittee Chairman Reigle with Senators Proxmire, Garn, Dodd, and Wirth as co-sponsors. This bill would expand the authority of the SEC to conduct an investigation in response to the request of a foreign regulatory authority. It also would exempt certain confidential documents received from foreign authorities from mandatory disclosure under the Freedom of Information Act, while providing explicit authority to the SEC to permit foreign authorities access to nonpublic documents and other information. Additionally, the legislation provides explicit authority for the SEC to censure, revoke the registration, or impose employment restrictions upon securities professionals based upon findings of a foreign court or securities authority.

The SEC asked the Department to testify in support of the bill. The Department declined, clearly recognizing the important benefits the legislation could provide to international securities law enforcement efforts. The Department has certain concerns about its impact on the criminal investigative authority. These concerns have been raised with the SEC in hopes of resolving them without stating an objection to the legislation. A statement is being prepared for the hearing record for submission in the next two weeks.

SEC Chairman Ruder and the Principal Deputy Legal Adviser at the Department of State, Mary V. Mochary, testified in support of the bill at the Subcommittee hearing. Chairman Ruder expressed opposition to the provision that foreign authorities must agree to provide the United States with the investigative assistance similar to that which the SEC is authorized by the bill to provide to foreign authorities. Chairman Reigle questioned the basis for this opposition in light of the fact that the Department of State does not oppose the reciprocity requirement. Chairman Ruder's response indicated that it is not a dispositive issue for the SEC. The Subcommittee is likely to submit follow-up questions to both the SEC and the Department of State.

Congressman Dingell introduced the SEC version of this legislation on June 29 by request, with Congressmen Markey, Lent, and Rinaldo as co-sponsors. The SEC version is very similar to S. 2544 but it does not include the reciprocity provision. The Department's preliminary assessment indicates that such a provision pertains primarily to our strategy in obtaining cooperation from foreign authorities and it is not essential to effective legislation. The bill will be referred to the Energy and Commerce Subcommittee on Oversight and Investigations, where the SEC will push for hearings. The legislation could pass the Senate this summer if the concerns about criminal investigative authority can be resolved with the SEC. It is too early to speculate on action in the House.

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Mandatory Supreme Court Jurisdiction

This legislation would eliminate mandatory Supreme Court jurisdiction, except for review of decisions by three-judge district courts. On October 14, 1987, Deputy Assistant Attorney General Stephen J. Markman testified before a hearing of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice on H.R. 3152. He explained that the Department supports revision that would render the Court's docket

generally discretionary in certain cases. These would include cases wherein the highest court of a state holds federal legislation unconstitutional on its face and cases wherein a federal court of appeals invalidates an act of a state legislature on its face. The Subcommittee marked up H.R. 3152 in June, but the report has not yet been filed.

Meanwhile, the Senate version of the legislation was referred to the Committee on the Judiciary and reported on May 26, 1988. By this date, the Department had determined to support the bill without certain amendments, based upon information received from the Court. On June 7, 1988, the House passed the Senate version, S. 952, and the Department joined in the Administration floor position supporting enactment of the bill. On June 17, 1988, S. 952 was presented to the President, and it is anticipated that it will be approved soon. A signing statement was prepared commending Congress for its passage of this important judicial reform legislation.

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Military Medical Malpractice

On February 17, 1988, the House passed H.R. 1054, which would permit service members to sue the United States for military medical malpractice under the Federal Tort Claims Act. Such suits have been barred by the Feres doctrine that generally prohibits suits by service members for injuries resulting from activities that are incident to military service. The Departments of Justice and Defense vigorously opposed this bill in testimony before the Subcommittees of both the House Judiciary and the Armed Services Committees in 1987. The legislation would precipitate a flood of tort litigation against the United States that would substantially disrupt military operations. Despite the Department's unalterable opposition, the bill passed by a vote of 312 to 61 with an amendment that purports to limit damages for non-economic loss to $300,000.

H.R. 1054 was referred to the Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice. The Senate companion, S. 347, was introduced by Senator Sasser and initially referred to the Armed Services Subcommittee on Manpower and Personnel. Although the Department succeeded in delaying action in that Subcommittee, the bill was referred to the Judiciary Committee.

In a letter dated June 6, 1988 to Chairman Biden, the Department of Justice and the Department of Defense explained their strong opposition to both H.R. 1054 and S. 347. The letter pointed out the benefits already available to compensate injuries sustained by service members under the Military Claims Act, 10 U.S.C. § 2733 (MCA). Accordingly, a draft bill was attached to amend the MCA to provide compensation for service members injured by military medical malpractice. This alternative is vastly preferable to the pending legislation because it involves no judicial review and applies worldwide, unlike the Federal Tort Claims Act, which is limited to causes of action arising in the United States. Since the high transaction costs of litigation are avoided, the cost-benefit analysis is much more favorable to both the injured person and the United States.

On June 17, 1988, the Subcommittee on Courts and Administrative Practice held a hearing on H.R. 1054 and S. 347, now denominated as S. 2490. Deputy Assistant Attorney General Brent O. Hatch, of the Civil Division, joined DOD General Counsel Kathleen Buck in urging the Senate to abandon this legislation in favor of the MCA remedy if, indeed, any legislative action is necessary at this time. In light of the substantial margin of passage in the House and the Senate Subcommittee action, the prognosis is uncertain at this time. It may depend in part upon how effectively the Administration persuades members of the Senate to accept the MCA alternative.

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Public Safety Officers' Death Benefits

The House Judiciary Committee, chaired by Congressman Rodino, conducted a mark-up on June 22, 1988 of H.R. 4758, a bill which amends the Omnibus Crime Control and Safe Streets Act of 1968 to increase the death benefit for public safety officers from $50,000 to $100,000 and to provide that nondependent parents may be beneficiaries. The bill was favorably reported out of Committee by a unanimous vote. It is anticipated that the House will pass this bill in July under a suspension of the rules.

The Senate version of the bill is included in Senator Biden's Juvenile and Criminal Justice Partnership bill, S. 1250. It is anticipated that mark-up will be scheduled this month.

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CASENOTES

CIVIL DIVISION

Supreme Court Rejects Government's Contentions On Scope Of "Discretionary Function" Exception To Government's Tort Liability In Polio Vaccine Case.

Recently, the Supreme Court unanimously held that the Food and Drug Administration can be sued for licensing the Sabin oral polio vaccine and for permitting release by a drug company of individual lots of that vaccine. The Court rejected the government's defense that these actions were exempt from liability under the "discretionary function" exception to the Federal Tort Claims Act and stated emphatically that there was no immunity for "core governmental functions." Nonetheless, the Court reiterated its adherence to United States v. Varig Airlines, 467 U.S. § 797 (1984), and explained that the government will continue to be protected from private damage actions whenever challenged acts are "within the range of choice accorded by federal policy and law and were the results of policy determinations."

The reason for the Court's decision in this case is that FDA statutes and regulations permit licensing and release of drugs only when certain tests have been passed and reviews performed by FDA employees. The Court has explained that whenever the agency's "policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment," that activity will not be protected from private tort suit. When an agency adopts policies permitting its employees discretion in regulatory activities, the "discretionary function" exception will continue to apply. Thus, in Varig, where Federal Aviation Administration inspectors engaged in a spot-checking of aircraft, the government was protected from suit. However, when inspectors are governed by more stringent requirements, as in this case, tort claims will be permitted.

Berkowitz v. United States, (No. 87-498, June 13, 1988).
DJ # 157-64-765.

Attorneys: John F. Cordes, FTS 633-3380
William G. Cole, FTS 633-5090

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First Circuit Holds That Doctor Must Exhaust Statutory Remedies Before Challenging 5-Year Exclusion From Medicare Program, And Holds That Medicare Peer Review Scheme Satisfies Due Process.

On the basis of the Maine peer review organization (PRO)'s recommendation, the Inspector General of HHS determined that the plaintiff, a Maine physician, should be precluded from receiving reimbursement for the treatment of Medicare patients for at least five years. The PRO's recommendation was made after finding that, in three instances, the plaintiff had "grossly and flagrantly violated" his obligation to provide medical care of a quality which meets professionally recognized standards of health care. The plaintiff, without first exhausting statutorily prescribed administrative remedies, immediately sought to have HHS enjoined from carrying out its order. The district court rejected the plaintiff's constitutionally based legal attacks on HHS's statute and procedures, but it agreed with the plaintiff that the Maine PRO had failed to follow an HHS regulation governing the choice of recommended sanction. Therefore, the court issued an injunction from which the Secretary appealed.

The court of appeals held that the district court could not lawfully have issued an injunction because the plaintiff had failed to exhaust his administrative remedies. It rejected plaintiff's claim that the agency's purported failure to consider a regulatory requirement was a "collateral issue" warranting waiver of the exhaustion requirement, holding instead that, in the absence of some showing that the challenged action is based on an important "systemwide" agency policy, exhaustion is not to be excused. Turning to the issues raised by plaintiff's cross-appeal, the court of appeals held that the "gross and flagrant" standard was not unconstitutionally vague, and that, so long as the doctor is afforded notice and an opportunity to respond, the Constitution allows HHS leeway in balancing the risk of erroneous deprivation against the protection of Medicare beneficiaries from incompetent doctors.

Doyle v. Bowen, (Nos. 87-1711, 87-1741, 87-1768, June 3, 1988). DJ # 137-37-140.

Attorneys: John F. Cordes, FTS 633-3380
Michael E. Robinson, FTS 633-5460

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Sixth Circuit Applies Chevron Rule In Upholding Customs Service Ban On Balisong Knives As A Permissible Interpretation Of The Switchblade Knife Act.

Plaintiff, an importer of Balisong or "butterfly" knives, brought this suit for injunctive and declaratory relief alleging that U.S. Customs officials had illegally seized shipments of his knives in three states. Plaintiff sought a declaration that the knives were not switchblades within the meaning of the Switchblade Knife Act, 15 U.S.C. § 1241(b), and an injunction against future seizures of Balisong shipments by Customs. The district court held that the Act did not reach plaintiff's Balisong knives because they were not "ready for use" until at least two manual operations were performed after the blade was exposed. Further, the district court's order purported to enjoin the Customs Service from seizing future importations of Balisong knives nationwide. The Sixth Circuit has now reversed.

The court of appeals, citing Chevron, U.S.A., Inc. v. NRDC, 467 U.S. § 837 (1984), held that Customs' administrative determination that Balisong knives of the type here at issue are switchblades is a reasonable construction of the statute and regulation. Significantly, the court found that while the agency's rulings over time proceeded from a position of total prohibition of Balisong knives to a case-by-case adjudication of their importability, Customs never departed from its position that the knives were subject to scrutiny under the Act. The court concluded that the decision to deny importation of Taylor's knives was entitled to "considerable deference" since it was "consistent with the statutory language and underlying policy of the law and regulation in this case." Accordingly, the court reversed the judgment of the district court and set aside its injunctive order.

Taylor v. United States, (No. 87-5014, June 6, 1988).
DJ # 157-70-584.

Attorneys: Leonard Schaitman, FTS 633-3441
Jeffrica Jenkins Lee, FTS 633-3469

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Supreme Court Holds That District Court Did Not Abuse Its Discretion In Determining That HUD's Position In Operating Subsidy Litigation Was Not "Substantially Justified," But Gives Narrow Definition Of "Special Factors" Justifying Award Of Fees In Excess Of EAJA's $75/Hour Cap.

In this action under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), the Ninth Circuit held that the Secretary of HUD was not "substantially justified" in litigating his obligations under the operating subsidy program of 1975-77. The court of appeals also held that plaintiffs were entitled to fees in excess of the EAJA's general $75/hour limit. The Supreme Court granted certiorari on both issues.

The Court has now affirmed on the substantial justification issue, holding that the district court did not abuse its discretion in determining that the Secretary's position in the operating subsidy litigation was not "substantially justified." In reaching this conclusion the court held that the test for substantial justification is whether the government's position was reasonable, as opposed to a higher standard such as "clearly reasonable." The Court discounted legislative history to the contrary in the 1985 reenactment of the EAJA. Additionally, the Court vacated the fee award and remanded for recomputation, concluding that the Ninth Circuit misapplied the "special factors" test for exceeding EAJA's $75/hour limit. The Court rejected use of factors designed to establish market rates for attorneys' services as "special factors" to exceed the EAJA fee cap. The Court further indicated that the "limited availability of qualified attorneys" special factor only comes into play in areas which require "distinctive knowledge or specialized skill" such as patent law.

Pierce v. Underwood, (No. 86-1512, June 27, 1988).
DJ # 145-17-1154.

Attorneys: William Kantor, FTS 633-1597
John S. Koppel, FTS 633-5459

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Supreme Court Rules That Prejudgment Interest May Be Awarded Against Postal Service In Title VII Cases.

The Supreme Court has ruled that prejudgment interest may be awarded against the Postal Service in favor of successful Title VII plaintiffs. The five-Justice majority relied principally on the proposition that the statute creating the Postal Service as a "sue and be sued" agency (39 U.S.C. § 401) constitutes a broad waiver of sovereign immunity which is to be "liberally construed" and presumptively subjects the Service to liability on the same terms as any other business. The Court distinguished its decision in Shaw v. Library of Congress on the ground that there Title VII provided the waiver of sovereign immunity (and thus had to be construed narrowly), whereas in the present case the waiver of immunity came from the pre-existing "sue and be sued" provision, even though the same Title VII section created the cause of action.

Loeffler v. Frank, (No. 86-1431, June 13, 1988).
DJ # 35-42-92.

Attorneys: William Kanter, FTS 633-1597
John F. Daly, FTS 633-4027

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Supreme Court Rules That A Bivens Action Cannot Be Implied Against Former Secretary Of HHS And Two Other Officials Where Plaintiffs Sought Damages For Alleged Emotional Distress Caused By Initial Termination Decisions In Social Security Disability Cases.

This is a Bivens action brought by three disability benefits recipients against former Secretary of Health and Human Services Schweiker, former Social Security Administration Commissioner Svahn, and William Sims, the current Administrator of the Arizona State Disability Determination Service for the alleged emotional distress caused plaintiffs by initial determinations to terminate their disability benefits. The Supreme Court, in a 6-3 decision, has just agreed with us that, given the comprehensiveness of the social security administrative process and the constant attention which Congress gives to the social security disability programs, the "case * * * cannot reasonably be distinguished from Bush v. Lucas." Accordingly, the Court ruled that a Bivens action would not be implied in these circumstances, and ordered the case to be

dismissed. Given its disposition on the Bush v. Lucas "special factors" analysis, the majority stated that it would not consider whether 42 U.S.C. § 405(h) specifically precludes a Bivens remedy, especially since the "exact scope" of § 405(h) "is not free from doubt * * *."

Richard Schweiker, et al. v. James Chilicky, et al., (No. 86-1781, June 24, 1988). DJ # 145-16-207.

Attorneys: Barbara Herwig, FTS 633-5426
William Kanter, FTS 633-1597
Howard Scher, FTS 633-4820

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Supreme Court Narrows The Scope Of The Intentional Tort Exception To FTCA.

Mrs. Sheridan was struck by a bullet fired at passing cars by a drunken off-duty enlisted man at Bethesda Naval Hospital. The district court and the Fourth Circuit held that the Sheridans' Federal Tort Claims Act suit was barred by the exception barring claims "arising out" of a battery. The Sheridans sought to avoid that bar by alleging that other Navy personnel had negligently failed to prevent the assailant from committing the battery. In a 6-3 decision the Supreme Court has now reversed and remanded. The majority held that because the FTCA itself only applies to government employees acting within the scope of their employment, the intentional tort exception is similarly limited. Here because the assailant was plainly acting outside the scope of his employment, the exception was held not to bar the suit. Significantly, the majority also expressly reserves the question whether a plaintiff can evade the exception and survive a motion to dismiss simply by alleging that the government negligently supervised the assailant.

Sheridan v. United States, (No. 87-626, June 24, 1988). DJ # 157-35-1172.

Attorney: Anthony J. Steinmeyer, FTS 633-3388

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Seventh Circuit Holds Unspent Grant Funds May Not Comprise A Part Of Bankrupt's Estate And Must Be Returned To The Government.

Joliet-Will Community Action Agency ("Joliet-Will") was a private operation which did good works with direct and indirect (i.e., state-administered) federal grants. Joliet-Will spent far more than its grants permitted, and ultimately abandoned any pretext that it intended to comply with grant requirements. Instead of going back to the granting agencies for wind-down proceedings, including an audit, Joliet-Will petitioned for bankruptcy relief. The granting agencies filed a motion to compel the trustee to abandon the unspent grant monies on the ground that the funds, abandoned by the grantee, were the property of the United States. The Bankruptcy Court and the United States District Court for the Northern District of Illinois denied the motion and we appealed. The Seventh Circuit has now reversed, concluding that, under Buchanan v. Alexander, 45 U.S. (4 How.) 19 (1846), the unspent grant monies should be regarded as property of the United States. (The appellate court expressed doubt, however, that Buchanan comprised binding precedent in the bankruptcy context.) Ultimately, the court held that our position was favored on grounds of public policy.

In Re: Joliet-Will County Community Action Agency, (Nos. 87-2285, 87-2467, June 1, 1988). DJ # 77-23-1940.

Attorneys: John F. Cordes, FTS 633-3380
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CRIMINAL DIVISION

Federal Rules Of Criminal Procedure

Rule 32(c)(3). Sentence and Judgment. Presentence Investigation. Disclosure.

Defendant, while on probation for a weapons violation, committed suicide but first killed the prosecutor who had sent him to prison on another charge many years before. Defendant's presentence investigation report (PSI) was sought, under Rule 32(c), by the prosecutor's estate, which is considering a civil negligence action against the probation service, and by a newspaper which wants it for use in informing the public about the sentencing process. The government opposed disclosure arguing that the documents are confidential court records. The district court refused disclosure. The estate and the newspaper appealed.

Federal Rule of Criminal Procedure 32(c) mandates disclosure of PSIs to defendants, their attorneys, and the government, but is silent as to release to third parties. The district court has discretion to release the PSI when, as here, the ends of justice are thereby served. The appellant estate has no other source for the information contained in the PSI and disclosure to the appellant newspaper will serve the public interest. The Court held that disclosure is appropriate. To assure protection of any confidential information in the PSI, the district court should redact any information from the requested documents which it determines to be confidential under Rule 32(c)(3)(A). When completed, the district court shall permit the newspaper and the estate to read and make notes from the PSI.

(WRIT ISSUED. REMANDED) U.S. v. Schlette, 842 F.2d 1574 (9th Cir. 1988).

* * * * *

Rule 43(a). Presence of the Defendant. Presence Required.

A fugitive defendant, who voluntarily and intentionally absented himself to avoid trial, was tried in absentia in the District Court. The jury returned a general verdict finding defendant guilty and a special verdict imposing forfeiture of defendant's property. On appeal, defendant's counsel argues that the Judgment of Forfeiture and Order of Forfeiture entered by the court violate the prohibition against sentencing in absentia, contained in Federal Rules of Criminal Procedure 43 which requires the defendant's presence at certain stages of the prosecution. The Government argued that since the Constitution allows trials in absentia, sentencing in absentia is equally permissible by implication.

The Court of Appeals for the Tenth Circuit held that the flaw in the government's argument is that the defendant was not claiming a violation of the Sixth Amendment right to be present for trial; defendant was affirmatively claiming the privilege of presence provided by the Federal Rules of Criminal Procedure, specifically Rule 43(a). The Judgment and Order of Forfeiture were vacated. The case was remanded with instructions to sentence defendant in accordance with Rule 43 once he has been brought personally before the court.

(Reversed and Remanded) U.S. v. Stephen Jay Songer, 842 F.2d 240 (10th Cir. 1988)

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LAND AND NATURAL RESOURCES DIVISION

Company's Leachate Collection Basin Held Subject To Regulation Under The Resource Conservation And Recovery Act

The court of appeals, by a per curiam decision, affirmed a summary judgment in favor of EPA and the New York State Department of Environmental Protection holding that AL Tech's leachate collection basin stores hazardous waste and is thus subject to the regulations under the Resource Conservation and Recovery Act, (RCRA), 42 U.S.C. § 6901 et seq. The court did not reach the additional question whether a listed hazardous waste is exempt from RCRA's permitting requirements merely because the waste from which the leachate is derived was originally deposited in a landfill prior to the effective date of RCRA and its implementing regulations.

AL Tech Specialty Steel Corp. v. U.S. Environmental Protection Agency, et al., 2nd Cir. No. 87-6289 (May 10, 1988) DJ # 90-7-1-329.

Attorneys: Jacques B. Gelin, FTS 633-2762
Dirk D. Snel, FTS 633-4400
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and EPA staff

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NRC's User Fee Rule Promulgated Under Omnibus Budget Reconciliation Act Of 1985 Sustained

In this case, the D.C. Circuit upheld the NRC's user fee rule, promulgated under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Under the rule, licensees had to pay a uniform annual charge of $950,000 per reactor. The court rejected petitioner's three objections to the user fee regulation: (1) that the rule violated the standards contained in COBRA, (2) that, if COBRA were interpreted to authorize NRC's annual flat fee, then the measure would constitute an unconstitutional delegation of Congress' power to tax, and (3) that procedural errors, including a 15-day comment period, deprived them of a meaningful opportunity to comment on the rule.

Judge Starr dissented. He would have found the rule lacking because it did not link the annual fee imposed on each licensee (a flat $950,000 per reactor) with "a fair approximation of the benefit inuring to the licensee * * *." Slip Op. at 12.

Florida Power & Light v. United States and U.S. Nuclear Regulatory Commission, D.C. Cir. Nos. 86-1512, 86-1567 and 86-1571 (May 13, 1988). DJ # 90-1-4-3118.

Attorneys: Kathleen P. Dewey, FTS 633-4519
Jacques B. Gelin, FTS 633-2762
and NRC staff

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TAX DIVISION

Federal Circuit Holds That U.S. Steel Did Not Realize Cancellation Of Indebtedness Income On Its Exchange Of Debentures For Preferred Stock.

United States Steel Corp. v. United States (Fed. Cir.).

On June 10, 1988, the Federal Circuit reversed the Claims Court and held in favor of the taxpayer in this cancellation of indebtedness income case. The facts have their origin in 1901, when U.S. Steel was incorporated. At that time, it issued $100 par value preferred stock, for which it presumably received $100. In 1966, following a reorganization, the company issued debentures in exchange for the preferred, which was then worth $165 per share. Each debenture was in a face amount of $175. (The interest on the debenture would be deductible, however, whereas dividends on the preferred would not be.) In 1972, U.S. Steel brought in $12.5 million face amount of debentures for $8.5 million. This was equivalent to a value of $118 for each $175 debenture. Although it originally reported the $57 per debenture spread as income, U.S. Steel later maintained that it had not realized any cancellation of indebtedness income because it had paid $18 more for each debenture than it had received for the original $100 preferred stock shares.

The governing Treasury Regulations provide that the taxpayer realizes cancellation of indebtedness income to the extent the "issue price" of the obligation exceeds the repurchase price. The controversy therefore focused on the issue price of the debentures. The Claims Court held that there was cancellation of indebtedness income, but that it was measured by the spread between the preferred's $165 value in 1966 and the $118 paid for the debentures in 1972, or $47 per share. We did not challenge this

holding. The Federal Circuit, however, reversed. It held that the issue price of the debentures was $100 originally received for the preferred stock. Since U.S. Steel had not brought in its debt for less than that issue price, it did not have income. It based this holding on its conclusion that the exchange of debentures for preferred stock did not increase the company's assets, and that the issue price of the debentures was the capital it had received for the preferred.

* * * * *

Second Circuit Reverses District Court's Holding That Termination Allowances Paid To Conrail Employees Are Not Includable In Gross Income.

Herbert v. United States (2d Cir.)

On June 2, 1988, the Second Circuit, reversing the district court, held in favor of the Government in a case presenting the question whether termination allowances paid to former Conrail employees under the Northeast Rail Service Act of 1981 ("NERSA") are includable in gross income. A former Conrail employee had brought this refund suit in the Southern District of New York, contending that his separation allowance was exempt from income tax under a NERSA section (codified at 45 U.S.C. § 797d(b)) providing that Conrail termination allowances "shall be considered compensation solely for purposes of [the Railroad Retirement Act and the Railroad Unemployment Insurance Act]." The district court agreed with the employee, holding that since the above statutory language indicated that the allowances would not be considered "compensation" for purposes of the Internal Revenue Code, they would also not be considered "income" for such purposes. The court of appeals reversed. The court first noted that under well-settled Supreme Court precedent (Commissioner v. Glenshaw Glass Co.), the allowances must be considered income, unless the taxpayer can establish unambiguously the existence of a specific exemption for such allowances. The court then concluded that, on the facts before it, the existence of such a "specific exemption" had not been established. The court pointed out that although Section 797d(b) limited the circumstances in which the allowances in question would be considered "compensation," the term "compensation" was not necessarily synonymous with the term "income."

The case is an important one, because it is the first appellate decision on this issue, and the issue is involved in hundreds of cases pending administratively or in the courts.

* * * * *

APPENDIX

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

Effective Date	Annual Rate	Effective Date	Annual Rate
12-20-85	7.57%	04-10-87	6.30%
01-17-86	7.85%	05-13-87	7.02%
02-14-86	7.71%	06-05-87	7.00%
03-14-86	7.06%	07-03-87	6.64%
04-11-86	6.31%	08-05-87	6.98%
05-14-86	6.56%	09-02-87	7.22%
06-06-86	7.03%	10-01-87	7.88%
07-09-86	6.35%	10-23-87	6.90%
08-01-86	6.18%	11-20-87	6.93%
08-29-86	5.63%	12-18-87	7.22%
09-26-86	5.79%	01-15-88	7.14%
10-24-86	5.75%	02-12-88	6.59%
11-21-86	5.77%	03-11-88	6.71%
12-24-86	5.93%	04-08-88	7.01%
01-16-87	5.75%	05-06-88	7.20%
02-13-87	6.09%	06-03-88	7.59%
03-13-87	6.04%	07-01-88	7.54%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent. For a cumulative list of those Federal civil postjudgment interest rates effective October 1, 1982 through December 19, 1985, see United States Attorney's Bulletin, Vol. 34, No. 1, Page 25, January 17, 1986.

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U.S. Department of Justice

Criminal Division

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

JUL 1 1988

MEMORANDUM

TO: All United States Attorneys

FROM: Edward S.G. Dennis, Jr.
Acting Assistant Attorney General
Criminal Division

SUBJECT: Stay Applications in Sentencing Guideline Cases

As you know, on June 13, 1988, the Supreme Court granted petitions for certiorari in United States v. Mistretta, Nos. 87-1904, 87-7028, a case originating in the United States District Court for the Western District of Missouri, to decide the constitutionality of the sentencing guidelines. The Mistretta case will be briefed over the summer, argued this fall, and the Court's decision will be issued sometime next term, most probably around the first of the year.

In the interim, even in cases where the district courts have held the guidelines unconstitutional, we continue to insist that you request them to impose guideline sentences to ensure compliance with the intent of Congress, achieve uniformity in sentencing, and minimize the need for taking appeals under 18 U.S.C. 3742. Therefore, in cases where a particular district judge finds the sentencing guidelines unconstitutional, the prosecutor should urge the court to stay its order pending the decision in Mistretta, and to impose a guideline sentence or, at least, to impose a guideline sentence and then set aside the sentence as unconstitutional. Significantly, several district courts have adopted the former course of action after striking down the sentencing guidelines. See, e.g., United States v. Brodie, No. 87-0492 (D.D.C., May 19, 1988) (opinion of Greene, J. holding the guidelines unconstitutional but staying order pending decision of Supreme Court).

To assist you in this effort, the Civil Division has prepared a model motion for a stay which can be filed in the district court after simply adding the pertinent facts of the

particular case. We do not, however, believe that it is appropriate to seek a stay in every case where the district court finds the guidelines unconstitutional. For example, where the offense is such a minor one such that, in your determination, the defendant would have finished serving a non-guideline prison sentence before the Supreme Court decides Mistretta, that case will become moot and resentencing will not be necessary. Similarly, you should continue to seek to have defendants waive their constitutional objections and sentencing appeals as part of plea bargains.

Please do not acquiesce in imposition of either "old" pre-guideline sentences or dual sentencing, as there is no clear statutory authority for the imposition of old sentences upon post November 1, 1987 conduct, and dual sentences are nearly impossible for the B.O.P. to administer (since, e.g., two different "good time" rules would have to be applied at the same time). Of course, a judge is not precluded from stating in dicta what sentence the court "would have given" under the old rules, but that "sentence dicta" ought to be sufficiently longer than the guideline sentence to take into account the greater degree of sentence shortening which would have resulted from the old good-time rules and action by the U.S. Parole Commission.

Also, we remind you that the Sentencing Commission's temporary emergency amendments, effective June 15, 1988, which you should already have received, directly address at § 1B1.8 the problem of what to do with factual information that is damaging to a defendant and given to us in confidence. Such information "should not be used in determining the applicable guideline range." As the Sentencing Commission's commentary to § 1B1.8 makes clear, the new guideline does not authorize the government to withhold relevant non-privileged information from the sentencing court. Instead, it protects the defendant against unrestricted use of that information. See also § 6B1.4(a) (policy statement; stipulations of facts pursuant to plea agreements shall "not contain misleading facts").

In addition, the United States Sentencing Commission Guidelines Manual, Section 5E4.1(a), as revised January 15, 1988, states that with regard to restitution not covered by the Victim and Witness Protection Act (VWPA) (18 U.S.C. §§ 3663, 3664, and 3563(a)(2), (b)(3)), restitution may be ordered nonetheless as a condition of probation or supervised release. See 18 U.S.C. § 3563(b)(20). The Criminal Division will follow these sentencing guidelines. Thus, please disregard the contrary statement concerning the unavailability of restitution for non-VWPA offenses committed after November 1, 1987, in the Fraud Section monograph "Restitution Pursuant to the Victim and Witness Protection Act" (May 1987) at page one.

Enclosure

MODEL MOTION FOR A STAY OF RULINGS INVALIDATING THE SENTENCING GUIDELINES PENDING A FINAL DECISION BY THE SUPREME COURT

INTRODUCTION

[This section is to be modified as appropriate in individual cases to outline briefly the proceedings in the district court leading up to a ruling that the sentencing guidelines promulgated by the United States Sentencing Commission are unconstitutional.]

The United States respectfully applies for a stay of this Court's ruling pending a final resolution by the United States Supreme Court in United States v. Mistretta, Nos. 87-1904, 87-7028, of the issue of the constitutionality of the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984.

As set out more fully below, an immediate stay of this order and the immediate application of the sentencing guidelines is required because of the compelling national interest in uniform criminal sentencing under a single regime throughout the country. In the absence of a stay, this suspension by judicial fiat of a statute "enacted by the representatives of the people" constitutes "a form of irreparable injury" to the public interest. New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice). More importantly, without a stay, the criminal justice system will be mired in a state of chaos as defendants are subjected to widely varying sentencing approaches dependent only upon which district court judge they happen to appear before.

STATEMENT

A. The Sentencing Reform Act of 1984.

The United States Sentencing Commission was created in the Sentencing Reform Act of 1984 as "an independent commission in the judicial branch of the United States * * *." 28 U.S.C. 991(a).[1] It is a permanent body with seven voting members, at least three of whom must be federal judges chosen from a panel of six recommended by the Judicial Conference of the United States. Ibid. The members of the Commission are chosen by the President with the consent of the Senate. They are removable by the President for good cause, and otherwise serve six-year terms. 28 U.S.C. 991(a), 992(a).

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[1] The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, 98 Stat. 1837, 1987 et seq.).

The Commission is charged with the task of developing determinate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. 994(a)(1). It is directed to formulate guidelines that "provide certainty and fairness in meeting the purposes of sentencing," while "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" and "maintaining sufficient flexibility to permit individualized sentences" where appropriate. 28 U.S.C. 991(b)(1)(B); see also 28 U.S.C. 994(a)-(n).

The guidelines are to establish a "sentencing range" "for each category of offense involving each category of defendant." 28 U.S.C. 994(b)(1). That range must be "consistent with all pertinent provisions of title 18" (ibid.), and may vary by no more than 25 percent or six months from the minimum to the maximum (28 U.S.C. 994(b)(2) (as amended by Pub. L. No. 99-363, Sec. 2, 100 Stat. 770 (1986)).

It is somewhat inaccurate to refer to the Commission's work as "guidelines" since they are binding on all federal judges. Thus, the law states that a sentencing court "shall impose a sentence of the kind, and within the range [set forth in the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines [and] that should result in a sentence different from that described." 18 U.S.C. 3553(b) (as amended by Pub. L. No. 100-182, Sec. 3, 101 Stat. 1266 (1987)). The sentencing judge must state the reasons for imposing the sentence selected and must give "the specific reason for the imposition of a sentence different from that described" in the applicable guideline. 18 U.S.C. 3553(c).

The Sentencing Act also abolished the United States Parole Commission, which served as an independent agency within the Department of Justice (18 U.S.C. 4202 et seq.). The Parole Commission remains in office with jurisdiction over pre-guideline offenses until 1992, five years after the effective date of the guidelines. Pub. L. No. 98-473, Title II, Ch. II, Sec. 235(b)(2), 98 Stat. 2032 (1984).

Pursuant to its statutory instructions, the Sentencing Commission grouped offenses into 43 categories, and defendants into six categories. The Commission established a matrix of coordinates, whereby the sentencing range for each defendant is determined by the intersection of the offense level and the defendant category on a detailed grid.

These promulgated guidelines then sat before Congress for a statutory six-month waiting period. See Pub. L. No. 98-473, Title II, Ch. II, Sec. 235(a)(1)(B)(ii)(III), 98 Stat. 2032

(1984). Because Congress took no negative action,[2] the guidelines went into effect on November 1, 1987, and they apply to crimes committed after that date.

B. The Constitutional Challenges.

In cases across the nation, and in the Court here, defendants have asked sentencing judges to set aside the sentencing guidelines as constitutionally invalid on various grounds, including contentions that: (1) Congress has impermissibly delegated legislative authority to the Sentencing Commission; (2) the Commission is improperly placed within the Judicial Branch; and (3) the presence of judges on the Commission violates the doctrine of separation of powers. In addition, some defendants have challenged the very concept of determinate sentencing, claiming that individualized judicial sentencing is constitutionally mandated on due process grounds. In sum, these challenges present fundamental constitutional questions concerning the separation of powers among all three branches of the federal government with regard to the crucial roles each branch has to play in the matter of criminal sentencing.

District courts have reached widely varying conclusions on the merits of these constitutional challenges. Many of the courts that have addressed the matter have found the Sentencing Commission to be constitutional either as legitimately located within the Judicial Branch, or as viewed as an Executive Branch agency, while other district courts have invalidated the sentencing guidelines either as promulgated by an executive agency on which judges have participated in violation of the separation of powers doctrine, or as intrinsically violative of due process, at least if established by an entity other than Congress itself. In sum, the courts have failed to arrive at any generally accepted rationale for either upholding the guidelines or striking them down.

On June 13, 1988, the Supreme Court granted cross-petitions for certiorari before judgment in the court of appeals (see Sup. Ct. Rule 18) in United States v. Mistretta, Nos. 87-1904, 87-7028. The Supreme Court will review the ruling of the United States District Court for the Western District of Missouri upholding the sentencing guidelines as constitutional. That district court decision is now published at 682 F. Supp. 1033. Since briefing in the Supreme Court will proceed in the regular course with argument to be heard in the Fall of 1988, we do not anticipate a decision by the Court until near the end of the year.

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[2] The House of Representatives defeated a proposal to delay implementation of the guidelines. 133 Cong. Rec. H8215 (Oct. 6, 1987).

ARGUMENT

The Court here has invalidated a carefully considered congressional enactment, which was viewed as so vital to a fair and efficient criminal justice system that the House of Representatives rejected a suggestion that the implementation of the guidelines be delayed even for a few months. See 133 Cong. Rec. H8107 (Rep. Conyers), H8113 (Rep. Fish) (Oct. 5, 1987); id. at H8215 (Oct. 6, 1987). Moreover, the legislative history of the Sentencing Reform Act of 1984 provides strong evidence of Congress' belief in the pressing need for sentencing reform to replace an outmoded sentencing system plagued by inconsistency and unacceptable disparities. See S. Rep. No. 98-225, 98th Cong., 2d Sess. 37-40 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-29.

As Justice Black ruled in granting a stay of an injunction against a civil rights statute pending Supreme Court review, except in the most imperative and exigent of circumstances, courts should not enjoin an Act of Congress and thereby effectively "'suspen[d] [] an act, delaying the date selected by Congress to put its chosen policies into effect.'" Katzenbach v. McClung, 85 S. Ct. 6, 7 (1964) (Black, Circuit Justice) (quoting Heart of Atlanta Motel v. United States, 85 S. Ct. 1, 2 (1964) (Black, Circuit Justice)).

The Sentencing Reform Act is the culmination of over a decade of effort by Congress to overhaul the federal criminal sentencing system, and, together with the other provisions of the Comprehensive Crime Control Act of 1984, constitutes "one of the most comprehensive reforms of our criminal justice system in its history." 130 Cong. Rec. S14220 (Oct. 11, 1984) (Sen. Biden). The sentencing guidelines at issue were promulgated by the United States Sentencing Commission after nearly two years of difficult work. The Commission's guidelines cover the sentences for hundreds of federal criminal offenses and will govern the sentences of thousands of criminal defendants this year.

Because several district courts have set aside the guidelines and declined to apply them, while others have approved the guidelines and are applying the existing law, the federal criminal justice system is now plagued by intolerable uncertainty and fundamentally contrary approaches by district judges on the basic matter of how convicted criminal defendants will be sentenced. Unless a stay is granted to establish uniform compliance with the existing statute until a definitive resolution is made by the Supreme Court, the result will be increasing hardships upon the lower courts, the government, and criminal defendants.

The standard for granting a stay pending a decision by the Supreme Court is well established, although this particular stan-

dard is usually applied by the Supreme Court rather than the lower courts. Since certiorari has recently been granted by the Supreme Court, the same standard should govern as would apply were the stay motion being considered by that Court.

Thus, under the Supreme Court standard, a stay should issue if: (1) there is a "reasonable probability" that four Justices will vote to grant certiorari; (2) there is a "fair prospect" that the Supreme Court will ultimately rule in favor of the position advocated by the stay applicant; and (3) considerations of irreparable injury, the balance of hardships between the parties, and the public interest militate in favor of a stay. Deaver v. United States, 107 S. Ct. 3177, 3177 (1987) (Chief Justice Rehnquist, Circuit Justice); see also Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice); Houchins v. KQED, Inc., 429 U.S. 1341, 1345 (1977) (Rehnquist, Circuit Justice); Republican State Central Committee v. Ripon Society, 409 U.S. 1222, 1224 (1972) (Rehnquist, Circuit Justice). This standard is easily satisfied in this case.

First, since the Supreme Court granted certiorari to review the constitutionality of the sentencing guidelines in United States v. Mistretta, the initial criterion for granting a stay is plainly satisfied.

Second, there is certainly a "fair prospect" that the Supreme Court will uphold the constitutionality of the Sentencing Reform Act. The strong presumption of constitutionality that attaches to Acts of Congress is a compelling factor in evaluating the probability of success on the merits. See Bowen v. Kendrick, 108 S. Ct. 1, 1 (1987) (Chief Justice Rehnquist, Circuit Justice); Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, Circuit Justice). The power "to judge the constitutionality of an Act of Congress * * * [is] 'the gravest and most delicate duty that * * * [a court] is called upon to perform,'" and in exercising that power a court must "accord [] 'great weight to the decision of Congress.'" Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Blodgett v. Holden, 257 U.S. 142, 148 (1927) (Holmes, J.); and Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973)).

Moreover, the strong possibility that the Supreme Court will uphold the statute is enhanced by the very fact that a substantial number of those courts which have addressed the question have found that the sentencing guidelines pass constitutional muster. This establishes that the issue manifestly is "fairly debatable," and that the second criterion for a stay has been met. See Bowen v. Kendrick, 108 S. Ct. at 1 (Chief Justice Rehnquist, Circuit Justice).

Third, consideration of the equities and the public interest strongly mandates the granting of a stay. To begin with, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." Bowen v. Kendrick, 108 S. Ct. at 1 (quoting Walters v. National Ass'n of Radiation Survivors, 468 U.S. at 1324 (Rehnquist, Circuit Justice).

Even apart from this presumption of constitutionality, the equities and the public interest in favor of a stay here are compelling. The effective functioning of the entire federal criminal justice system is at stake. The prevailing uncertainty posed by hundreds of challenges to the constitutional validity of the guidelines and the divergent approaches being taken by different district judges is having an extremely unsettling impact upon the criminal justice system. Criminal proceedings are being substantially delayed as the courts, the Government, and criminal defendants debate the validity of the guidelines.

Furthermore, during this troubling interregnum between the effective date of the sentencing guidelines and the ultimate resolution of their validity by the Supreme Court, the key congressional intent to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" (28 U.S.C. 991(b)(1)(B)) is being entirely frustrated as individual district judges independently determine to impose sentences variously under either the old or new sentencing systems. Indeed, some district judges within the same district court are applying conflicting sentencing approaches, depending upon individual views of the validity of the guidelines.[3] Thus, a defendant's sentence and the basic

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[3] Compare United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988) (Judge Brewster), and United States v. Lopez-Barron, Crim. No. 87-1309-K (S.D. Cal. Feb. 26, 1988) (Judge Keep) (striking down guidelines), with United States v. Ruiz-Villaneuva, Crim. No. 87-1296-E (S.D. Cal. Feb. 29, 1988) (available on LEXIS) (Judge Enright) (upholding guidelines); compare United States v. Wylie, No. CR 88-04 (W.D. Wash. Mar. 29, 1988) (Judge Tanner), and United States v. Nordall, No. CR 87-067-TB (W.D. Wash. Apr. 20, 1988) (Judge Bryan) (striking down guidelines), with United States v. Knox, No. CR 88-11D (W.D. Wash. Apr. 21, 1988) (Judge Dimmick), and United States v. Amesquita-Padella, No. CR 87-264-R (W.D. Wash. Apr. 20, 1988) (Judge Rothstein) (upholding guidelines); compare United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo. 1988) (four judges upholding guidelines), with United States v. Johnson, supra (Judge Wright, dissenting) (striking down guidelines); compare United States v. Richardson, No. 88-8-01-CR-3 (E.D. N.C. May 13, (continued...)

sentencing scheme to which he is subject now turn arbitrarily upon whichever judge he happens to come before. This disparity should not be tolerated within our criminal justice system.

Moreover, judges who find the guidelines unconstitutional face additional difficulties when deciding how to sentence a defendant. They may attempt to impose a sentence under the old law, but the old law, including the possibility of parole, has been repealed for crimes committed after November 1, 1987. Thus, if a district judge strikes down the portions of the Sentencing Reform Act establishing the Sentencing Commission, a host of other vexing questions arise concerning the continuing validity of other provisions in the statute, most notably the abolition of parole. The effect is to further compound uncertainty upon uncertainty to the detriment of the fair and efficient operation of the criminal justice system.

Whereas the equities and public interest in favor of a stay are quite strong, the equities against a stay are much less compelling. In cases where lengthy prison terms are imposed, a substantial term of imprisonment invariably would have been imposed under the old sentencing regime and thus a Supreme Court decision may be anticipated before such defendants could have expected to have been released even if sentenced under pre-guidelines law. As for defendants who will be subject to shorter terms of incarceration under the guidelines, such that they may complete that term before a final decision is rendered by the Supreme Court, it nevertheless remains true that an identical prison term could have been imposed in the sentencing judge's discretion even under the old system. After all, the sentencing guidelines must be consistent with the sentencing statutes and can never provide for a sentence above the maximum permitted by statute. Defendants certainly have no constitutional or statutory right to receive a lighter sentence than that allowed by the governing statute.[4]

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[3](...continued)
1988) (available on LEXIS) (upholding guidelines), with United States v. Styron, No. 87-49-01-CR-4 (E.D. N.C. May 26, 1988) (striking down guidelines); compare United States v. Griffin, No. 88-00002-A (E.D. Va. June 17, 1988) (upholding guidelines), with United States v. Chambers, Crim. No. 88-67-N (E.D. Va. June 29, 1988) (striking down guidelines).

[4] Moreover, in unique cases where immediate sentencing under the guidelines would impose extraordinary hardships upon a particular defendant, exceptions on a case-by-case basis may be appropriate, or the defendant could be sentenced under the guidelines but released on bond to begin service of the sentence after the Supreme Court's resolution of the matter.

In any event, the public interest in a uniform system of sentencing throughout the federal criminal justice system, the compelling interest in preventing frustration of Congress' express desire to avoid sentencing disparity, and the interests of fair judicial administration in the application of a single approach in all district courts far outweigh any arguments against a stay. Moreover, since the Supreme Court has made clear that there is a strong presumption in favor of the constitutionality of a statute, the uniform application of the new sentencing regime makes it more likely that it will be unnecessary to resentence large numbers of defendants in the presumptive event that the guidelines are eventually upheld as constitutionally valid.

In addition, the fact that the Court has held a statute invalid does not mean that such a ruling should not be stayed and the statute applied pending Supreme Court review. Thus, in White v. Weiser, 412 U.S. 783, 788-89 (1973), the Supreme Court stayed a district court order and allowed an election to go forward under a state law that the district court had declared unconstitutional. The Supreme Court similarly stayed the effect of a district court order striking down a statute in Kirkpatrick v. Preisler, 394 U.S. 526, 529-30 (1969), again allowing activity to go forward temporarily under the statute under attack.

Furthermore, even where the Supreme Court itself has actually found a statute or practice to be unconstitutional, the Court has often weighed the equities and decided not to upset prior activities or imminent future activities pursuant to that statute or practice.[5] See, e.g., Northern Pipeline Co. v. Mara-

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[5] If the Court's primary objection to the Sentencing Reform Act is to the requirement that three judges be appointed to serve on the Commission, then the guidelines should be given full effect under the de facto officer doctrine. Under this traditional doctrine, a "person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." United States v. Lindsley, 148 F.2d 22, 23 (7th Cir. 1945); see also Buckley v. Valeo, 424 U.S. 1 (1976); Norton v. Shelby County, 118 U.S. 425 (1886); National Ass'n of Greeting Card Publishers v. United States, 569 F.2d 570 (D.C. Cir. 1976), vacated and remanded on other grounds, 434 U.S. 884 (1977). But see Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984). The doctrine, "which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." Norton, 118 U.S. at 441-42. Thus, although

(continued...)

thon Pipe Line Co., 458 U.S. 50, 88-90 (1982) (judgment holding broad grant of jurisdiction to bankruptcy court unconstitutional stayed for three months); Northern Pipeline Co., supra, 459 U.S. 813 (1982) (Marathon stay extended an additional three months); Buckley v. Valeo, 424 U.S. 1, 142 (1976) (although Federal Election Commission was constituted unconstitutionally, its past acts and future acts for 30 days were accorded de facto validity); Reynolds v. Sims, 377 U.S. 533, 585 (1964) (notwithstanding unconstitutionality of state legislative apportionment scheme, impending elections did not need to be disrupted).

In sum, a stay of district court orders invalidating the guidelines is urgently needed to restore order to the federal criminal justice system and make possible the uniform application of a single sentencing regime in all criminal cases. The preservation of the ideal of swift and just punishment of criminal offenses, as well as principles of sound judicial administration weigh strongly in favor of a stay here.[6]

CONCLUSION

A stay should be granted requiring application of the sentencing guidelines promulgated by the United States Sentencing Commission pending the Supreme Court's ultimate disposition of the constitutional challenges involving the Sentencing Reform Act.

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[5](...continued)
the appointment of judges to serve on the Commission may have been found to be unconstitutional, the validity of the Commission's past administrative actions should not be affected. See Buckley v. Valeo, 424 U.S. at 143.

[6] At least one district court, which found constitutional flaws in the guidelines system has already agreed to stay its holdings pending a final resolution of this vital question. See United States v. Brodie, Crim. No. 87-0492 (D.D.C. May 19, 1988).

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