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COMMENDATIONS

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

Susan Bailie (Indiana, Southern District), by Attorney General Janet Reno, and Eileen Barkas Hoffman, General Counsel, Federal Mediation and Conciliation Service (FMCS), Washington, D.C., for her special efforts in a case involving the defense of an FMCS mediator, and for bringing the matter to a successful conclusion.

Steven N. Berk (District of Columbia), by Robert M. Bryant, Special Agent in Charge, FBI, Washington, D.C., for his outstanding success in obtaining felony convictions of seven defendants engaged in a scheme to defraud American Security Bank and the Central Pension Fund.

Patricia D. Carter (District of Columbia), by Jack H. Weil, Associate Counsel to the Director, Executive Office for Immigration Review, Falls Church, Virginia, for her excellent representation in a Freedom of Information Act case involving a prisoner request seeking the release of supposed administrative staff manuals that in fact were nonexistent. ***Lallis A. Cotton*** provided valuable paralegal assistance.

Gonzalo P. Curiel (California, Southern District), by George A. Rodriguez, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Los Angeles, for his professionalism and outstanding legal skill in the successful prosecution of "Meth Mole," a large methamphetamine distribution network operating in Southern California and Nevada, resulting in guilty pleas by twenty-two defendants -- 100 percent of the targeted group.

Jeffrey S. Downing and ***Kathy J. M. Peluso*** (Florida, Middle District), by Floyd I. Clarke, then Acting Director, FBI, Washington, D.C., for their outstanding success in obtaining the convictions of thirty-two members of the Ronald "Romeo" Mathis organization, a violent group of drug traffickers.

James E. Flory (District of Kansas), by Roland J. Corvington, Supervisory Special Agent, FBI, Kansas City, for his professionalism and legal skill in the trial of a complex financial institution fraud case, and for his success in obtaining a guilty verdict on all counts.

Todd Foster, Monte C. Richardson, Jay L. Hoffer, and ***Robert A. Mosakowski*** (Florida, Middle District), by William S. Sessions, former Director, FBI, Washington, D.C., for their major contributions to the success of a Task Force investigation of bank fraud and money laundering, and for obtaining the conviction of thirty-six individuals, including mortgage brokers, postal employees, builders, realtors and a certified public accountant, and the court-ordered restitution of nearly $1.4 million.

Constance H. Frogale (Virginia, Eastern District), by James E. Childs, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense, Arlington, for her outstanding negotiating skills and successful efforts in obtaining a $50,000 out-of-court civil settlement from a Richmond laboratory for submitting false claims to the Defense General Supply Center, a Department of Defense installation.

Craig Gargotta (Texas, Western District), by Marcia S. Weiner, Chief Counsel, Department of Housing and Urban Development, San Antonio, for his excellent representation and outstanding victory in a complex Chapter 11 bankruptcy proceeding involving over $3 million, the total of which is to be paid to the agency in its entirety.

I. Randall Gold (Florida, Middle District), by Richard Byrd, Regional Inspector, Internal Revenue Service (IRS), Chamblee, Georgia, for his outstanding representation and successful prosecution of a tax protester who resisted IRS officers with a loaded semi-automatic handgun, then continually tried to divert his case with his tax protest philosophy. (The defendant was ultimately sentenced to thirty months in prison.)

Richard H. Goolsby (Georgia, Southern District), by Floyd I. Clarke, then Acting Director, FBI, Washington, D.C., for his skillful negotiations and successful prosecution of several individuals involved in an undercover operation referred to as "Tank Strike."

Greg G. Guidry and ***Peter G. Strasser*** (Louisiana, Eastern District), by K.D. Kell, Inspector in Charge, U.S. Postal Service, New Orleans, for their exceptional efforts, leadership and coordination of a series of insurance fraud prosecutions involving the principals of five defunct insurance companies and a Deputy State Commissioner.

Douglas G. Hendricks, John K. Vincent, and ***Helene Tenette*** (California, Eastern District), by Richard H. Ross, Special Agent in Charge, FBI, Sacramento, for their excellent presentations at a legal training conference on the United States Attorney's office, ex parte interviews of represented persons, and the victim/witness program.

David Huber (Kentucky, Western District), by Eileen Barkas Hoffman, General Counsel, Federal Mediation and Conciliation Service (FMCS), Washington, D.C., for his valuable assistance and successful efforts in a defamation action against an FMCS mediator, and for other advice and counsel over the past twelve months.

David R. Jennings and ***Susan Raab*** (Florida, Middle District), by Daniel M. Dockum, Chief, Criminal Investigation Division, Internal Revenue Service, Fort Lauderdale, for their successful prosecution of two prominent tax protesters for failure to file federal tax returns from 1984 through 1987, and for their outstanding legal skills in presenting the complexities of the case to the jury.

Jane Jolly (North Carolina, Eastern District), by Daniel R. Black, Associate Director (Compliance Operations), Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., for her major contribution to the success of the courtroom testimony class held recently in Glynco, Georgia.

Steven K. Mullins (Oklahoma, Western District), by Joseph R. Davis, Assistant Director-Legal Counsel, FBI, Washington, D.C., for his excellent representation in a protracted and sensitive case, and for his exceptional legal skill in bringing the matter to a successful conclusion.

Clare Nuechterlein (California, Eastern District), by Dave Dunwoody, Narcotics Detective, Marijuana Enforcement Team, Siskiyou County Sheriff's Department, Yreka, for her valuable assistance in a number of asset seizure cases, and for her special efforts on behalf of the Sheriff's Department on numerous occasions.

Dan L. Newsom (Tennessee, Western District), by Robert P. Wright, Special Agent in Charge, FBI, Memphis, for his outstanding efforts in the prosecution of a complex case involving the use of highly sophisticated "boiler room" techniques to defraud over 150 investors throughout the country out of $1.7 million.

Don O. Overall and ***Theodore Borek*** (District of Arizona), by Judge Lawrence H. Fleischman, Pima County Superior Court, Tucson, for their valuable assistance and prompt action in negotiating settlement in a complex, multi-party toxic tort case, resulting in savings to the government of hundreds of thousands of dollars in litigation costs.

John F. Paniszczyn (Texas, Western District), by Lt. Col. W. Gary Jewell, Acting Chief, Litigation Division, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his outstanding success in a Title VII discrimination case, and for his excellent services rendered in a number of tort suits over the last several years.

Thomas Payne (Mississippi, Southern District), by Tyler H. Fletcher, Chair, University of Southern Mississippi, Hattiesburg, for his excellent address to the first University graduating class to complete state law enforcement certification training.

Salvador Perricone (Louisiana, Eastern District), by William R. Schroeder, Chief, Legal Forfeiture Unit, Legal Counsel Division, FBI, Washington, D.C., for his excellent presentation at the FBI Academy in Quantico, Virginia on the dimensions of hearsay testimony and associated matters.

Melanie K. Pierson (California, Southern District), by T. A. Miller, Deputy Assistant Director for Training, Naval Criminal Investigative Service, Department of the Navy, Washington, D.C., for her outstanding presentation on federal courtroom procedures during a 2-week Environmental Crimes Investigation Course held in Miramar, California.

Thomas O. Plouff (Indiana, Northern District), by Michael T. Dyer, Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his successful prosecution of a physician and several individuals in the medical supply industry, following a 14-year conspiracy to tamper with heart pacemakers and thwart regulatory responsibilities regarding medical devices.

Miguel Rodriguez (California, Eastern District), by George W. Proctor, Director, Office of International Affairs, Department of Justice, for his thorough and expeditious handling of an extradition matter for the Canadian government, and for his contribution to the excellent relationship that exists between the United States and Canada.

Edmund Searby and ***Robert O'Neil*** (Florida, Middle District), by Major B. R. Holder and Sergeant K. Morman, Tampa Police Department, for their outstanding success in obtaining convictions of two armed career criminals for possession of a machine gun during a drug trafficking crime. (Due to their prior record, both are facing mandatory life sentences.)

Winfield Sinclair (Alabama, Northern District), by Roger F. Scott, Warden, Federal Correctional Institution (FCI), Talladega, for his outstanding representation of the Bureau of Prisons in numerous lawsuits filed by inmates incarcerated in Talladega, and for the "tremendous success rate in the Northern District of Alabama."

Chuck Stuckey (District of Oregon), by Eugene M. Thirolf, Director, Office of Consumer Litigation, Department of Justice, for his valuable assistance and professional advice during the investigation and prosecution of a case involving criminal violations of the Federal Food, Drug and Cosmetic Act.

Julie F. Tingwall and ***David R. Jennings*** (Florida, Middle District), by Allen H. McCreight, Special Agent in Charge, FBI, Tampa, and William S. Sessions, former Director, FBI, Washington, D.C., for successfully prosecuting a computer fraud case involving eighteen individuals who sold confidential government information. This case was described by the news media as one of the most important computer fraud cases in U.S. history.

Matt J. Whitworth and ***Mark C. Thompson*** (Missouri, Western District), by Thomas E. Den Ouden, Supervisory Senior Resident Agent, FBI, Springfield, for their outstanding efforts in a complex white collar crime case, the results of which have caused a significant impact in the Joplin area.

SPECIAL COMMENDATION FOR THE DISTRICT OF COLORADO

Robert Kennedy and ***James Russell, Assistant United States Attorneys for the District of Colorado,*** and ***Legal Assistant Patricia Smith,*** received Certificates of Appreciation from Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Englewood, Colorado, for their outstanding professional skill and legal expertise in an Organized Crime Drug Enforcement Task Force case targeting the Victor Hugo Reyes-Cueva Organization. This investigation was initiated in September, 1990 by the Drug Enforcement Administration, the Internal Revenue Service, the U.S. Customs Service, the Immigration and Naturalization Service, and the United States Attorney's Office for the District of Colorado.

The investigation began with the debriefing of an Ecuadorian cooperating individual who provided information on the drug and money laundering activities of the Reyes-Cueva Family in Quito, Ecuador. The cooperating individual has testified before the Denver Federal Grand Jury, initiating a Grand Jury investigation into the illegal activities of Victor Hugo Reyes-Cueva and associates. The investigation resulted in the return of a six-count indictment on eighteen defendants. The main defendant charged with Continuing Criminal Enterprise (CCE) is Jorge Hugo Reyes-Torres, who is the son of ex-patriarch, Victor Hugo Reyes-Cueva. Among the other defendants are some of the most notorious Colombian and Mexican drug violators. The investigation yielded in excess of $28 million in seized assets.

Special Agent Perry said the investigation of this magnitude would not have been possible without the cooperation of all the federal agencies who participated, and the full support of the United States Attorney's Office.

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SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF OHIO

Thomas E. Getz, Assistant United States Attorney for the Northern District of Ohio, was commended by Peter J. Millock, General Counsel, State of New York Department of Health, Albany, for his excellent representation and cooperative efforts in the successful prosecution of Sandy Musser, founder of the Musser Foundation, an adoption research firm, and Barbara D. Moskowitz, an investigator for the Foundation. Both women were charged with conspiracy, theft of government property, mail fraud, wire fraud, false statements, and false personation of a government employee, in relation to an ongoing scheme involving searches conducted by Ms. Moskowitz to locate adopted children and biological parents of adopted children. Mr. Millock said Mr. Getz' strategy to separate the emotional issue of adoption from the facts of the underlying criminal scheme to violate the confidentiality of government records for monetary gain was an important distinction which affected the course of the prosecution and conviction.

According to the indictment, the Musser Foundation was a private, for-profit business operated by Sandy Musser in Cape Coral, Florida. The Foundation provided various adoption-related services, including search assistance to find missing relatives, such as children who had been given up for adoption and biological parents ("birthparents") of adopted children. The Foundation also lobbied for "adoptee rights," such as the opening of court adoption records, which are kept sealed by law in most jurisdictions. Ms. Musser had frequently appeared on local and national television programs, including "Sally Jesse Raphael" and "House Party" to promote her Foundation. Individuals seeking relatives could contract with the Foundation to have a search conducted for a fee ranging from $450.00 to $2,500.00. Ms. Moskowitz, one of the "searchers" hired by the Foundation, used her home telephone in South Euclid, Ohio to contact various Social Security Administration offices throughout the country. She would then represent herself to be a court official, Social Security Administration employee, or someone else with an authorized need for confidential information retained in the computer files of the Social Security Administration. The indictment alleged that she made twenty-two such telephone calls to the Social Security Administration between August, 1989 and July, 1990.

On July 30, 1993, Sandra Musser was convicted by a federal jury of more than thirty counts, including theft of confidential government records, after five hours of deliberation. In June, 1993 Barbara Moskowitz pled guilty to charges she lied to Social Security workers, conspired to defraud the agency, and engaged in mail and wire fraud.

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HONORS AND AWARDS

Environment And Natural Resources Division Awards

On October 13, 1993, Myles E. Flint, Acting Assistant Attorney General for the Environment and Natural Resources Division, presented Special Commendation Awards to two Assistant United States Attorneys for their contributions to the Environmental Enforcement Section. The recipients are:

Patricia C. Hannigan, Assistant United States Attorney for the District of Delaware, for her exceptional work as lead counsel on In re Oriental Republic of Uruguay. Her skillful handling of depositions and negotiations was an important factor in achieving agreement on a settlement-in-principal.

Gregory Weddle, Chief of the Civil Division, Eastern District of Tennessee, for his outstanding work in United States v. Olin Corporation. Mr. Weddle demonstrated a cooperative spirit, good judgment, enthusiasm and skill in handling an evidentiary hearing on very short notice.

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District Of Oregon

Jack C. Wong, United States Attorney for the District of Oregon, was the recipient of two awards at the 1993 National Asian Peace Officers Association conference in San Francisco. For the first award, Mr. Wong was named Top Asian American Executive in his capacity as United States Attorney for the District of Oregon. The second award was presented by the City and County of San Francisco Board of Supervisors for his service and commitment to law enforcement. Mr. Wong also addressed the members of the conference.

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Central District Of California

On September 7, 1993, four Assistant United States Attorneys in the Public Corruption and Government Fraud Section, United States Attorney's office for the Central District of California, were presented plaques by John Luksic, Special Agent in Charge, United States Customs Service, Los Angeles. Mr. Luksic stated that the Los Angeles Customs Office is now considered the nation's "showcase" office for prosecuting customs-fraud cases, in large part due to the efforts of the prosecutors in the Government Fraud Section. The award recipients are:

Nathan Hochman, for his work on the Daniel Ekman case, which is the largest Customs bribery case in U.S. history;

Mark Harris, for his work on the "Ming/Black Pearl" case involving the importation of controlled substances through the use of false importation documents;

George Newhouse, for his work on the "Chen/Sunrider" case involving the use of double invoices to avoid both customs duty and federal income taxes; and

Mike Emmick, for his supervision of the Public Corruption and Government Fraud Section, which handles the customs-fraud matters in the United States Attorney's Office.

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Northern District Of Indiana

On September 16, 1993, at a banquet in Chicago, Illinois, ***Ronald J. Kurpiers II, Assistant United States Attorney for the Northern District of Indiana,*** was presented the "Gil Amoroso Memorial Award" for his outstanding efforts in the successful prosecution of four outlaw motorcycle gangs -- the American Breed, the D.C. Eagles, the Outlaws and the Scorpions -- for manufacturing and distributing illegal drugs throughout Canada and the United States. Each of these gangs is based primarily in the Midwest. After a 4-week trial, all defendants were convicted on all charges. In addition, the Government forfeited over $2,000,000 in cash and approximately $2,000,000 in real estate and other personal property. Mr. Kurpiers was nominated by the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, and was the only prosecutor to receive this prestigious award.

The United States is one of seven countries that participates in the International Outlaw Motorcycle Gang Investigators Association. This association is comprised of law enforcement officials from around the world who focus on the illegal activities of outlaw motorcycle gangs. The "Gil Amoroso Memorial Award" is named after one of its founding members.

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Western District Of Tennessee

Robert M. Williams, Jr., Assistant United States Attorney for the Western District of Tennessee, was presented a plaque by Henry Hudson, Director, United States Marshals Service, and John T. Callery, United States Marshal, Western District of Tennessee, for successfully defending a Deputy United States Marshal who was sued in a Bivens case for his actions in serving a seizure warrant in a criminal case. The jury returned a verdict in favor of the Deputy after twelve and a half minutes of deliberation, thus ending seven years of litigation. ***Sidney P. Alexander*** provided valuable research assistance crucial to the successful outcome of the case.

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DEPARTMENT OF JUSTICE LEADERSHIP

New United States Attorneys

The following is a list of the new United States Attorneys appointed by the President and confirmed by the United States Senate as of October 1, 1993:

Claude Harris, Jr.	-	Alabama, Northern District
Paula Jean Casey	-	Arkansas, Eastern District
Paul Kinloch Holmes, III	-	Arkansas, Western District
Michael J. Yamaguchi	-	California, Northern District
Eric H. Holder	-	District of Columbia
Betty H. Richardson	-	District of Idaho
Judith A. Stewart	-	Indiana, Southern District
Randall K. Rathbun	-	District of Kansas
Walter Michael Troop	-	Kentucky, Western District
Jay P. McCloskey	-	District of Maine
Lynn Ann Battaglia	-	District of Maryland
Edward L. Dowd, Jr.	-	Missouri, Eastern District
Thomas Monaghan	-	District of Nebraska
Kathryn Landreth	-	District of Nevada
Zachary W. Carter	-	New York, Eastern District
Mary Jo White	-	New York, Southern District
Patrick H. NeMoyer	-	New York, Western District
John Thomas Schneider	-	District of North Dakota
Edmund A. Sargus, Jr.	-	Ohio, Southern District
Stephen Charles Lewis	-	Oklahoma, Northern District
Vicki Lynn Miles-Lagrange	-	Oklahoma, Western District
John W. Raley	-	Oklahoma, Eastern District
David M. Barasch	-	Pennsylvania, Middle District
Frederick W. Thieman	-	Pennsylvania, Western District
J. Preston Strom, Jr.	-	District of South Carolina
Karen E. Schreier	-	District of South Dakota
Veronica F. Coleman	-	Tennessee, Western District
Gaynelle Griffin Jones	-	Texas, Southern District
Scott M. Matheson, Jr.	-	District of Utah
Charles Robert Tetzlaff	-	District of Vermont
Helen F. Fahey	-	Virginia, Eastern District
Robert Crouch	-	Virginia, Western District
James Patrick Connelly	-	Washington, Eastern District
William David Wilmoth	-	West Virginia, Northern District

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ATTORNEY GENERAL HIGHLIGHTS

HEALTH CARE REFORM

First Lady And The Attorney General Announce New Health Care Initiative

On September 15, 1993, as part of the Administration's efforts to reform the nation's health care system, First Lady Hillary Rodham Clinton, Attorney General Janet Reno, and Assistant Attorney General Anne K. Bingaman in charge of the Antitrust Division, were joined by Federal Trade Commission Chairman Janet D. Steiger at the Department of Justice to unveil antitrust enforcement policy statements for the health care industry. Also participating were Senator Howard Metzenbaum (D-Ohio), and Representative Jack Brooks (D-Tex.). Mrs. Clinton said, "This is my first visit to the Justice Department, a place that has always had a lot of personal and professional meaning for me, and with whom I have had a relationship through the years with various lawyers who have had the privilege of serving here."

The Attorney General announced six joint policies for health care antitrust enforcement, and stated, "Back in law school, they tried to tell us antitrust law was exciting. And important. And this morning we are going to prove it. The opening salvo in the effort to promote quality and efficiency -- and to curb excessive costs -- in the nation's health care system will be fired by the Justice Department's Antitrust Division, along with the Federal Trade Commission."

New Antitrust Enforcement Policies

The new antitrust enforcement policies discussed below will provide guidance to hospitals and health care providers to know whether they can enter into mergers and joint ventures without violating the antitrust laws. They will also help alleviate uncertainty within the health care industry making it easier for mergers and joint ventures to take place, resulting in lower health care costs. The policy statements provide antitrust "safety zones" which describe circumstances under which the Department of Justice and the Federal Trade Commission (the "Agencies") will not challenge:

(1) ***Hospital Mergers***. The Agencies have challenged only eight of well over 200 hospital mergers in the last five years. Many hospital mergers do not present antitrust concerns because the merging hospitals are not significant competitors of each other. In other cases, where a merger substantially reduced the number of competing hospitals in an area, the Agencies in the past have refrained from bringing an action because the merger produced significant cost savings that could not otherwise be realized. The policy statement establishes an antitrust safety zone for mergers where one of the merging hospitals is small. Specifically, the Agencies commit not to challenge, absent extraordinary circumstances, a merger in which one of the merging hospitals has less than 100 licensed beds and an average daily inpatient census of less than 40 patients.

This antitrust safety zone will be especially helpful for small rural hospitals that consider a merger necessary in order to continue providing services, but fear the cost of an expensive investigation by federal antitrust authorities. Hospitals which are unsure if they are within the safety zone may obtain timely advice from the Agencies through the expedited 90-day review procedures set forth in the policy statement.

(2) ***Hospital Joint Ventures Involving High-Technology Or Other Equipment.*** The Agencies have never challenged a joint venture among hospitals to purchase or operate high-technology or other expensive medical equipment. In most cases, these collaborative activities create procompetitive efficiencies that benefit consumers, which outweigh any potential anticompetitive harm. Although numerous hospitals presently participate in joint ventures, it has been suggested that fear of antitrust enforcement currently chills such ventures and forces hospitals to purchase expensive equipment individually, even though joint ventures clearly would be more efficient and less expensive.

The policy statement sets out an antitrust safety zone for joint ventures involving high-technology or other expensive equipment that must be shared in order to allow the hospitals to recover the cost of acquiring, operating and marketing the services provided by the equipment. As long as the joint venture is reasonably necessary to recover these costs and does not include a hospital or a group of hospitals that could have offered a competing service to the planned joint venture, the Agencies will not challenge, absent extraordinary circumstances, the formation or operation of the venture. For example, joint ventures among rural hospitals to share MRIs or other expensive equipment and agreements among community hospitals to operate helicopter or other expensive services jointly normally will fall within the antitrust safety zone. Joint ventures that fall outside the antitrust safety zone do not necessarily raise significant antitrust concerns. The policy statement, therefore, includes a brief description and examples of how these ventures will be analyzed. Hospitals considering joint ventures may obtain timely advice from the Agencies through the expedited 90-day review procedure set forth in the policy statement.

(3) ***Physicians' Provision of Information to Purchasers of Health Care Services***. This policy statement defines an antitrust safety zone that covers the collective provision of non-price information by physicians to purchasers of health care services. The collective provision of this type of information will have procompetitive benefits and allow physicians to work with health care purchasers to improve the quality of care that patients receive. The policy statements provide that the Agencies will not challenge, absent extraordinary circumstances, the collective provision of underlying medical data, including the development of suggested practice parameters. The safety zone would not cover physicians who collectively threaten to or actually refuse to deal with a purchaser because they object to the purchaser's administrative, clinical or other terms governing the provision of services. In addition, it does not cover the collective provision of fee-related information. The collective provision of price information is not, however, necessarily illegal. Physicians who wish collectively to provide such information may receive timely advice from the Agencies under the expedited 90-day review procedure.

(4) ***Hospital Participation in Exchanges of Price and Cost Information***. This policy statement defines an antitrust safety zone that covers hospital participation in written surveys of prices for hospital services or wages, salaries or benefits of hospital personnel. The safety zone applies where (1) the survey is managed by a third party, (2) the information collected for the survey is more than three months old, and (3) the price or cost data reported are based on data from at least five hospitals and aggregated so that the prices charged or compensation paid by particular hospitals cannot be identified. The policy statement also includes a description of how the Agencies will evaluate information exchanges that fall outside the antitrust safety zone. Hospitals that are unsure of the legality of a proposed survey can obtain timely advice from the Agencies through the expedited 90-day review procedure set forth in the policy statement.

(5) ***Joint Purchasing Arrangements Among Health Care Providers***. Most joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concerns; indeed the Agencies have never challenged such a joint purchasing arrangement. Such collaborative activities typically allow the participants to achieve efficiencies that will benefit consumers. This policy statement covers arrangements among providers to purchase such goods and services as laundry or food services, computer or data processing services, and prescription drug and other pharmaceutical products. Under the policy statement, the Agencies will not challenge, absent extraordinary circumstances, a joint purchasing arrangement if the group's purchases account for less than 35 percent of the total purchases of the relevant product or service, and the cost of the product or service being jointly purchased accounts for less than 20 percent of the total revenues from all products or services sold by each participant in the joint purchasing arrangement.

(6) ***Physician Network Joint Ventures***. This policy statement sets forth the Agencies' analysis of the formation of physician network joint ventures that are controlled by physicians and that jointly market the services of their member physicians. These joint arrangements have the potential to provide quality services at reduced costs, and can offer significant procompetitive benefits for consumers. Physicians who participate in legitimate network joint ventures can collectively provide information to health care purchasers, and jointly negotiate with them. The policy statement sets forth an antitrust safety zone that covers physician network joint ventures comprised of 20 percent or less of the physicians in each physician specialty in the relevant geographic market, when the members share substantial financial risk. The statement includes examples of physician network joint ventures that would meet the requirement of sharing substantial financial risk. The statement also includes a brief description and examples to illustrate how the Agencies will analyze a physician network joint venture that does not fall within the antitrust safety zone. Physicians forming network joint ventures can obtain timely antitrust advice from the Agencies under the expedited 90-day review procedure.

The Department of Justice and Federal Trade Commission are also committing themselves to an expedited business review procedure under which the agencies would provide responses within 90 days, after all necessary information is received, to requestors seeking guidance on health care joint ventures and information exchanges.

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Press Conference

Following the announcement, the First Lady and Attorney General Janet Reno held a press conference in the Attorney General's conference room at the Department of Justice. In her introduction and remarks, the Attorney General said, "The Justice Department is currently evaluating measures to increase the Federal power to fight fraud and abuse, for example, by strengthening anti-kickback laws and making heavy penalties against defrauding the Government applicable to those who defraud the private health care system as well. Those of us in law enforcement plan to play an important part in the President and Mrs. Clinton's effort to make sure that health care is available and affordable for all Americans." Other statements at the conference follow:

> ***The First Lady:*** I want to applaud the actions taken today by the Department and the Federal Trade Commission in issuing these guidelines. They are the result of a lot of hard work by Anne Bingaman and Janet Steiger, by Senator Metzenbaum and Congressman Jack Brooks, and their very dedicated staffs.
>
> These guidelines represent an important first step for an industry that is facing rapid change. They are a good example of what health care reform is all about. They will help lower costs, maintain high quality, and knock down the barriers to collaboration that unfortunately are too common in our present system. The Attorney General has spelled out what the problem is. We have a complex and inefficient system that keeps doctors and hospitals from spending their money wisely and drives up the prices that consumers and the Government have to pay. Over time, the actions we take will turn this system right side up. Instead of requiring every hospital or doctor's office to buy the same expensive piece of equipment, these guidelines will allow them to share that equipment. They allow physicians to get together to control costs, and they allow mergers that are competitive and save consumers money.
>
> I have learned many, many things about our health care system in the past months, but one of the first lessons that I learned came to me from traveling around the country, when a member of a hospital board or a physician or a hospital administrator would come and, with real poignancy say, we want to help, but we cannot even have a meeting to talk about how we could have one piece of expensive equipment in our community instead of all of us feeling compelled to buy one for ourselves because our lawyers tell us we cannot cooperate.

This is a problem that comes from the Justice Department or the Federal Trade Commission or the Senate or the House. This is a problem that comes from the grassroots of people trying to do a better job to deliver quality health care. These actions are pro-competition, pro-collaboration, and pro-consumer. The results over time will achieve the following positive results: consumers will pay less, equipment will not stand idle, it will be used more frequently, hospitals will save money, the pressure on physicians to order tests to pay for the machinery that they bought in order to be competitive will stop, and the highest quality tests and the latest technology will still be available, and I would argue more readily available, to those who need.

I also want to thank the Attorney General and the Justice Department for their ongoing and accelerating efforts to crack down on the problem of health care fraud and abuse. As the Nation's health care bills have mounted, consumers and businesses have paid a high price. The crimes have grown more sophisticated and more outrageous, and every time someone rips off the health insurance system, the public, the private insurers, all of us pay more. Settlements like the ones the Department has recently achieved on the West Coast (see, p. 344 of this Bulletin) and the strong measure that we will have more to say about next week (the President's health care address before a joint session of Congress) send a strong warning to those who would steal from the American taxpayers and permit the kind of health care fraud that has a damaging impact on all of us, no matter who we are. We intend to make it very clear, health care fraud will not go unpunished. In a reformed health care system there will no longer be any room for the kind of games that for too long have permitted the kind of fraud and abuse that we are cracking down on now. This is a message we must send to every American who has health insurance and pays too much, and to every American who does not know if they will be able to afford their coverage next month or next year.

It's a great pleasure for me to stand here in this Department with this team that has been assembled to take these steps on the road to getting health care costs under control and providing health care security for every American. This is the kind of example of thoughtful, careful work that leads to a positive result that will translate into better health care for Americans in the years to come.

Janet Steiger, Chairman, Federal Trade Commission (FTC): I just want to stress that the policy statements do represent a collaborative effort by the two Federal agencies who are entrusted with the responsibility for antitrust enforcement. They also represent a bipartisan effort. Sound antitrust laws is not a partisan matter. The First Lady has noted that guidance is needed in how the antitrust laws do apply to the field of health care. Health care is vital not only to our physical wellbeing as people, but to our economic wellbeing as a country. And antitrust enforcement has historically played a very important role in protecting competition in the health care markets, and in lowering the cost of health care for consumers. But antitrust is, as Anne Bingaman said, a very complicated area of the law, particularly as it applies to the field of health care. This complexity has given rise, we believe, to the need to tell people with clarity what kinds of activities are and are not permissible, so that legitimate conduct is not deterred, conduct that is beneficial to consumers. That that conduct is not deterred by a fear of antitrust enforcement that is not in order.

We at FTC are very proud of our record in the health care area, of our record of challenging barriers to the development of HMO's and other innovative health care delivery systems. And we are proud of our record of attacking conspiracies to raise prices to consumers. Sound antitrust enforcement efforts of this type should and will continue. But at the same time it is important to attest there are such as those we took today, to better explain our enforcement intentions so that misunderstandings about those intentions do not inhibit activities that benefit consumers.

Anne K. Bingaman, Assistant Attorney General for the Antitrust Division: Let me just emphasize the extraordinary cooperation and coordination and consultation that went on jointly between the Federal Trade Commission and the Department of Justice in developing and issuing its guidelines. it is, I believe, almost unprecedented. It has been a wonderful experience. It is exactly the kind of responsible and responsive Government that we need to have, because we recognize -- the Federal Trade Commission recognizes and the Department of Justice recognizes there is a problem out there. People in small communities honestly didn't know what the rules were.

As the First Lady said, you hear it over and over again. The rules were there, but they were in speeches and letters and business review advisories going back over a 10-year period, so that if you were a partner in a major New York or Washington law firm, you knew the letter issued February 18, 1985 covered such-and-such, but if you were somebody in Santa Fe, New Mexico, my home town, you may not know there were such letters, and yet you had to give advice to your local hospital or your local group of physicians as a lawyer, or if you're on a hospital board, or a doctor trying to comply, you had to understand what the rules were. So this is an effort to clarify, to state in one simple place what those rules are, and to commit to ongoing review in order to provide responsible help to the health care community throughout this country in a time of enormous change which needs to occur, and we want to do our part. I want to thank Chairman Steiger and the Federal Trade Commission so sincerely for their enormous help. It has been a great pleasure working with them, and we look forward to many months and years of cooperation.

Senator Howard Metzenbaum (D-Ohio), Chairman, Senate Judiciary Committee, Subcommittee on Antitrust, Monopolies, and Business Rights: Today's announcement is a victory for consumers that will speed health care reform. These measures will help end uncertainty about how the antitrust laws will apply to hospital and physician deals, without creating costly loopholes in those laws that could hurt consumers. They will also help hospitals and doctors to understand the difference between a joint venture that cuts costs and also benefits the public and a joint venture that is likely to eliminate competition and drive up prices.

Congressman Jack Brooks (D-Texas), Chairman, House Judiciary Committee: I intend to do my share in moving the antitrust section of the health package forward in the coming months. What we are witnessing today as the unveiling of health care antitrust guidelines is simply good medical technique, opting for preventive medicine rather than radical surgery. . . I salute the First Lady and the wonderful work of you, Janet, and your organization, and the Justice Department.

A copy of the transcript of the press conference and other informational materials are available by calling the United States Attorneys' Bulletin, at (202) 514-4633.

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First Health Care Network

On September 28, 1993, the Department of Justice announced that it does not intend to challenge under the antitrust laws a proposal by National Cardiovascular Network Inc. (NCN) to establish a national network of cardiologists, cardiovascular surgeons and acute care hospitals. NCN's proposal is the first application of the Statements of Antitrust Enforcement Policy in the Health Care Area issued by the Department and the Federal Trade Commission on September 15, 1993, and qualified for an antitrust safety zone as set forth in the policy statement relating to physician network joint ventures. Anne Bingaman, Assistant Attorney General for the Antitrust Division, said, "This action shows that the Department is serious about alleviating uncertainty in the health care industry, and that it will not challenge joint ventures and other arrangements that qualify for an antitrust safety zone."

NCN's proposal is similar to other recently developed alternative delivery systems featuring a national network of medical "centers of excellence" that provide specialized medical care. NCN would create a preferred provider organization (PPO) of cardiac care specialists in 41 metropolitan areas around the country to provide cardiac care to beneficiaries of large third-party payers such as insurers, unions and multi-site employers. In each city, the participating cardiologists, cardiovascular surgeons and acute care hospitals would agree to provide services at all-inclusive, global prices covering all hospitalization and physician expenses of plan beneficiaries. The department concluded that NCN's proposed PPO was unlikely to have an anticompetitive effect. In 38 of the 41 metropolitan areas, NCN does not plan initially to contract with any cardiologists, cardiovascular surgeons or acute care hospitals that currently compete with each other.

In the three cities in which it intends to contract with competitors and any other cities in which it would do so in the future, NCN assured the Department that it would not contract with more than 20 percent of the cardiologists, or more than 20 percent of the cardiovascular surgeons, with active admitting privileges at hospitals in the relevant geographic market. With this assurance, NCN's proposal qualified for an antitrust safety zone under the health care industry policy statements.

Under the Department's long-standing business review procedure, an organization may submit a proposed action to the Antitrust Division and receive a statement as to whether the Division will challenge the action under the antitrust laws. In conjunction with the recent enforcement policy statements, the Department also committed itself to provide responses to business review requests relating to health care joint ventures or information exchanges within 90 days of receiving all necessary information. 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 3233, 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 Would Challenge Pharmaceutical Manufacturers Association Proposal

On October 1, 1993, the Department of Justice announced that it is prepared to challenge a drug industry proposal that could reduce price competition for prescription drugs, if implemented. The Department's position was stated in a business review letter from Assistant Attorney General Anne K. Bingaman, in charge of the Antitrust Division, to counsel for the Pharmaceutical Manufacturers Association (PMA). The PMA proposal would limit individual pricing decisions among the more than 100 companies that develop, produce and market most of the prescription drugs sold in the United States. The Department said that the arrangement would fall within the types of agreements that the Supreme Court has held to be per se illegal. Ms. Bingaman said, "Agreements among competitors, including agreements setting maximum prices, that interfere with the ability of each firm in a market to determine its own prices have long been illegal under the antitrust laws. Maximum price agreements often become agreements on actual price increases. Courts have recognized this danger and have held such agreements to be clearly unlawful."

PMA is a trade association of more than 100 pharmaceutical companies that develop, produce and market most of the prescription drugs sold in the United States. Under PMA's program, each participating member company would agree to limit the annual increase in the average change in the prices of its prescription drug products to a level not greater than the annual increase in the consumer price index. The program would not apply to the price of any individual product, and it would specifically exclude new products. PMA members would agree upon a definition of "new products," and the methodology to be used in calculating the average price increases each year. The proposal also includes a mechanism to allow PMA members to certify that they had in fact limited their price increases in conformity with the agreement. Ms. Bingaman noted that price competition in the pharmaceutical industry has been increasing rapidly in recent years and is expected to increase further as managed care assumes a larger role in providing health care.

Assistant Attorney General Bingaman stated that this Administration is committed to making health care affordable and available to all Americans but antitrust laws can not be violated in the process. Individual firms are allowed to adopt unilateral polices designed to control price increases for their products; however, agreement on prices among competitors is clearly illegal.

Under the Department's business review procedure, a person or organization may submit a proposed action to the Antitrust Division and receive a statement as to 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 3233, 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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Major Medicare Fraud Settlement

On September 13, 1993, the Department of Justice announced that two of the nation's largest independent blood testing laboratories have paid the United States $39.8 million to settle allegations they submitted false Medicare claims for unnecessary blood tests. Frank W. Hunger, Assistant Attorney General for the Civil Division, said the case was part of the Department's continuing effort to investigate and vigorously prosecute independent blood laboratories and other health care providers that abuse or defraud the federal health care system. The Department settled the case on behalf of the Department of Health and Human Services, which administers Medicare. The laboratories involved are MetPath, a division of Corning Lab Services, Inc., headquartered in Teterboro, New Jersey, the nation's second largest independent blood laboratory, and MetWest, headquartered in Tarzana, California, the sixth largest independent blood laboratory.

Assistant Attorney General Hunger explained that the two labs manipulated doctors into receiving medically unnecessary test results for HDL (high density lipoprotein), total iron binding capacity (TIBC) and protein bound glucose (PBG) whenever doctors ordered certain basic, automated blood tests. The allegations involved a series of laboratory tests conducted on a "sequential multiple analysis computer" (SMAC) for which Medicare reimbursed laboratories on a flat fee basis for any nineteen or more tests, even if the physicians needed the results of only a few of the tests. The SMAC series of tests, because it is highly informative and relatively low in cost, is an extremely popular laboratory test ordered by doctors for a variety of diagnostic and monitoring purposes.

MetPath and MetWest regional laboratories revised their order forms and compendium of services in 1988 to combine the HDL test with the SMAC, market them as "ChemScreen Profile" or "ChemPanel" and bill HDL, not performed on the SMAC, separately to Medicare. In 1990 and 1991, MetPath and MetWest regional laboratories engaged in similar programs to package the TIBC and PBG tests (performed on the SMAC) as part of the "ChemScreen Profile" or "ChemPanel" and also billed each to Medicare separately. Although specific sales, marketing, and billing practices varied among the companies' regional laboratories, generally each of these additional tests were added routinely to the SMAC for a "nominal" additional price or as part of annual across-the-board price increases to the physicians, while the fact that Medicare would be billed separately for each test at retail prices often was not revealed to the doctors. Medicare claims for each additional test were submitted directly by the labs to the Medicare insurance carries, who reimbursed the labs for each separately-billed additional test -- HDL, TIBC and PBG -- based on retail fee schedules. As a result of this marketing scheme, some doctors ordered the labs' ChemScreen Profiles or ChemPanels even if they needed only the SMAC, not realizing that the unnecessary HDL, TIBC and PBG tests were costing Medicare millions of dollars.

The government also alleged that the sales pricing and marketing practices of MetPath and MetWest regional laboratories led some doctors to believe that they had no choice but to receive the additional HDL, TIBC and PBG tests whenever a SMAC was ordered, or that they would receive a better price for the SMAC with additional tests than without them. As a result of these practices, hundreds of thousands of claims for payment to Medicare for TIBC and other tests were submitted to Medicare that MetPath and MetWest regional labs knew were not reasonable and necessary for the diagnosis or treatment of an illness or injury, as required by Medicare. Under the settlement, MetPath has paid the government $35.013 million and MetWest has paid the government $4.787 million.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

New Freedom Of Information Act Directive

Attached at the Appendix of this Bulletin as Exhibit A are Freedom of Information Act policy memoranda issued by President Clinton and Attorney General Janet Reno on October 4, 1993, which substantially increases the amount of government information that is made available to the public. The President and the Attorney General rescinded a 1981 rule which encouraged federal agencies to withhold information whenever there was "a substantial legal basis" for doing so. In its place, the Attorney General said a "presumption of disclosure" should be applied. Ms. Reno further stated that the Justice Department would defend agencies that are sued for non-disclosure only when it was "reasonably foreseeable that disclosure would be harmful" to an interest protected by the law, and only when it need be. The Attorney General added, "The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable."

The President called upon all federal departments and agencies to renew their commitment to the Freedom of Information Act and to its underlying principles of government openness, and stated that this was an appropriate time for them to take a fresh look at how they comply with the law, and to reduce backlogs. The Attorney General "strongly encouraged" each agency to make discretionary disclosure of technically exempt information whenever possible. She also instructed Justice Department personnel to review pending FOIA litigation to implement the new policy, and ordered a review of all forms and correspondence utilized by the Department in responding to FOIA requests to make them more clear, consistent and complete. To ensure a clear and current understanding of the situation, the Attorney General requested that each Department and Agency component send to the Office of Information and Privacy a copy of their Annual FOIA Report to Congress for 1992, together with a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that will be helpful.

If you have any questions, please call Co-Directors Richard L. Huff or Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice, at (202) 514-4251.

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Federal Bureau Of Investigation (FBI) And The Drug Enforcement Administration (DEA)

On September 29, 1993, Deputy Attorney General Philip B. Heymann testified before the Subcommittee on Civil and Constitutional Rights and the Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, U.S. House of Representatives, concerning various options for enhancing the federal drug enforcement efforts of the FBI and DEA. These are matters which have been extensively

studied by the Department of Justice and the National Performance Review Committee chaired by Vice President Al Gore. The Vice President and the Attorney General agree that action in this area is needed, and the Deputy Attorney General presented the issues and options that are being considered. The Deputy Attorney General also emphasized the Department's commitment to improving the coordination and effectiveness of the federal government's efforts to combat the importation and distribution of narcotics in our country, while eliminating the wasteful duplication of resources and energy. Mr. Heymann stated that the FBI and the DEA are in agreement on one fundamental issue: Something must be done to eliminate the bifurcation of the Justice Department's drug enforcement effort. There also is general agreement on what are the most critical coordination and duplication problems. Mr. Heymann discussed four major options available to the Department of Justice to streamline, coordinate, and improve federal drug law enforcement efforts:

-- Maintain the status quo. This would effectively entail encouraging greater cooperation between the separate agencies while maintaining them as separate law enforcement organizations. Mr. Heymann stated this is not an acceptable alternative.

-- Remove the FBI from drug law enforcement activities, which would result in the DEA's becoming the single departmental organization responsible for federal drug enforcement. Such a removal would require the transfer of the FBI's drug and drug-related intelligence to the DEA. It also would necessitate the transfer of several hundred FBI agents presently assigned to drug enforcement activities to the DEA.

-- A merger of the FBI and the DEA into one federal drug enforcement super-agency, thereby creating a single point-of-contact for all federal, state and local drug law enforcement efforts.

-- Continue to have both the DEA and the FBI investigate and combat drug trafficking and drug importation, but create a new, single point of authority that is capable of dealing with the problems of overlapping and inconsistent efforts. This alternative grew out of the Justice Department's review process.

The Attorney General has directed the Deputy Attorney General to lead a comprehensive effort to analyze the complex issues involved with assuring the American people that the anti-drug functions of the Department of Justice work in the most effective manner possible. The Attorney General has personally discussed this matter with Members of Congress, the Director of the Office of National Drug Control Policy, the FBI Director, the DEA Administrator, Special Agents and former administrators of law enforcement agencies, as well as Department of Justice attorneys working on this review. The review has centered upon six key issues that must be considered when evaluating any option to address the problems that now exist: 1) temporary disruption that may result from reorganization; 2) the long term effects on our ability to combat drug abuse and violent offenses; 3) the financial impact of change versus the status quo; 4) the status of cooperation with other countries in the drug effort; 5) cooperation with state and local law enforcement; and 6) the personnel status of FBI and DEA agents.

Mr. Heymann discussed the problems and ramifications at length and reiterated that the Attorney General has yet to reach a decision on our best response to the significant problems of coordinating the drug enforcement efforts of the FBI and the DEA. He acknowledged that there are significant advantages to several of the options and also difficulties with each of them. In closing, Mr. Heymann said, "We are committed to finding and implementing the most viable solution, taking into account all of the relevant concerns. We welcome your counsel as we move forward to resolving these issues."

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

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Iran-Contra Funds

On September 21, 1993, the Department of Justice filed a lawsuit against two Iran-Contra figures seeking to recover millions of dollars in Swiss bank accounts from the secret sales of arms to Iran in 1986. The funds, estimated at more than $10 million, are left over from the secret effort to sell arms to Iran to win the release of American hostages in Lebanon and divert some of the proceeds to rebels who were fighting the Sandinista government in Nicaragua. The complaint was filed in U.S. District Court, Alexandria, Virginia, against retired Air Force Major General Richard Secord, of Reston, Virginia, and his business partner, Albert Hakim of Los Gatos, California. The Department also filed a similar claim in Geneva, Switzerland.

In its complaint, the United States alleged that the arms sales proceeds belong to the federal government because Secord and Hakim received the money as agents for the United States. According to the complaint, former Marine Lieutenant Colonel Oliver North, a White House aide at the time, entrusted responsibility for the arms shipments to Secord and Hakim, who carried out the sales through a financial enterprise consisting of foreign shell corporations and Swiss bank accounts. The United States contends that the assets remaining in the Swiss accounts are the proceeds of U.S. government arms sales to Iran and other covert activities undertaken at North's direction, and that the funds are therefore the property of the United States. In November, 1989, Secord pleaded guilty to a felony count of making false statements to Congress during the investigation of the Iran-Contra matter. In sworn testimony before Congress, Secord stated that he did not intend to profit from the Iran arms sales and that he and Hakim never contemplated using the proceeds of the enterprise for personal purposes. Hakim pleaded guilty in November, 1989 to a misdemeanor of supplementing the salary of then White House aide North. At the time of his criminal plea, Hakim executed a separate civil agreement, under which he recognized the United States' right to the proceeds from the arms sales and pleaded to "cooperate fully" to enable the government to obtain funds in the accounts, other than an amount of $1.7 million to satisfy specific creditors. Litigation over the frozen funds has been pending since the arms sales became public in 1986.

The Office of Independent Counsel Lawrence Walsh (OIC), acting with the cooperation of the Criminal Division of the Department, originally blocked movement of the funds under a Mutual Legal Assistance Treaty between the United States and Switzerland. The treaty permits claims to funds in a foreign bank account based on "reasonable suspicion" that criminal acts have been committed in connection with the funds in the requesting state. In 1992, the Swiss denied the OIC's request for the return of funds after most of the criminal prosecutions relating to embezzlement of the funds were dismissed. An appeal to a Swiss federal tribunal was rejected on procedural grounds in March, 1993, but the court kept the freeze in place and allowed the United States to file a civil claim to the assets. The Civil Division initiated civil proceedings against the banks holding the funds in Geneva in April of this year.

Secord and Hakim, who stand to benefit if the money is released, intervened in the Swiss proceedings to oppose the government's efforts to obtain the funds. In June, the Geneva court ordered the United States to file an action to establish ownership of the money in the bank accounts on or before September 21, 1993. A similar action was filed in Geneva.

A copy of the complaint is available by calling the United States Attorneys' Bulletin staff, at (202) 514-4633.

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ASSET FORFEITURE

Review Of Official Use Of Forfeited Property

On September 15, 1993, Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture (EOAF), Office of the Deputy Attorney General, issued a memorandum to representatives of the Drug Enforcement Administration, Federal Bureau of Investigation, Immigration and Naturalization Service, U.S. Marshals Service, and U.S. Park Police, concerning review of official use of forfeited property. Part IV, D of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990) requires notification to EOAF "at the time property valued at $50,000 or greater is placed into official use." Although this requirement may be satisfied by post-transfer notification, the FBI and the U.S. Marshals Service have gone further and provided the EOAF with advance notice of and notified the Justice Management Division's Budget Staff and Facilities and Administrative Services Staff of such proposed transfers and given them an opportunity to review and comment.

The Attorney General is considering a revision to the Guidelines to require Attorney General or Deputy Attorney General approval of such decisions. Mr. Copeland has asked that, pending that action, EOAF be given advance notice of and an opportunity to review official use actions involving federal forfeited property valued at $50,000 or more. EOAF will endeavor to act on all such notifications within two weeks of receipt. A copy of Mr. Copeland's Directive No. 5, is attached at the Appendix of this Bulletin as Exhibit B.

If you have any questions, please contact the Executive Office for Asset Forfeiture, at (202) 616-8007.

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CRIME ISSUES

Northern District Of Illinois

On September 22, 1993, Michael J. Shepard, United States Attorney for the Northern District of Illinois, announced the filing of two criminal informations involving Cook County Sheriff's office personnel. The first information charges the former Director of Personnel and six other individuals with falsifying the test results and educational credentials of at least 455 applicants for law enforcement positions. The information further charges the former Sheriff's Merit Board investigator with accepting and passing bribes in connection with applications for positions as part-time and full-time Cook County deputy sheriffs, in violation of federal bribery statutes. In addition, the information charges the Sheriff's police officer with promising applicants positions as part-time deputy sheriffs in exchange for their payment of $3,000 toward the campaign fund of a candidate for Cook County Sheriff, in violation of a federal anti-patronage statute. The second information charges that from December 16, 1988, until November 9, 1990, Chicago resident Marie D'Amico received a salary of approximately $18,250 from the Cook County Sheriff's office in exchange for services which she never performed, in violation of federal mail fraud statutes. The Cook County Sheriff's Merit Board is in charge of testing, investigating and certifying applicants for positions as Cook County deputy sheriffs, corrections officers, and sheriff's police officers. Illinois law and rules and regulations issued by the Merit Board require applicants for such positions to pass a written reading comprehension examination and to possess a high school diploma or certification of equivalent formal education.

The defendants named in the informations are: the Director of Personnel, Cook County Sheriff's office, in charge of hiring Cook County deputy sheriffs and corrections officers; the Assistant Director, Cook County Sheriff's Merit Board, in charge of administering and overseeing the individual steps required for selection, investigation and certification of applicants for positions as deputy sheriffs, corrections officers, and Sheriff's police officers; two Investigators for the Cook County Sheriff's Merit Board, assigned to conduct background investigations and interviews of applicants for positions as corrections officers and deputy sheriffs; three Cook County Sheriff's office employees, responsible for, among other things, administering and grading entrance examinations given to applicants for positions as deputy sheriffs, corrections officers, and Sheriff's police officers. All of the defendants face possible maximum sentences of up to 25 years incarceration, and fines of up to $750,000.

One of the Investigators for the Cook County Merit Board served as President of the Northwest Republican Organization and campaigned for the office of 41st Ward Alderman in the City of Chicago. During that time, he assisted approximately 60 individuals in obtaining jobs as deputy sheriffs and corrections officers with the Sheriff's office in exchange for their assistance during his campaigns. He also ensured that these favored applicants were certified for hiring regardless of whether they passed the written entrance examination or were otherwise qualified for employment. In addition, he provided blank GED certificates or high school diplomas to approximately 15 applicants for positions as deputy sheriffs and corrections officers who assisted him during his political campaigns.

In announcing the criminal informations, United States Attorney Shepard stated, "These charges expose a pervasive pattern of fraud in the process by which people got jobs at the Cook County Sheriff's office during the period from 1987 through November, 1990. The endemic corruption in these hiring practices included active falsification of test results, forgery and misrepresentation of educational credentials, bribe-taking, and the hiring of ghost-payrollers. Unqualified individuals were vested with law enforcement authority, and qualified applicants were deprived of the opportunity to compete for the positions given to unqualified applicants. When political favoritism and patronage hold sway over the honest administration of hiring standards, public trust in the integrity of law enforcement is gravely undermined." ***Assistant United States Attorneys Scott D. Levine*** and ***Jacqueline Oreglia*** will prosecute the case.

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Crimes Affecting U.S. Households Reach New Low

On September 5, 1993, the Bureau of Justice Statistics (BJS) of the Department of Justice, issued a Bulletin indicating that a smaller percentage of U.S. households were victimized by violent crime or thefts last year than in any year since BJS started counting in 1975. Burglaries and thefts showed the biggest drops for the 1975-1992 period. Assaults and robbery also declined. Only rape and motor vehicle theft did not decrease. Altogether, 22 million of the nation's almost 100 million households were affected by crime last year--roughly 23 percent. In 1975, 32 percent of American households were hit by at least one crime. Acting BJS Director Lawrence A. Greenfeld said, "Nonetheless, that still means almost one in four households were victimized by a violent or property crime during 1992." Mr. Greenfeld added that five percent of American households experienced violent crimes during 1992, which was unchanged from 1991. Other findings included in the Bulletin are:

- -- Most crime was more likely to have minority or poor households as victims;
- -- While 22 percent of all white households were touched by crime last year, 27 percent of black households were victimized;
- -- Twenty-two percent of the households headed by non-Hispanics were victimized by crime at least once last year, compared to 31 percent of the households headed by Hispanics;
- -- Households with incomes under $15,000 were more vulnerable to becoming victims of a burglary than were households with higher incomes;

-- Seven percent of all black households had a member who was a violent crime victim last year, compared to 5 percent of all white households.
-- As in previous years, households in the Northeast were the least likely to be victimized by crime. Those in the West were the most likely. Urban households were more vulnerable than were rural.

Some of the 1975-1992 decreases were substantial. For example: Burglary fell from 7.7 percent to 4.2 percent of all households during the 17-year period. Household theft dropped from 10.2 to 7.2 percent, and personal theft from 16.4 to 9.7 percent. The decline was attributed, in part, to gradual shifts in population from large households and those in urban areas, which are more likely to experience crime, to smaller ones or those in suburban and rural areas.

The households indicator is a component of the National Crime Victimization Survey, conducted for BJS by the Bureau of the Census. Interviews are conducted at six-month intervals with approximately 99,000 occupants age 12 or older in about 49,000 housing units. The nationally representative survey counts only those crimes for which the victim can be questioned and therefore excludes homicides. However, the inclusion of homicides would have made no appreciable difference in the data.

Copies of the Bulletin entitled "Crime and the Nation's Households, 1992" (NCJ-143288) may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-800-732-3277.

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Crime Scene Fingerprinting

On September 19, 1993, the National Institute of Justice (NIJ) of the Department of Justice announced the development of a portable vapor wand, which could revolutionize the science of finding fingerprints at crime scenes. The device, developed with funds from NIJ, generates prints observable with the naked eye in about twenty seconds. The wand is a standard butane soldering iron the size of a large fountain pen fitted with a rechargeable cartridge filled with a mixture of cyanoacrylate (superglue) and a dye. The wand vaporizes the glue, which quickly freezes the latent fingerprint. The dye stains the print to make it visible.

Superglue has been used as a fingerprint stabilizer on on-porous surfaces since 1978, but its use involves a cumbersome, two-step process. First, the fingerprint must be preserved and then stained. Sometimes investigators had to seal off whole rooms and vaporize them to bring out prints. In some other cases they had to remove fixtures, wall sections, doors and other materials and take them back to the lab for processing. The wand makes obtaining fingerprints a one-step procedure by combining the development and staining procedures into a single process. Law enforcement officers can now spray small surfaces quickly to determine whether prints are on small objects or other likely spots. If they are they can be lifted at once. The vapor wand, designed by Alaska's Scientific Crime Detection Laboratory designed under an NIJ grant, is modeled on an ordinary soldering iron, which can be purchased in most hardware stores. However, NIJ said the wand is still experimental, and NIJ notes that the appropriate precautions must be taken when using the device.

For a copy of the report, "A One Step Fluorescent Cyanoacrylate Fingerprint Development Technology," (NCJ-144019), can be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 10850.

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PRISON STATISTICS

Prison Population Reaches Record High

On October 3, 1993, the Bureau of Justice Statistics (BJS), Department of Justice, reported that there are more men and women in state and federal prisons than ever before. The inmate population on June 30 was 925,247. The number of prison inmates grew by an average 1,600 a week from January through June, or about 5 percent during the six-month period. The increase of almost 42,000 inmates so far this year was considerably more than the 31,500 additional prisoners counted during the first six months of 1992. According to Acting BJS Director Lawrence A. Greenfeld, this was the third largest six-month increase ever recorded. State corrections officials and the federal prison system reported a six percent increase in the first half of 1990 and a record 7.3 percent increase in 1989. Other statistics included in the report are:

-- The federal prison population has grown by 8.4 percent this year, which is almost double the 4.3 percent growth rate of the prisons in the 50 states and the District of Columbia;

-- Two states recorded double-digit half-year increases: Texas, 11.8 percent, and West Virginia, 11.1 percent;

-- For a full year ending on June 30, six states had prisoner growth exceeding 10 percent: Texas, Minnesota, Georgia, Oklahoma, California, and Delaware;

-- Six states recorded declines during the 12-month period: Maine, New Jersey, Rhode Island, Nebraska, Montana and Oregon;

-- On June 30, considering only persons sentenced to state or federal prison for more than one year (known as "sentenced" prisoners), the incarceration rate was a record 344 inmates per 100,000 U.S. residents;

-- There were 37 sentenced female offenders in prison for every 100,000 females in the population. The rate for males was 18 times higher -- 665 sentenced male prisoners for every 100,000 male U.S. inhabitants.

-- As of midyear for all 50 states and the District of Columbia, there were 316 sentenced prisoners per 100,000 population. Louisiana had the highest such rate -- 505 inmates per 100,000 residents. North Dakota had the lowest rate--69 inmates per 100,000 residents. The federal rate was 28 sentenced prisoners per 100,000 U.S. residents.

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Prison Inmate AIDS Deaths In The Northeast

On September 12, 1993, the Bureau of Justice Statistics, Department of Justice, issued a report indicating that more than half of the prison inmate deaths in the nation's Northeastern states during 1991 were caused by the Acquired Immune Deficiency Syndrome (AIDS). Nationwide, 28 percent of the 1,863 state prisoners who died in custody died from AIDS -- 513 men and 15 women. Other statistics included in the report are:

-- In New Jersey, 69 percent of the inmate deaths were AIDS-related deaths, as were 66 percent tin New York, 44 percent in Florida, 33 percent in Maryland and 30 percent in North Carolina and Massachusetts;

-- In 1991, the latest year for which the data are available, 2.2 percent of the 792,000 men and women in federal and state prisons were infected with the human immunodeficiency virus (HIV) that causes AIDS. Of these, 0.6 percent exhibited HIV symptoms, and 0.2 percent had confirmed AIDS;

-- The states reporting the highest percentage of HIV positive inmates were New York (13.8 percent), Connecticut (5.4 percent), Massachusetts (5.3 percent), New Jersey (4 percent), Rhode Island (3.5 percent) and Georgia (3.4 percent).

-- In a nationally representative survey of state prisoners, about half the inmates reported that they had been tested for HIV infection and were willing to share the results with the interviewers. Among tested prisoners who said they had never used drugs, 0.8 percent were HIV positive, as were 2.5 percent who said they had used drugs at least once, 4.9 percent who said they had used needles to inject drugs and 7.1 percent who said they had shared needles. About 25 percent of all state prison inmates reported they had used a needle to inject illegal drugs, and about half of them had previously shared a needle with others.

-- An estimated 6.8 percent of Hispanic women were HIV positive, as were 3.5 percent of Hispanic men.

-- Among black inmates, 3.5 percent of the women and 2.5 percent of the men were HIV positive.

-- Among white inmates, 1.9 percent of the women and 1 percent of the men were HIV positive.

-- Inmates 35 to 44 years old had an infection rate of 3.7 percent and were more likely than those in other age groups to be HIV positive.

-- Prisoners sentenced for drug, property or public order offenses (such as gambling or weapons violations) were more likely to be HIV positive than were violent offenders.

-- All the states, as well as the District of Columbia, and the Federal Bureau of Prisons test inmates for the HIV virus either routinely or for specific reasons. Seventeen jurisdictions test all prisoners, at admission, upon release or during custody. Thirty-nine test if asked to do so by the inmate, and 40 test if an inmate exhibits symptoms of HIV infection.

Copies of the special report "HIV in U.S. Prisons and Jails." (NCJ-143292) may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-800-732-3277.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Largest Penalty Ever Imposed In Safe Drinking Water Case In Butte, Montana

On September 13, 1993, the Department of Justice announced the largest penalty ever imposed under the federal laws protecting the nation's drinking water. Butte Water Company in Montana has agreed to pay $900,000 to settle charges of supplying its 30,000 customers in Silver Bow County, Montana with unacceptable quality drinking water. The main problem was unacceptable levels of dirt particles (turbidity) found continuously in the drinking water, endangering public health by harboring bacteria, viruses or parasites. The government also asserted that Butte failed to properly monitor and report problems to its customers.

Butte Water Company agreed to pay $720,000 to the United States and $180,000 to Montana. Part of the $180,000 penalty will be used to train operators of public water supplies and sewage treatment plants statewide. This action culminates administrative and legal actions brought by federal and state agencies for violations that date back to August, 1987. The consent decree was lodged in U.S. District Court in Butte by the Department of Justice on behalf of the Environmental Protection Agency and the State of Montana. Myles E. Flint, Acting Assistant Attorney General for the Environment and Natural Resources Division said, "Today's record-setting penalty demonstrates our continued resolve to use enforcement to ensure compliance with our nation's environmental laws and remove incentives to non-compliance."

* * * * *

CIVIL RIGHTS DIVISION

Grants Awarded Under The Americans With Disabilities Act

On September 29, 1993, the Department of Justice announced that a technical assistance grant has been awarded which will make information on the rights of people with disabilities available in local libraries across the country. The grant is just one of nine, totaling $1.7 million, that has been awarded to fund projects promoting compliance with the Americans with Disabilities Act (ADA). Other grants will assist establishments ranging from museums and shoe repair shops to travel agencies and aquariums in understanding their obligations under the ADA. The grants, together with seven others the Department announced on July 26, represent a total of $3.1 million the federal government has provided to groups, businesses, or government units that have rights or responsibilities under the ADA. The grants complement the Department's own ADA technical assistance services.

The grants were awarded to the American Association of Museums; American Association of Retired Persons; The Arc; Bazelon Center for Mental Health Law; California Foundation on Employment and Disability; Chief Officers of State Library Agencies; Council of Better Business Bureaus' Foundation; National Association of Towns and Townships; and Telecommunications for the Deaf, Inc.

Attorney General Janet Reno stated, "Tough enforcement of the ADA is our policy and educating the public is a key element of that policy. Let no one rely on ignorance of the ADA to explain away discrimination against people with disabilities."

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SENTENCING REFORM

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 6, No. 2, dated September 1, 1993, and Volume 6, No. 3, dated September 24, 1993, is attached as Exhibit C at the Appendix of this Bulletin. The Guideline Sentencing Update 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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LEGISLATION

Anti-Crime Initiative

On September 23, 1993, anti-crime legislation was introduced in both the United States Senate and the House of Representatives. This legislation is summarized in Vol. 41, No. 9, of the United States Attorneys' Bulletin, dated September 15, 1993, at p. 300. Also, a press release issued by the White House was attached as an exhibit at the Appendix of that issue.

Both versions of the legislation are similar although the Senate bill does not include language mandating a 5-day waiting period for the purchase of a handgun. The so-called "Brady" bill is contained in a separate measure. Senator Joseph R. Biden, Chairman of the Senate Judiciary Committee, said he hoped to bring the Senate version to the Senate floor sometime in October. Congressman Charles E. Schumer, Chairman of the House Judiciary Subcommittee on Crime, said, "This is a tough bill. . . but it's a fair bill." [NOTE: Last year, after exhaustive debates, the crime bill died in the Senate in the final hours of the Congressional session.]

* * * * *

"Brady" Bill

On September 30, 1993, Eleanor D. Acheson, Assistant Attorney General for the Office of Policy Development, testified before the Subcommittee on Crime and Criminal Justice, House Committee on the Judiciary, concerning H.R. 1025, the "Brady Handgun Violence Prevention Act." The Brady Bill provides for up to a five working-day waiting period to buy a handgun through a licensed dealer. Prospective purchasers would have to provide proof of identification to gun dealers, and state on a federal form that they are not among the classes of prohibited purchasers, as is currently required. The gun dealer would forward the prospective purchaser's name, address and date of birth to local law enforcement authorities, who would have up to five working days to conduct a background check on the prospective purchaser. A handgun transfer could occur prior to five working days if the dealer is notified by law enforcement that the sale may proceed earlier. Under the waiting period provision, unless the sale is denied, local law enforcement would have to destroy the form submitted by the gun dealer and records derived from it. Local law enforcement would not have discretion to arbitrarily deny a handgun purchase. If law enforcement has no information indicating that the purchaser is in a prohibited class, the sale must proceed.

The Brady Bill would also authorize $100 million in funds for the development of state criminal history records and establish a national instant background check system for all firearm purchases through gun dealers. Upon the Attorney General's certification that the national instant criminal record background check system had achieved at least 80 percent currency of case dispositions in the last five years, the waiting period will be superseded. However, state and local waiting periods will remain unaffected. This measure is meant to be a floor, not a ceiling, and it is hoped that this remains the case. States and localities should have the option of imposing additional standards for firearms purchases.

Assistant Attorney General Acheson testified that in state after state, years of experience show that waiting periods provide law enforcement officers with the time necessary to thoroughly check the background of prospective purchasers, and that the background check prevents numerous illegal purchases. Most crimes are committed by people local to the area. And the knowledge and experience of local law enforcement authorities -- which the Brady Bill would harness -- is the single, most powerful tool we have for preventing illegal handgun sales. In closing, Ms. Acheson stated that the bill is long overdue and it is time to give law enforcement this simple, yet powerful, tool in its struggle against violent crime.

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

* * * * *

Legal Services Corporation Reauthorization

On September 22, 1993, Associate Attorney General Webster L. Hubbell testified before the Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, regarding H.R. 2644, the "Legal Services Reauthorization Act of 1993." While the Associate Attorney General expressed the Administration's support for reauthorization of the Legal Services Corporation, he also discussed concerns about the restriction on the use by local legal services programs of non-Corporation funds and the prohibition on representation in any redistricting matters.

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

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POINTS TO REMEMBER

Equal Employment Opportunity Policy Statements

Attached at the Appendix of this Bulletin as Exhibit D are three Equal Employment Opportunity Statements issued by Anthony C. Moscato, Director, Executive Office for United States Attorneys, to all United States Attorneys on September 16, 1993, as follows: 1) Equal Employment Opportunity Policy, 2) Policy Statement on Sexual Harassment, and 3) Policy Statement on Persons with Disabilities. In his cover memorandum, Mr. Moscato said, "Discrimination based on race, sex, religion, color, age, national origin, physical or mental disability is prohibited. The responsibility for ensuring that our employees do not become victims of discrimination based on any of these factors belongs to each of us. As a result, I encourage you to take a strong, positive leadership role in initiating actions that will ensure a workplace free of any form of discrimination."

If you have any questions or concerns, please contact Yvonne J. Makell, Equal Employment Opportunity Officer, Executive Office for United States Attorneys, at (202) 514-3982.

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Vice President's National Performance Review

On September 7, 1993, the Vice President of the United States reported the National Performance Review's major recommendations to the Cabinet for improvements throughout the Federal government, including personnel, procurement and information technology, as well as agency-specific recommendations designed to improve performance, cut costs and empower employees. A representative selection of problems consistently identified by Department of Justice employees are:

-- The organizational structure of the Department needs to be changed. There is much duplication of responsibilities and authority with little accountability.

-- The procurement process is often a barrier to good management and cost-cutting efforts.

-- The personnel rules and regulations are cumbersome and fail to penalize poor performance and reward outstanding work.

-- The Department needs to foster a better working environment through the use of flexible working schedules, flexiplace, telecommuting, and other "worklife" improvements.

-- Efforts to improve communication, productivity, and service to the public through employee office automation and improved systems have been inadequate.

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CASE NOTES

CIVIL DIVISION

Fourth Circuit Holds That Actions Taken Pursuant To Department Of Justice Settlements Of Litigation Are Not Insulated From Judicial Review

This case concerns a settlement agreement between the federal government and Downey Communications, Inc. ("Downey"). The settlement agreement resolved prior litigation between Downey and the government by modifying a procurement contract that had previously been awarded to Downey. Officials of the Department of Justice authorized the settlement pursuant to the Attorney General's authority to compromise claims involving the United States. The settlement agreement modified a contract between the Defense Commissary Agency ("DeCA") and Downey regarding a "civilian enterprise publication" for distribution to DeCA employees. Executive Business Media, Inc., which was an unsuccessful bidder on the initial contract awarded to Downey, then filed this lawsuit challenging the agreement, arguing, inter alia, that the contract modifications were so extensive that they resulted in a "new" contract that should have been put out for competitive bids. The parties filed cross-motions for summary judgment, and the district court ruled in favor of defendants, holding that the settlement agreement is not subject to judicial review.

The court of appeals (Hall, Sprouse, Michael) has now reversed and remanded. The court acknowledged the breadth of the Attorney General's authority to compromise litigation but held that, in doing so, she is bound to comply with the same legal provisions that control the agency she represents. Accordingly, where the actions taken pursuant to the settlement arguably trench upon enforceable rights of third parties, the fact that they are embodied in a settlement agreement does not insulate them from judicial review. The court remanded the case for a determination of whether the settlement agreement in fact effected a sufficiently broad change in the procurement contract to require a new round of competitive bidding.

Executive Business Media, Inc. v. Department of Defense,
No. 92-2490 (September 1, 1993) [4th Cir.; E.D. Va].
DJ # 145-15-2113

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Michael S. Raab - (202) 514-4053

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Fifth Circuit Affirms Dismissal Of FTCA Claim Brought By Former Federal Employee To Challenge The Loss Of His Job

Plaintiff, an employee of the FDIC, was a term-limited, nonpreference-eligible employee in the excepted service who had not completed any probationary period. After a series of disputes with his supervisors over his proper role in promoting the agency's minority outreach program, plaintiff was allegedly asked to resign. He did so. He then brought a claim under the Federal Tort Claims Act, alleging that government employees had violated his rights under the Constitution, federal statutes, and state common law. The district court dismissed the suit for want of jurisdiction, on the grounds that plaintiff's exclusive remedy was under the Civil Service Reform Act.

The Fifth Circuit (Reavley, Duhe, Barksdale) has now affirmed in a per curiam decision. The court held that the CSRA provides the plaintiff's exclusive remedy even though, because of his limited tenure, it provides him with no remedy. The court also held that the preclusive effect of the CSRA applies equally to plaintiff's claims based on state law, federal statutory law, and the federal Constitution.

Austin R. Guitart v. United States, No. 92-3934 (August 19, 1993) [5th Cir.; E.D. LA.]. DJ # 157-32-1692.

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Eighth Circuit Affirms District Court's Dismissal Of Challenge To Secretary's Interpretation Of "Duration Of Impairment" Requirement In Social Security Disability Programs, But Vacates District Court's Dismissal Of Other Causes Of Action Based On "Live" Claimants' Failure To Exhaust Remedies

Titus, on behalf of himself and a class of claimants, challenged the Secretary's interpretation of the "duration of impairment" requirement in the Social Security disability programs. Plaintiffs also alleged that the Iowa disability determination service failed in several ways to develop cases adequately before determining that a claimant failed to meet the duration-of-impairment requirement. The district court rejected the first challenge, sustaining the Secretary's well-settled interpretation that the Act requires a denial of disability benefits where the claimant has been unable to show that his or her impairment is expected to keep him or her from working for twelve consecutive months. The district court rejected plaintiffs' argument that all the Act requires is that a claimant show that his or her impairment will last for twelve months. The district court dismissed plaintiffs' other challenges because plaintiffs had failed to exhaust administrative remedies as required under 42 U.S.C. 405(g). The district court ruled that plaintiffs' claims were not collateral to their claims for benefits -- and thus plaintiffs were not entitled to a waiver of exhaustion under the principles announced in Bowen v. City of New York, 476 U.S. 467 (1986) -- because they had not shown the existence of a secret policy.

The court of appeals (Lay, Richard Arnold, Loken (concurring)) has now affirmed the district court's ruling on the duration-of-impairment requirement, but vacated the exhaustion ruling and remanded for further proceedings on the claims that were dismissed for failure to exhaust. The court of appeals ruled that City of New York did not hold that an issue was collateral to a claim for benefits -- thus permitting the courts to excuse the exhaustion requirement over the Secretary's objection -- only if plaintiffs could show that the challenged policy was a secret one. The court of appeals thus remanded the remaining claims to the district court for further proceedings on both class certification issues and the merits. The court indicated that the Secretary could still argue on remand that exhaustion should not be excused by showing, based on arguments other than the secret policy argument, that plaintiffs' remaining claims were not collateral to their claims for benefits.

Titus v. Sullivan, No. 91-3498 (Sept. 1, 1993) [8th Cir.; S.D. Idaho]. DJ # 181-28-29

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Tenth Circuit Reverses District Court And Holds That United States May Be Entitled To Immunity To Suit Under Colorado Automobile No-Fault Statute

This case arises out of an automobile collision involving a vehicle of the United States Postal Service. The Colorado no-fault statute permits suit where a defendant driver is not insured by a Colorado insurance company, and otherwise bars tort actions. The district court held that the Postal Service, which does not obtain conventional insurance and does not participate in the no-fault scheme, could be sued under the provisions of the no-fault statute.

The court of appeals (Mckay, Ebel, Leonard) has now reversed. The court recognized that the Federal Tort Claims Act requires that the United States be analogized to a private person in like circumstances. The court held that the United States need not literally satisfy the requirements of a state statutory scheme in order to be analogized to a complying party. Instead, the relevant question is whether the United States has satisfied the objectives of the statutory scheme. The court concluded that the United States' policy of self-insurance satisfied the statutory policy of encouraging private motorists to procure insurance. The court remanded for a determination of whether this insurance was the equivalent of that provided by private insurance companies, although it is not clear what this inquiry entails.

Nationwide Mutual Insurance Co. v. United States, No. 92-1069 (August 31, 1993) [10th Cir.; D. Colo.]. DJ # 157-13-986

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Eleventh Circuit Holds That Alleged Failure To Publicize Federal Flood Insurance Program Is Not Actionable Under The Federal Tort Claims Act

Individuals and businesses suffering uninsured losses due to flash floods in Alabama in March 1990 brought these consolidated actions under the Federal Tort Claims Act, claiming they failed to obtain federally subsidized flood insurance because the Federal Emergency Management Agency failed to make information about the program available to them and other similarly situated residents pursuant to the requirements of the National Flood Insurance Act, 42 U.S.C. § 4020. The district court dismissed the case on the basis of the flood control immunity provided for federal flood control projects under 33 U.S.C. § 702c, reasoning that the National Flood Insurance Act is sufficiently related to federal flood control efforts to come within its scope.

On appeal, the Eleventh Circuit (Cox, Dubina, Godbold) declined to reach the question of whether section 702c immunity can be extended to these circumstances, and instead affirmed on one of our alternate grounds, the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The court held that section 4020's directive that the Director of FEMA "shall from time to time take such action as may be necessary in order to make information and data [concerning federal flood insurance] available to the public" is a grant of discretion of the type Congress sought to protect with the discretionary function exception to the FTCA. The court also rejected plaintiffs' contention that FEMA "totally failed" to publicize the federal flood insurance in their area; the court took judicial notice of the "detailed description" of the program in the Code of Federal Regulations, the notices published in the Federal Register when individual counties entered the program, and the numerous FEMA publications concerning the program.

Powers, et al. v. U.S., No. 92-6320 (August 2, 1993) [11th Cir.; M.D. Ala.]. DJ # 157-2-419.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Government Not Barred From Suing To Collect Deficiencies In Oil And Gas Lease Royalties Until Mineral Management Service (MMS) Had Conducted An Audit That Disclosed Underpayment

After certain underpayments of royalties owing on an oil and gas lease had been disclosed by an audit conducted by the Mineral Management Service (MMS), Department of the Interior, the MMS issued an order directing Phillips Petroleum Company (Phillips) to pay the deficiencies. Phillips then initiated a suit in the district court alleging that the order was unenforceable as, according to Phillips, any suit by the government to collect the deficiencies would be barred by the six-year statute of limitations set forth in 28 U.S.C. 2415(a), which purportedly began to run on the date the lease payment was due. The district court ruled in Phillips' favor, rejecting the government's contention that the limitations period had been tolled until such time as the payment deficiency had been disclosed as a result of the MMS audit.

The Tenth Circuit reversed and remanded. Noting that 28 U.S.C. 2416(c) tolls the bar of Section 2415(a) for all periods during which facts material to the government's right of action are not known and reasonably could not be known by an official of the United States, the court of appeals ruled that the statute of limitations is, under ordinary circumstances, tolled until such time as the royalty payment deficiency is disclosed by the audit. The court further ruled, however, that the MMS must conduct its audits within a reasonable time and suggested that the six-year period for which federal oil and gas lessees are required by statute to maintain lease records provides a generally applicable standard for determining whether the MMS initiated its audit within a reasonable time. The Tenth Circuit remanded the case to the district court for a determination concerning whether the MMS audit in question had been conducted within a reasonable time.

Phillips Petroleum Company v. Manuel Lujan, et al., 10th Cir. No. 92-5136 (September 2, 1993) (Broby, McWilliams, Brown)

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Martin W. Matzen - (202) 514-2753

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Applicant For Mining Patent Does Not Have Vested Property Interest Until He Satisfied The Department Of The Interior That All Requirements Of The Mining Law Have Been Met

In 1967, Elmer M. Swanson filed an application for seven millsite patents in an area that is now the Sawtooth National Recreation Area. Because the government had contested the validity of the millsite claims through the formal administrative process, patents had not issued for these millsite claims when the Sawtooth Act creating the Sawtooth National Recreation Area was passed on August 22, 1972. Since Section 12 of the Sawtooth Act forbade the issuance of patents to "locations and claims heretofore made in the [Sawtooth National] recreation area under the mining laws of the United States," the government maintained that Swanson can no longer obtain patents for these claims. The proceedings to contest the validity of Swanson's millsite claims took a circuitous route. Initially, an administrative law judge found three of the millsites to be valid, but questioned whether the remaining four were valid as to the entire area encompassed. However, on finding that the government had not met its burden of proof, he dismissed the contest to the remaining claims.

On appeal, the Interior Board of Land Appeals, which exercises delegated authority over such matters on behalf of the Secretary of the Interior, ruled that none of the seven millsites were valid as to the entire area encompassed, and remanded the contest to allow Swanson to adjust his claims. 14 IBLA 158 (January 16, 1974). Upon his refusal to do so, the IBLA invalidated four of the seven millsites, and substantially reduced the area of the remaining three. 34 IBLA 25 (February 14, 1978). The IBLA also found that the Sawtooth Act precluded the issuance of patents to these claims. This decision was appealed to the district court, where the IBLA's decision to reduce the size of three of the claims, as well as its determination that the Sawtooth Act precluded the issuance of patents, was upheld. However, on June 3, 1982, the district court (Callister, C.J.) remanded the decision invalidating the remaining four claims. On remand, the IBLA found that two of the four claims were invalid. United States v. Elmer H. Swanson, 93 IBLA 1 (July 14, 1986). This determination was also appealed to the district court. Before going to trial, however, the parties reached a settlement. The government agreed to recognize all of the claims as valid if they were reduced in size. At this point, Swanson had several other claims involved in the appeal which were affected by the compromise settlement. Based upon a stipulation of settlement entered by the parties, the district court (Lodge, J.) entered judgment dismissing the case.

On appeal, the Ninth Circuit held: one, that the provisions of the Sawtooth Act expressly preclude the issuance of any patents on protected land after the date of the Act's passage, and two, that a patent right does not vest upon the submission of a patent application if the Secretary of the Interior contests the validity of the patent application and thus delays its issuance.

Elmer H. Swanson, et al v. Bruce Babbitt, Secretary of the Interior, et al., 9th Cir. No. 91-36341 (September 3, 1993) (Trott, Brunetti and Leavy)

Attorneys: Jacques B. Gelin - (202) 514-2762
Robert L. Klarquist - (202) 514-2731

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TAX DIVISION

California's Worldwide Combined Unitary Tax System

The Supreme Court invited the United States to file an amicus brief in Barclays Bank v. Franchise Tax Board of California, which presents the question whether California's worldwide combined unitary tax system violates the United States Constitution. The California Supreme Court rejected Barclays Bank's argument that this method of taxation, as applied to groups of corporations with foreign parents, interferes with the Federal Government's power to regulate foreign commerce and foreign affairs, finding that Congress had, by implication, approved the use of this method because it had not forbidden it.

The California legislature recently approved a bill which would modify the state's method of unitary taxation of multinational firms by eliminating the toll-charge on electing to be taxed on a non-unitary basis, i.e., a "water's edge" basis. The bill would also ameliorate some of the other concerns raised by foreign governments. It is expected that California Governor Pete Wilson will sign this bill. The Office of the Solicitor General has been working with the Treasury Department and the White House in determining the impact of this legislation on the Government's views in Barclays Bank.

* * * * *

Indictment Returned In The Southern District Of Texas Charging Federal Diesel Fuel Excise Tax Fraud

On September 1, 1993, an indictment was returned under seal in the Southern District of Texas charging Charles L. Henke, Thomas E. Huitt, John A. Moritz and Larry F. West with conspiring to defraud the United States by obstructing the Internal Revenue Service in the assessment and collection of over $3 million in federal diesel fuel excise taxes owed by Texas Metro Fuels, Inc. (Metro) during the years 1990 through 1992. Henke and Huitt were also charged with seven counts of tax evasion, four counts of making false statements, and two counts of making false representations in connection with the purchase of tax-free diesel fuel. Moritz was also charged with one count of making false statements. The indictment was unsealed on September 2, 1993.

Metro, a wholesaler of diesel fuel conducting business in Houston, Texas, was owned and operated by a partnership owned by Henke and Huitt. The partnership also owned and operated several retail truck stops and gas stations in the Houston area, which were supplied by Metro. Metro was required to pay federal excise taxes on diesel fuel that it sold to certain wholesalers and retailers. From September 30, 1990, to June 30, 1991, Metro filed excise tax returns with the Internal Revenue Service which allegedly falsely reported taxable retail sales of diesel fuel as nontaxable export sales to Haiti and Honduras. Henke and Huitt allegedly caused the preparation of false invoices and export documents and made false representations to other wholesalers of diesel fuel and to the IRS. From September 30, 1991, through March 31, 1992, Metro failed to file excise tax returns. Moritz was employed as a criminal investigator with the Texas State Comptroller's office in Houston, Texas, until his departure from that office in November, 1991. He was assigned to investigate motor fuels excise tax cases for the State of Texas. Moritz allegedly disclosed confidential law enforcement information to Henke regarding an ongoing criminal investigation, and made false and misleading statements to the IRS for the purpose of furthering the conspiracy. West allegedly arranged the sale and delivery of diesel fuel by Metro to various retailers in Houston, collecting payment from the retailers for sales of diesel fuel by Metro and providing false invoices to conceal Metro's involvement in the conspiracy.

Henke and Huitt face a maximum sentence of seventy years in prison and a fine of over $3 million. Moritz faces a maximum sentence of ten years in prison and a $500,000 fine. West faces a maximum sentence of five years in prison and a $250,000 fine. Trial is scheduled for November 8, 1993.

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Suit Filed In The District Of Connecticut Challenging Estate and Gift Taxes

The plaintiffs in National Taxpayers Union, Inc. v. United States, (D.D.C.), and Sharp, et al. v. United States, (D.Conn.), recently filed suit, seeking declaratory and injunctive relief with respect to Section 13208 of Title XIII of the Omnibus Budget Reconciliation Act of 1993. Section 13208 increases the estate and gift taxes imposed on certain estates and lifetime gifts. It applies retroactively to the estates of decedents who died, and to lifetime gifts made, on or after January 1, 1993. The plaintiffs in each of these cases claim that the retroactive effective date of Section 13208 is unconstitutional.

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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 August 16 - September 14, 1993. Persons listed below are AUSAs unless otherwise indicated:

Affirmative Civil Litigation Seminar (Denver, Colorado)

James R. Allison, United States Attorney, District of Colorado. From the District of Massachusetts: ***Suzanne Durrell,*** Chief, Civil Division, ***David Abelman, Roberta Brown,*** and ***Michael Loucks; Robert Begleiter,*** Eastern District of New York; ***James Bickett,*** Northern District of Ohio; ***John Broadwell,*** Chief, Civil Division, Western District of Louisiana; ***William Campbell,*** Western District of Kentucky; ***Susan Cassell,*** District of New Jersey; ***Lee Weidman,*** Chief, Civil Division, and ***Howard Daniels,*** Central District of California; ***Robert DeSousa,*** Chief, Civil Division, Middle District of Pennsylvania; ***Robert Dopf,*** Chief, Civil Division, Southern District of Iowa; ***Ken Dodd,*** Eastern District of Texas; ***William Gillmeister,*** Western District of New York; ***Robert Jaspen,*** Chief, Civil Division, Eastern District of Virginia; ***Joseph Maloney,*** Eastern District of California; ***James Sheehan,*** Chief, Civil Division, ***Bernadette McKeon*** and ***Catherine Votaw,*** all from the Eastern District of Pennsylvania; ***David Orbuch,*** District of Columbia; ***Jack Robinson,*** Southern District of California; ***Eugene Seidel,*** Southern District of Alabama; ***Stephen Shefler,*** Northern District of California; ***Linda Wawzenski,*** Northern District of Illinois. ***Colette Winston,*** Trial Attorney, Civil Division. ***George Dobrovic,*** Senior Resident Agent, Office of the Inspector General, Department of Housing and Urban Development. Postal Inspectors ***Michael Jones*** and ***Frank O'Connor,*** United States Postal Service. ***John Meyer,*** Senior Litigation Counsel, Office of General Counsel, Inspector General Division, Department of Health and Human Services.

Appellate Chiefs Seminar (Arlington, Virginia)

Honorable Drew Days, Solicitor General; ***Christopher J. Wright,*** Assistant to the Solicitor General. ***Kenneth E. Melson,*** United States Attorney, and ***William Otis,*** Appellate Chief, Eastern District of Virginia. ***Patricia Blake,*** Appellate Chief, Eastern District of Michigan; ***Paul Brysh,*** Appellate Chief, Western District of Pennsylvania; ***Aileen Castellani,*** Deputy United States Attorney, Civil Division, Western District of Missouri; ***Margaret Curran,*** Appellate Chief, District of Rhode Island; ***Camille Damm,*** Appellate Chief, District of Nevada; ***John Fisher,*** District of Columbia; ***Roger Haines,*** Southern District of California; ***Rodger Heaton,*** Appellate Chief, Central District of Illinois; ***Linda Hertz,*** Appellate Chief, Southern District of Florida; ***Gary Katzmann,*** Chief Legal Counsel, District of Massachusetts; ***Margaret McGaughey,*** District of Maine; ***David S. Moynihan,*** Chief, Civil Division, District of Nevada; ***Peter Norling,*** Appellate Chief, Eastern District of New York; ***Tamra Phipps,*** Appellate Chief, Middle District of Florida; ***Delonia Watson,*** Northern District of Texas; ***David Williams,*** Senior Litigation Counsel, District of New Mexico. From the Tax Division: ***Gary Allen,*** Appellate Chief, and ***Robert Lindsay,*** Criminal Chief, Enforcement Section. ***Robert Kopp,*** Director, and ***William Kanter,*** Deputy Director, Appellate Staff, Civil Division. ***David Flynn,*** Appellate Chief, Civil Rights Division. ***Catherine G. O'Sullivan,*** Appellate Chief, Antitrust Division. ***Anne Almy,*** Assistant Chief, Appellate Section, Environment and Natural Resources Division. ***Patty Stemler,*** Appellate Chief, Criminal Division. ***John Steen,*** General Counsel, and ***Pam Montgomery,*** Staff Attorney, United States Sentencing Commission.

Introduction to the Freedom of Information Act (Washington, D.C.)

From the Office of Information and Privacy: ***Carol S. Hebert,*** Attorney-Advisor, ***Melanie Ann Pustay,*** Senior Counsel, and ***Kirsten J. Moncada,*** Attorney.

Examination Techniques: Direct and Cross Examination of Lay and Expert Witnesses (Washington, D.C.)

Eleanor Thompson, Western District of Oklahoma; ***Bertram Isaacs,*** Southern District of Texas; ***Richard Parker*** and ***Debra Prillaman,*** Eastern District of Virginia; ***Michael Hardy,*** Western District of Texas. ***David Deutsch,*** Attorney, Special Litigation Section, Civil Rights Division. ***Steve Talson,*** Trial Attorney, Torts Branch, Civil Division. ***Captain Marshall Caggiano,*** Assistant Staff Judge Advocate, Air Force Materiel Command Law Center, Wright-Patterson Air Force Base. ***Richard Foster,*** Chief Attorney, Office of Civil Rights, Department of Education. ***James Richardson,*** Attorney-Advisor, United States Court of Military Appeals. ***Gary Fox,*** Chief Counsel for Special Litigation, Office of Litigation, Small Business Administration.

Evidence for Experienced Criminal Litigators Seminar (Denver, Colorado

John Campbell, Chief, Public Corruption/Government Fraud Section, and ***Larry Parkinson,*** District of Columbia. ***Donald A. Davis,*** Chief, Criminal Division, and ***Michael MacDonald,*** Western District of Michigan. ***Steven Miller,*** Chief, Special Prosecutions Division, and ***Sheila Finnegan,*** Northern District of Illinois. ***Stewart Walz,*** Chief, Criminal Division, District of Utah. ***John Barton,*** District of South Carolina; ***Steven Clymer*** and ***Michael Emmick,*** Central District of California; ***Karla Spaulding,*** Chief, Economic Crime Section, and ***Judith Lombardino,*** Southern District of Texas; ***Roger McRoberts,*** Northern District of Texas; ***Craig A. Weier,*** Eastern District of Michigan.

In-House Criminal Asset Forfeiture Training (Charleston, West Virginia)

Terry Derden, Senior Litigation Counsel, Eastern District of Arkansas; and ***Bart Van De Weghe,*** Southern District of New York.

Experienced Paralegal Seminar (Washington, D.C.)

From the Civil Division: ***Kathlynn Fadely,*** Assistant Director, Torts Branch; ***William Pease,*** Chief, Civil Division; ***Jane Mahoney, Adam Bain,*** and ***Paul Yanowitch,*** Trial Attorneys; ***Pat Dragonuk*** and ***Larry Lange,*** Paralegal Specialists. From the Criminal Division: ***Bond Rhue,*** Trial Attorney, and ***Holly Henderson,*** Paralegal Specialist. From the Justice Management Division: ***Marsha Carey,*** Reference Librarian, and ***Kathleen Larson,*** Program Specialist. ***Richard Knodt,*** Supervisory Paralegal, Environment and Natural Resources Division. From the District of Columbia: ***Linda Marks, Richard Edwards, Ivy Hart-Daniel,*** Supervisory Paralegal, ***Michelle Neverdon,*** Senior Paralegal, and ***Cheryl Beegle,*** Paralegal Specialist. ***Victoria Major*** and ***Don Stennett,*** Southern District of West Virginia; ***Stacy Joannes,*** Systems Manager, Western District of Wisconsin; and ***Charles Roberts and Kathleen Massarotto,*** Paralegal Specialist, Northern District of New York.

Basic Negotiations Skills Seminar (Washington, D.C.)

From the Department of Health and Human Services: ***Thomas Parrett,*** Director, Labor Management and Employee Relations Division; ***Patricia Randle,*** Director, Litigation Branch, Labor Management and Employee Relations Division; ***Neil Kaufman,*** Director of Mediation Services; ***Ron Walczak,*** Chief, Negotiation and Alternative Dispute Resolution Branch; ***Doris Campos-Infintino,*** Alternative Dispute Resolution Specialist; and ***Maria Mone,*** Senior Dispute Resolution Specialist. ***Lawrence Klinger,*** Assistant to the Director, Torts Branch, Civil Division. ***Ranelle Rae,*** Director, Institute Division, Environmental Protection Agency.

Appellate Skills Seminar (Washington, D.C.)

Judge Stephen F. Williams, United States Court of Appeals for the District of Columbia. From the Civil Division: ***Barbara Biddle,*** Assistant Director, Appellate Staff, ***Tarek Sawi,*** Trial Attorney, Torts Branch, and ***Mark Stern,*** Appellate Litigation Counsel.

Criminal Enforcement of Child Support Seminar (Columbia, South Carolina)

Kent McDaniel, First Assistant, Southern District of Mississippi; ***Larry Leiser,*** Chief, Criminal Division, and ***Elizabeth Collins,*** Central District of Illinois; ***Tim Shea,*** Eastern District of Virginia. ***Donna Enos,*** Acting Assistant Director, LECC/Victim-Witness Staff, Executive Office for United States Attorneys. ***Deborah Sorkin,*** Trial Attorney, Criminal Division.

Complex Prosecutions Seminar (Nashville, Tennessee)

From the Eastern District of Virginia: ***Kenneth Melson,*** United States Attorney, ***Joseph Aronica*** and ***Jack Hanly, Jr.; Ted McBride,*** First Assistant, District of South Dakota; ***Richard Dean,*** Chief, Criminal Division, Northern District of Georgia; ***Ronald Sievert,*** Chief, Austin Branch, and Dan Mills, Western District of Texas; ***Michael P. Sullivan,*** Senior Litigation Counsel, Southern District of Florida; ***Joseph B. Valder,*** Senior Litigation Counsel, District of Columbia; ***Cheryl Pollak,*** Lead Drug Task Force Attorney, Eastern District of New York; ***Jimmie Lynn Ramsaur*** and ***William Cohen,*** Middle District of Tennessee; ***Lance A. Caldwell,*** District of Oregon; ***Alice Hill*** and ***Steve Mansfield,*** Central District of California; ***Carol C. Lam,*** Southern District of California; ***Kurt Shernuk,*** District of Kansas. From the Criminal Division: ***Stephen T'Kach,*** Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations, ***Ronald Roos,*** Trial Attorney, Internal Security Section, and ***Ellen R. Meltzer,*** Special Counsel, Fraud Section. ***David Farnham,*** Senior Trial Attorney, Criminal Enforcement Division, Tax Division.

Attorney Management Seminar (Annapolis, Maryland)

From the Executive Office for United States Attorneys: ***Anthony C. Moscato,*** Director; ***Wayne A. Rich Jr.,*** Principal Deputy Director; ***Michael Baille,*** Deputy Director, Administrative Services Staff; ***Charlotte Saunders,*** Supervisory Budget Analyst, Financial Management Staff; ***Mary Anne Hoopes,*** Deputy Legal Counsel; ***Brian Jackson,*** Assistant Director, Evaluation and Review Staff; ***Rick Sponseller,*** Associate Director, Financial Litigation Staff; ***Deborah Westbrook,*** Legal Counsel, and ***Gail Williamson,*** Assistant Director, Personnel Staff.

Advanced Bankruptcy Seminar (Cedar Rapids, Iowa)

Judge Michael J. Melloy, United States District Court, Northern District of Iowa. From the Commercial Litigation Branch, Civil Division: ***J. Christopher Kohn,*** Director; ***Tracy Whitaker,*** Assistant Director; and ***John Stemplewicz,*** Senior Trial Attorney. ***Stephen Csontos,*** Senior Legislative Counsel, Tax Division. ***Larry Lee,*** Southern District of Georgia; ***Virginia Powell,*** Eastern District of Pennsylvania; ***Rudy Renfer,*** Eastern District of North Carolina; ***Kristin Tolvstad,*** Northern District of Iowa; ***Marianne Tomecek,*** Southern District of Texas.

Agency Civil Practice Seminar (Washington, D.C.)

Jeffrey Minear, Assistant to the Solicitor General. From the Civil Division: ***Dennis G. Linder,*** Director, ***Thomas W. Millet,*** Assistant Director, and ***Elizabeth Pugh,*** Assistant Director, Federal Programs Branch; ***John Euler,*** Deputy Director, and ***Larry Klinger,*** Assistant to the Director, Torts Branch; ***Polly Dammann,*** Assistant Director, ***Robert M. Hollis,*** Assistant Director, ***James Kinsella,*** Assistant Director, and ***John Stemplewicz,*** Senior Trial Attorney, all from the Commercial Litigation Branch. ***Mark Nagle,*** District of Columbia; and ***Jeanette Plante,*** District of Maryland.

Appellate Advocacy (Washington, DC)

Martha Boersch, Northern District of California; ***Jacqueline Chooljian*** and ***Mary Sedgwick,*** Central District of California; ***Terry Cushing,*** Western District of Kentucky; ***Jack Halliburton,*** Western District of Louisiana; ***Steve Mullins,*** Western District of Oklahoma; ***Mollie Nichols,*** Western District of Texas; ***Tom Stahl,*** Southern District of California; ***John Stevens,*** District of Arizona; ***Chris Yates,*** Eastern District of Michigan.

District of Michigan.

COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of October 1993 through January 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.

Date	Course	Participants
	October 1993	
5-8	Federal Practice	DOJ Attorneys, AUSAs
19-21	Money Laundering, Financial Issues, Asset Forfeiture	AUSAs, DOJ Attorneys
19-22	Complex Prosecutions	DOJ Attorneys, AUSAs
25-Nov. 5	Civil Trial Advocacy	DOJ Attorneys
	November 1993	
4-5	Asset Forfeiture, ARPA	AUSAs, DOJ Attorneys, Attorneys
15-19	Appellate Advocacy	AUSAs, DOJ Attorneys
15-18	Criminal Tax Institute	AUSAs, DOJ Attorneys
17-19	Asset Forfeiture	Ninth Circuit (AUSAs, Component Support Staff, LECC Coordinators)
	December 1993	
1-3	First Assistants, USAOs	FAUSAs (Large Offices)
6-11	Asset Forfeiture Advocacy	AUSAs
7-10	Evidence for Experienced Litigators	AUSAs

Date	Course	Participants
	December 1993 (Cont'd.)	
8-10	Attorney Supervisors	Supervisory AUSAs
13-17	Complex Prosecutions, Advanced Grand Jury	AUSAs
14-16	Land Acquisitions	AUSAs, DOJ Attorneys
14-16	Customs Fraud	AUSAs, DOJ Attorneys, Attorneys
	January 1994	
10-14	Advanced Civil Trial Advocacy	AUSAs, DOJ Attorneys
11-13	Securities Fraud	AUSAs
11-13	Asset Forfeiture	Eleventh Circuit (AUSAs, Component Support Staff, LECC Coordinators)
24-28	Criminal Federal Practice	AUSAs
25-27	Civil Federal Practice	AUSAs
26	Executive Session for United States Attorneys (Debt Collection)	USAs

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. Attached at the Appendix of this Bulletin as Exhibit E is a nomination form for LEI courses listed below (except those marked by an *). Local reproduction is authorized and encouraged. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form approximately three weeks before the course begins. **Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *).**

Date	Course	Participants
	October 1993	
5	FOIA Update	Attorneys
8	Ethics and Professional Conduct	Attorneys
13-14	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals
15	Privacy Act	Attorneys, Paralegals
25-26	Federal Administrative Process	Attorneys
26-28	Environmental Law	Attorneys
27-29	Attorney Supervisors	Supervisory Attorneys
	November 1993	
1-5	Support Staff	Support Staff, USAOs
2-3	Agency Civil Practice	Attorneys
8-10	Discovery	Attorneys
15-19	Criminal Paralegal	Paralegals
17	Introduction to FOIA	Attorneys, Paralegals
22	Ethics for Litigators	Attorneys
22	Legal Writing	Attorneys
29-30	Federal Acquisition Regulations	Attorneys
30-Dec. 2	Basic Bankruptcy	Attorneys
30-Dec. 3	Librarians Conference	Librarians
30-Dec. 3	Examination Techniques	Attorneys
	December 1993	
13-15	Negotiation Skills	Attorneys
14	Advanced FOIA	Attorneys

Date	Course	Participants
	December 1993 (Cont'd.)	
14-16*	Land Acquisitions for Support Staff	USAO Paralegals and Support Staff
16-17	Alternative Dispute Resolution	Agency Counsel
20	Statutes and Legislative Histories	Paralegals, Support Staff
	January 1994	
6	Appellate Skills	Attorneys
10-14	Support Staff	USAO Support Staff
19-20	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals
28	Legal Writing	Attorneys
31-Feb. 4	Civil Paralegals	USAO Paralegals
31-Feb. 2	Trial Preparation	Attorneys

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

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

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

Director	Donna Bucella
Deputy Director	David Downs
Assistant Director (AGAI-Criminal)	Charysse Alexander
Assistant Director (AGAI-Civil & Appellate)	Ron Silver
Assistant Director (AGAI-Asset Forfeiture)	Suzanne Warner
Assistant Director (AGAI-Debt Collection)	Nancy Rider
Assistant Director (LEI)	Donna Preston
Assistant Director (LEI)	Chris Roe
Assistant Director (LEI-Paralegal & Support)	Donna Kennedy

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ADMINISTRATIVE ISSUES

Career Opportunities

Federal Bureau of Prisons, Washington, D.C.

The Office of Attorney Personnel Management, Department of Justice, is recruiting an attorney for the Human Resources Management Division of the Federal Bureau of Prisons in Washington. D.C. Responsibilities will include providing legal advice and assistance to central office and field managers with regard to disciplinary and adverse personnel actions and other matters covered by the Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5, U.S.Code); and acting as principal attorney in preparing and presenting the government's case before Administrative Judges of the Merit Systems Protection Board, Administrative Law Judges of the EEOC and Federal Labor Relations Authority and independent arbitrators appointed by the Federal Mediation and Conciliation Service.

The selectee will be responsible for all phases of case processing from pre-action inquiries through preparation of post-hearing briefs and appeals to administrative authorities. Other significant duties include participation in the negotiation and administration of a nationwide collective bargaining agreement and with ongoing labor relations with the union; and serving as an instructor on labor relations matters in management training programs. Frequent travel to field stations (up to 50% of time) will be required. Preference will be given to applicants with a strong federal and/or private sector labor relations background. Applicants must possess a J.D. degree from an ABA-accredited law school, be an active member of the Bar in good standing, and have at least one year of post-J.D. experience. Applicants are to submit a current SF-171 (Application for Federal Employees) to: Bureau of Prisons, 320 First Street, N.W., Suite 301-NALC, Washington, D.C. 20534, Attn: Donald Laliberte - (202) 724-3134.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range is GS-11 (33,623 - $43,712) to GS-13 ($47,920 - $62,293). This position is open until filled. No telephone calls, please.

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United States Trustee's Office
New Haven, Connecticut

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

Applicants must possess a J.D. degree, have at least five years of legal experience, be an active member of the Bar in good standing (any jurisdiction); possess extensive litigation and management experience; and have at least three years of bankruptcy law experience. Applicants must submit a resume, salary history, and SF-171 (Application for Federal Employment) to: Office of the U.S. Trustee Office, 80 Broad Street, Third Floor, New York, New York 10004, Attn: Arthur J. Gonzalez.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range is $71,938 - $90,000. This position is open until filled. No telephone calls, please.

* * * * *

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

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Claude Harris, Jr.
Alabama, M	James Eldon Wilson
Alabama, S	Edward Vulevich, Jr.
Alaska	Joseph W. Bottini
Arizona	Janet Ann Napolitano
Arkansas, E	Paula Jean Casey
Arkansas, W	Paul Kinloch Holmes, III
California, N	Michael J. Yamaguchi
California, E	Robert M. Twiss
California, C	Terree A. Bowers
California, S	James W. Brannigan, Jr.
Colorado	James R. Allison
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Eric H. Holder, Jr.
Florida, N	Gregory R. Miller
Florida, M	Douglas N. Frazier
Florida, S	Roberto Martinez
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Jay D. Gardner
Guam	Frederick A. Black
Hawaii	Elliot Enoki
Idaho	Betty H. Richardson
Illinois, N	Michael J. Shepard
Illinois, S	Clifford J. Proud
Illinois, C	Byron G. Cudmore
Indiana, N	David A. Capp
Indiana, S	Judith A. Stewart
Iowa, N	Robert L. Teig
Iowa, S	Christopher D. Hagen
Kansas	Randall K. Rathbun
Kentucky, E	Karen K. Caldwell
Kentucky, W	Walter Michael Troop
Louisiana, E	Robert J. Boitmann
Louisiana, M	P. Raymond Lamonica
Louisiana, W	William J. Flanagan
Maine	Jay P. McCloskey
Maryland	Lynne Ann Battaglia
Massachusetts	A. John Pappalardo
Michigan, E	Alan M. Gershel
Michigan, W	John A. Smietanka
Minnesota	Francis X. Hermann
Mississippi, N	Alfred E. Moreton, III
Mississippi, S	George L. Phillips
Missouri, E	Edward L. Dowd, Jr.
Missouri, W	Marietta Parker

DISTRICT	U.S. ATTORNEY
Montana	Lorraine I. Gallinger
Nebraska	Thomas J. Monaghan
Nevada	Kathryn Landreth
New Hampshire	Peter E. Papps
New Jersey	Michael Chertoff
New Mexico	Larry Gomez
New York, N	Gary L. Sharpe
New York, S	Mary Jo White
New York, E	Zachary W. Carter
New York, W	Patrick H. NeMoyer
North Carolina, E	James R. Dedrick
North Carolina, M	Benjamin H. White, Jr.
North Carolina, W	Jerry W. Miller
North Dakota	John Thomas Schneider
Ohio, N	Emily M. Sweeney
Ohio, S	Edmund A. Sargus, Jr.
Oklahoma, N	Stephen Charles Lewis
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Vicki Lynn Miles-LaGrange
Oregon	Jack C. Wong
Pennsylvania, E	Michael J. Rotko
Pennsylvania, M	David M. Barasch
Pennsylvania, W	Frederick W. Thieman
Puerto Rico	Guillermo Gill
Rhode Island	Edwin J. Gale
South Carolina	J. Preston Strom, Jr.
South Dakota	Karen E. Schreier
Tennessee, E	Guy W. Blackwell
Tennessee, M	Ernest W. Williams
Tennessee, W	Veronica F. Coleman
Texas, N	Paul E. Coggins
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	Susan L. Barnes
West Virginia, N	William D. Wilmoth
West Virginia, S	Charles T. Miller
Wisconsin, E	Thomas Paul Schneider
Wisconsin, W	Peggy Ann Lautenschlagler
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT
A

THE WHITE HOUSE

WASHINGTON

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William J. Clinton

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

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures"

whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially

those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

U.S. Department of Justice

Office of Information and Privacy

Washington, D.C. 20530

October 4, 1993

MEMORANDUM

TO: Principal FOIA Administrative and Legal Contacts
at All Federal Agencies

FROM: Richard L. Huff
Daniel J. Metcalfe
Co-Directors

SUBJECT: FOIA Policy Memoranda Issued by President Clinton and Attorney General Janet Reno on this Date

Enclosed are copies of new Freedom of Information Act policy memoranda issued by President Clinton and Attorney General Janet Reno to the heads of all federal departments and agencies on this date. As you can see, President Clinton's FOIA Memorandum incorporates Attorney General Reno's FOIA Memorandum, which is an attachment to it. Together, they establish a strong new spirit of openness in government and require the immediate attention of everyone involved in the administration of the Act throughout the executive branch. It now is up to all of us to infuse this new spirit into all aspects of FOIA administration, most particularly through application of the new foreseeable harm standard and its accompanying emphasis on discretionary FOIA disclosures.

We urge you to disseminate these memoranda both promptly and widely within your offices and to all interested personnel within your respective agencies as well. They also will be distributed and discussed tomorrow at the Office of Information and Privacy's "Annual Update Seminar on the FOIA," which will be attended by many of you and/or members of your staffs. To emphasize the importance of this change in FOIA policy, Associate Attorney General Webster L. Hubbell will attend.

In Attorney General Reno's FOIA Memorandum, she asks that each agency send to the Office of Information and Privacy a copy of its Annual FOIA Report to Congress for 1992, under cover of a letter addressing the status of any present FOIA backlog within each agency in addition to related considerations. When responding to the Attorney General's request, we ask that you provide FOIA backlog data uniformly--in terms of calendar days elapsed between the receipt of a FOIA request and the completion of agency action on the request--in order to facilitate ready comparison and statistical aggregation. In making this request, the Depart-

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT B

DIRECTIVE NO. 93-5

September 15, 1993

MEMORANDUM

TO: Paul King, FBI
Jack Mahoney, DEA
Dan Stephan, INS
Joey Lucero, USMS
Larry Maxwell, Postal Inspection Service
Charles Hume, U.S. Park Police

FROM: Cary H. Copeland
Director and Chief Counsel

SUBJECT: Review of Official Use of Forfeited Property

Part IV, D of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990) requires notification to this Office "at the time property valued at $50,000 or greater is placed into official use." Although this requirement may be satisfied by post-transfer notification, the FBI and USMS have gone further and provided this Office with advance notice of and an opportunity to review such decisions. I have informally notified the Justice Management Division's Budget Staff and Facilities and Administrative Services Staff of such proposed transfers and given them an opportunity to review and comment.

The Attorney General is considering a revision to the Guidelines to require Attorney General or Deputy Attorney General approval of such decisions. Pending that action, please ensure that this Office is given advance notice of and an opportunity to review official use actions involving federal forfeited property valued at $50,000 or more. We will endeavor to act on all such notifications within two weeks of receipt.

cc: Adrian Curtis
Ben Burrell
Bob Diegelman

EXHIBIT C

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

EQUAL EMPLOYMENT OPPORTUNITY POLICY

It is the policy of the Offices of the United States Attorneys and the Executive Office for United States Attorneys to provide equal opportunity in employment on the basis of merit and to prohibit discrimination because of race, color, religion, sex, age, national origin or handicap (physical or mental). The goal is to promote the full realization of equal employment opportunity through a continuing affirmative action program that will eliminate discrimination based on factors irrelevant to job performance.

To achieve this goal, management at all levels must take positive action to eradicate any internal practice or procedure which denies equality of opportunity to any group or individual on any basis other than merit and fitness. Through affirmative action, managers can provide opportunities for all persons to compete equally for employment and advancement to their highest levels of proficiency where individual skills and training are fully utilized. In addition, managers must ensure that all questions and complaints of discrimination are resolved without fear of reprisal.

Anthony C. Moscato
Director

SEP 16 1993

Date

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

SEP 16 1993

POLICY STATEMENT ON SEXUAL HARASSMENT

It is the policy of the Offices of the United States Attorneys (OUSA) and the Executive Office for United States Attorneys (EOUSA) that sexual harassment is unacceptable conduct in the workplace and will not be condoned. Personnel management within OUSA and EOUSA shall be free from prohibited personnel practices, as outlined in the provisions of the Civil Service Reform Act of 1978. All employees should avoid conduct which undermines these merit principles.

Sexual Harassment is a complex and sensitive issue. It is a form of employee misconduct which undermines the integrity of the employment relationship. Harassment on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended. In accordance with the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, (29 CFR 1604.11), unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtures. Sexual harassment debilitates morale and interferes in the work productivity of its victims and co-workers. Therefore, behavior of this nature will not be tolerated.

Anthony C. Moscato

Anthony C. Moscato
Director

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

SEP 16 1993

POLICY STATEMENT ON PERSONS WITH DISABILITIES

The Offices of the United States Attorneys (OUSA) and the Executive Office for United States Attorneys (EOUSA) affirm their commitment to hire qualified persons with disabilities. The Offices of the United States Attorneys and the Executive Office will continue to promote equal employment opportunity by working to eradicate all non-merit factors of employment that would adversely affect persons with disabilities.

To accomplish this goal, all levels of management must: (1) ensure that personnel and other internal practices and procedures are executed equitably, and do not deny equal opportunity for any group of individuals based on non-merit and non-fitness factors; (2) provide opportunities that will allow persons with disabilities the chance to compete on an equal basis for advancement to their highest level of proficiency; and (3) ensure that all complaints of discrimination filed by persons with disabilities are handled in a manner which does not impose fear of reprisal.

Anthony C. Moscato
Director

EXHIBIT D

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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 3 • SEPTEMBER 24, 1993

Criminal History

INVALID PRIOR CONVICTIONS

Sixth Circuit holds en banc that "a narrow window of challenge to prior convictions is available" to defendants sentenced under the Guidelines. Defendant challenged the validity of two prior state convictions for violent felonies that would have placed him in the career offender category. The district court held that the convictions were invalid under state law and defendant should not be sentenced as a career offender. The original appellate panel held that the validity of the convictions had to be determined not under state law but under federal constitutional standards, and remanded after finding that federal standards were not violated. That opinion was withdrawn for rehearing en banc "to decide whether a defendant may challenge at sentencing a prior state court conviction not previously ruled invalid which would result in a longer sentence if included within the Sentencing Guidelines calculus."

The majority of the en banc court held that "under certain limited circumstances it is within a sentencing court's discretion to entertain a challenge to the inclusion of a prior state conviction in a criminal history score. . . . [T]he defendant must first comply with the procedural requirements for objecting to the conviction's inclusion in the criminal history score. The defendant also must state specifically the grounds claimed for the prior conviction's constitutional invalidity in his initial objection and 'the anticipated means by which proof of invalidity will be attempted—whether by documentary evidence, including state court records, testimonial evidence, or combination—with an estimate of the process and the time needed to obtain the required evidence.' . . . An example of a challenge that a court should entertain would be a challenge to a previously unchallenged felony conviction where the defendant was not represented by counsel, counsel was not validly waived, and court records or transcripts are available that document the facts."

"In addition to the types of proof that will be offered, the court also should consider whether the defendant has available an alternative method for attacking the prior conviction either through state post-conviction remedies or federal habeas relief. While this factor should not be dispositive of whether a sentencing court should entertain such a challenge, the availability of an alternative method should play a significant role in the court's decision." The court stated that its holding is similar to the Fourth Circuit's approach that "district courts are obliged to hear constitutional challenges to predicate state convictions in federal sentencing proceedings only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the particular case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) [5 *GSU* #15].

As to defendant's challenge, the en banc court held that the district court erred in finding that the prior convictions were invalid under state law: "When the inclusion of a prior state conviction in the criminal history score is challenged, the validity of that conviction must be determined solely as a matter of federal law." Holding that the convictions were valid under federal law, the court reversed and remanded.

Twelve of the fourteen members of the en banc court joined in the result. Six joined the opinion on the issue of what circumstances a district court must consider before allowing a challenge to prior convictions; one judge concurred but would allow district courts more discretion. Five judges would further limit such challenges. The two judges who dissented from the result would allow challenges to prior convictions as a matter of right, as in *U.S. v. Vea-Gonzalez*, 999 F.2d 1326 (9th Cir. 1993) (superseding 986 F.2d 321 [5 *GSU* #10]).

U.S. v. McGlocklin, No. 91-6121 (6th Cir. Sept. 17, 1993) (en banc) (Guy, J.) (dissenting opinions noted above).

See *Outline* at IV.A.3.

Sentencing Procedure

Eleventh Circuit holds that defendants may waive right to appeal Guidelines sentences, but the waiver must be specifically addressed in the plea colloquy. Defendant appealed his sentence. The government argued the appeal should be denied because defendant's plea agreement included a waiver of his "right to appeal or contest . . . his sentence on any ground," unless the sentence was in violation of law.

The appellate court held that, under most circumstances, "a defendant's knowing and voluntary waiver of the right to appeal his sentence will be enforced." However, "for a waiver to be effective it must be knowing and voluntary [and] . . . in most circumstances, for a sentence appeal waiver to be knowing and voluntary, the district court must have specifically discussed the sentence appeal waiver with the defendant during the Rule 11 hearing." To enforce a waiver, either the district court must have "specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy" or it must be "manifestly clear from the record that the defendant otherwise understood the full significance of the waiver."

Here, the court held the district court "did not clearly convey to Bushert that he was giving up his right to appeal under *most* circumstances. . . . Nor does . . . the record [show] that Bushert otherwise understood the full significance of his sentence appeal waiver." The court concluded that "the remedy for an unknowing and involuntary waiver is essentially severance"—the waiver "is severed or disregarded . . . while the rest of the plea agreement is enforced as written and the appeal goes forward." The appellate court found defendant's claims of sentencing error had no merit and affirmed his sentence.

U.S. v. Bushert, 997 F.2d 1343 (11th Cir. 1993).

Evidentiary Issues

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Affirmed: Cocaine excluded at trial because it was seized during an unconstitutional search was properly used to calculate defendants' offense levels. Evidence illegally seized for the purpose of sentence enhancement would be excludable, but there was "no indication in the record that this evidence was obtained to enhance defendants' sentences." The court distinguished as dicta the conclusion in *U.S. v. Nichols*, 979 F.2d 402, 410–11 (6th Cir. 1992), that unlawfully seized evidence should not be used in setting the base offense level.) (Keith, J., dissented on this issue).
See *Outline* at IX.D.4.

Adjustments

Use of Special Skill

U.S. v. Mainard, No. 92-10298 (9th Cir. Sept. 20, 1993) (Fernandez, J.) (Remanded: Enhancement under § 3B1.3 for use of special skill was improperly given for defendant's "sophistication in methamphetamine manufacturing" and "ability to pass his expertise along to others." There was "no evidence that Mainard was a trained chemist or pharmacist . . . who abused his skills to produce drugs." "Although the methamphetamine laboratory might have been sophisticated, nothing indicates that Mainard used any 'pre-existing, legitimate skill not possessed by the general public,'" and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under § 3B1.3.). *Accord U.S. v. Young*, 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant learned how to manufacture PCP—which by definition requires special skill—insufficient for § 3B1.1).

Compare U.S. v. Spencer, No. 93-1041 (2d Cir. Aug. 25, 1993) (Altimari, J.) (Remanded for recalculation of drug amount, but affirmed special skill enhancement for defendant convicted of methamphetamine offenses. Although "special skill" "usually requir[es] substantial education, training, or licensing," § 3B1.3, comment. (n.2), and defendant was self-taught, he "presents the unusual case where factors other than formal education, training, or licensing persuade us that he had special skills in the area of chemistry. . . . [He] experimented often as an amateur chemist . . . , built an extremely sophisticated home chemistry laboratory . . . , used his chemical acumen professionally . . . to conduct a joint project [with a chemist] to develop a sophisticated medical testing device," and had taken college courses.). *Accord U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor had acquired requisite "special skill" through experience).

See also U.S. v. Muzingo, 999 F.2d 361 (8th Cir. 1993) (Affirmed: Defendant used "special skill" to break into safe-deposit boxes He made keys to the boxes, "a skill that he acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys." There was also evidence he had technical drawings and a "little gadget" he used to determine the profile of the keys that he required.).
See *Outline* at III.B.9.

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Truss, No. 92-2171 (6th Cir. Sept. 8, 1993) (Suhrheinrich, J.) ("[W]e find the majority's position persuasive and join [most circuits] in holding that, while an additional term of supervised release may be in the best interests of an orderly administration of justice, no additional term of supervised release is permitted by § 3583(e)(3)."). *Accord U.S. v. Tatum*, 998 F.2d 893 (11th Cir. 1993) (per curiam) (Remanded: "We join the majority of circuits that have addressed this issue and hold that upon revocation of a term of supervised release, a district court is without statutory authority to impose both imprisonment and another term of supervised release.").
See *Outline* at VII.B.1.

Offense Conduct

More than Minimal Planning

U.S. v. Wong, No. 92-5570 (3d Cir. July 30, 1993) (Mansmann, J.) (Affirmed: When appropriate, both enhancement for more than minimal planning and adjustment for role in offense may be given: "The upward adjustments mandated respectively by §§ 2B1.1(b)(5) and 3B1.1(c) operate independently of each other . . . . [W]e hold that where a defendant is not only a participant in a sophisticated criminal scheme, but is also one of the more culpable individuals in that scheme, the two enhancements may be applied in tandem.").

Contra U.S. v. Chichy, No. 92-3481 (6th Cir. Aug. 6, 1993) (Contie, Sr. J.) (Remanded: It is "impermissible double counting" to impose both enhancements. The appellate court held it was bound by *U.S. v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992), which held that separate enhancements under § 2F1.1(b)(2) and § 3B1.1(a) were improper. "We believe the same reasoning applies to subsection (c) of § 3B1.1. . . . Although it is possible for a defendant to receive an enhancement under § 2F1.1(b)(2) for more than minimal planning without being an organizer, leader, manager, or supervisor under § 3B1.1(c), the converse is not true. A defendant cannot receive an enhancement for role in the offense under § 3B1.1(c) unless he has engaged in more than minimal planning.").
See *Outline* at II.E and III.B.6.

Calculating the Weight of Drugs

U.S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993) (Remanded: *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991), a drug importation case, applies to conspiracy to manufacture and possess cases. Thus, for defendants convicted of conspiracy to manufacture and possess methamphetamine, it was error to include amounts of discarded "sludge" that contained less than one percent methamphetamine and "were not only unusable, but also toxic." Courts may, however, use "the approximation approach" in § 2D1.1, comment. (n.12), if the amount of drugs seized does not reflect the scale of the offense and the evidence supports that method.).

Compare U.S. v. Nguyen, No. 92-8032 (10th Cir. Apr. 13, 1993) (Saffels, Sr. Dist. J.) (Affirmed: District court properly used entire weight of "a 10.3 gram 'eight-ball' comprised of small pieces of yellowish cocaine base mixed with white sodium bicarbonate powder." Defendant argued that crack cocaine is not usually combined with sodium bicarbonate powder, but the appellate court stated: "This is not an absurd case, but one in which the sodium bicarbonate could have remained after the distillation into the final cocaine base form. In addition, the defendant purchased the drug in this form and sold it in this form.") (previously unpublished table opinion, 991 F.2d 806, to be published in full).
See *Outline* at II.B.1.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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

VOLUME 6 • NUMBER 2 • SEPTEMBER 1, 1993

Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Fourth Circuit holds Guidelines' reasonable foreseeability analysis should be used to determine drug quantities for mandatory minimum sentences under 21 U.S.C. § 841(b). Two defendants in a large drug conspiracy were subject to ten-year minimum terms if they were held responsible for the full amount of drugs distributed by the conspiracy. 21 U.S.C. §§ 846 and 841(b). However, under the Guidelines' reasonable foreseeability analysis a smaller quantity of drugs would be attributed to them and their sentences would be significantly lower. The district court sentenced them to the mandatory term using the full amount from the conspiracy, but also imposed alternative sentences under the Guidelines.

The appellate court held that it was improper to automatically use the full amount of drugs from the conspiracy for purposes of the mandatory minimum. The court looked to the statutes and legislative history to "conclude that the most reasonable interpretation of the relevant statutory provisions requires a sentencing court to assess the quantity of narcotics attributable to each coconspirator by relying on the principles set forth in *Pinkerton* [*v. U.S.*, 328 U.S. 640 (1946)]." To hold a defendant liable for acts of other conspirators under *Pinkerton*, "the act must be 'done in furtherance of the conspiracy' and 'be reasonably foreseen as a necessary or natural consequence of the' conspiracy."

The relevant conduct section of the Guidelines "incorporates the concept of reasonable foreseeability as described in *Pinkerton*" and should be used to "determine the application of § 841(b) for a defendant who has been convicted of § 846." The court held that "in order to apply § 841(b) properly, a district court must first apply the principles of *Pinkerton* as set forth in the relevant conduct section of the Sentencing Guidelines, U.S.S.G. § 1B1.3, to determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement. If that amount satisfies the quantity indicated in § 841(b), the district court must impose the mandatory minimum sentence absent a higher sentencing range resulting from application of the Sentencing Guidelines. If the quantity is less than that set forth in § 841(b), the statutory mandatory minimum sentencing provision would not apply."

The court held that the alternative sentences imposed under the Guidelines in this case were proper, and remanded for amendment of the judgments.

U.S. v. Irvin, No. 91-5454 (4th Cir. Aug. 23, 1993) (Wilkins, J.).

See *Outline* at II.A.2 and 3.

CALCULATING WEIGHT OF DRUGS

U.S. v. Johnson, No. 91-1621 (7th Cir. July 29, 1993) (Lay, Sr. J.) (Remanded: For defendant convicted of possession with intent to distribute cocaine, it was error to include the weight of waste water in which a small amount of cocaine base was mixed. "The waste water does not serve as a dilutant, cutting agent or carrier medium for the cocaine base. It does not 'facilitate the distribution' . . . of the cocaine in that cocaine is not dependent on the water for ingestion, and unlike a dilutant or cutting agent, the waste water does not in any way increase the amount of drug available at the retail level. The liquid, with just a trace of cocaine base, is merely a by-product of the manufacturing process with no use or market value. . . . To read the statute or *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] as requiring inclusion of the weight of all mixtures, whether or not they are useable, ingestible, or marketable, leads to absurd and irrational results contrary to congressional intent.").

See *Outline* at II.B.1.

General Application Principles

SENTENCING FACTORS

D.C. Circuit holds en banc that, after granting a reduction for acceptance of responsibility, the sentencing court may consider defendant's decision to go to trial when picking the sentence within the guideline range. Defendant was convicted at trial on a drug charge. The district court granted a § 3E1.1 reduction, but expressed reservations about giving defendant the full benefit of the two-point reduction in light of his going to trial when "he, in effect, had no defense," and later made a "rather meager" acknowledgment of responsibility. The court stated that, if defendant had pled guilty before trial, it would "have sentenced him at the very bottom of the Guidelines," but because "the case did go to trial, I am going to add an additional six months to the guideline sentence that I intend to impose," and sentenced defendant to 127 months instead of 121. The original appellate panel affirmed, rejecting defendant's claim that he was punished for exercising his Sixth Amendment right to trial. *U.S. v. Jones*, 973 F.2d 928 (D.C. Cir. 1992) [5 *GSU* #3].

The en banc court affirmed, "although on narrower grounds. . . . [I]t is clear . . . that the district judge could not properly be described as enhancing defendant's punishment. Instead, in considering appellant's decision to admit guilt only after conviction, the judge merely viewed the appellant's timing as pertinent to the scope of the benefit he should receive. The judge decided he should give appellant less of a benefit than he would have allowed an otherwise identical defendant who showed greater acceptance of responsibility by acknowledging his guilt at an earlier stage."

The court added that, looking at the pre-adjustment guideline range as a "baseline sentence," "the sentencing judge appears simply to have given the defendant four-fifths of the possible credit for acceptance of responsibility (24 out of 30 possible months), explaining that if Jones had shown greater evidence of contrition (in this instance by pleading guilty), the judge would have made a greater adjustment." It was "legally relevant (and constitutionally unobjectionable)" for the district judge to conclude that, "within the 121–151 month range

the judge was bound to work within, Jones's limited remorse deserved only a 24-month reduction."

U.S. v. Jones, No. 91-3025 (D.C. Cir. July 2, 1993) (en banc) (Williams, J.) (three judges dissenting).
See *Outline* at I.C and III.E.4.

Relevant Conduct

U.S. v. Jenkins, No. 91-3553 (6th Cir. Aug. 20, 1993) (Joiner, Sr. Dist. J.) (Remanded: It was error to attribute to defendant all drugs distributed by the conspiracy on the basis that defendant "certainly could have reasonably foreseen" such amounts: "foreseeability is only one of the limitations on the ability of the court to charge one participant in a conspiracy with the conduct of the other participants. . . . Another limitation on the court's ability to charge a defendant with the conduct of others is that the conduct must be in furtherance of the execution of the 'jointly undertaken criminal activity.'" Thus, the district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake.").
See *Outline* at I.A.1 and II.A.2.

Departures

Mitigating Circumstances

U.S. v. Restrepo, No. 92-1631 (2d Cir. July 26, 1993) (Kearse, J.) (Remanded: Although consideration of alienage is not prohibited by the Guidelines, it was improper to depart downward for defendant who faced deportation and other collateral consequences due to his status as a permanent resident alien. Consideration of "national origin" is prohibited by § 5H1.10, p.s., but national origin "is not synonymous with 'alienage,' i.e., simply not being a citizen of the country in which one is present. . . . Thus, the prohibition against consideration of national origin does not constitute a prohibition against consideration of alienage. . . . [T]o the extent that alienage is a characteristic shared by a large number of persons subject to the Guidelines, it is a characteristic that, for sentencing purposes, is not 'ordinarily relevant.' It remains, however, a characteristic that may be considered if a sentencing court finds that its effect is beyond the ordinary" in nature or degree. In this case, however, "none of the bases relied on by the district court, i.e., (1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of sentence, and (3) the effect of deportation as banishment from the U.S. and separation from family, justified the departure."). *Cf. U.S. v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990) ("possibility of deportation is not a proper ground for departure"); *U.S. v. Ceja-Hernandez*, 895 F.2d 544, 545 (9th Cir. 1990) (reversed upward departure based on fact that anticipated deportation after release precluded imposition of fine or supervised release).
See *Outline* generally at VI.C.4.b.

U.S. v. Ziegler, No. 92-3242 (10th Cir. July 23, 1993) (Brorby, J.) (Remanded: District court improperly departed downward for defendant's post-offense drug rehabilitation. "[W]e hold drug rehabilitation is taken into account for sentencing purposes under U.S.S.G. 3E1.1 (1991) and, therefore, rehabilitation is generally an improper basis for departure." Even in extraordinary or unusual cases rehabilitation is not a proper basis for departure: "Although [§ 5H1.4, p.s.] explicitly refers to drug dependence, not drug rehabilitation, we interpret this section as encompassing both phenomena because drug rehabilitation necessarily presupposes drug dependence. . . . A departure based upon drug rehabilitation rewards drug dependency because only a defendant with a drug abuse problem is eligible for the departure. For this reason, we hold the Guidelines do not contemplate drug rehabilitation as a grounds for departure even in rare circumstances.").
See *Outline* at VI.C.2.a.

U.S. v. Gaither, No. 92-3222 (10th Cir. July 23, 1993) (Brorby, J.) (Reversed, in light of *Ziegler*, departure based on post-offense drug rehabilitation, but remanded for further findings on defendant's claim that departure was also based on his "exceptional acceptance of responsibility." Such a departure is proper only if "the district court finds the acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by U.S.S.G. 3E1.1.").
See *Outline* at VI.C.4.c.

U.S. v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (Affirmed: "Applying the modified standard of review for such cases recently announced in *U.S. v. Rivera*," 994 F.2d 942 (1st Cir. 1993), the district court properly departed downward—from the 24–30 month range to probation with six months' home confinement—for defendant's unusual family circumstances. Defendant had been living with a divorced woman and her two children since 1989, and had developed a special relationship with the woman's son that had helped ameliorate the son's serious psychological and behavioral problems. Evidence that the son "would risk regression and harm if defendant were incarcerated amply supports the district court's determination that Sclamo's relationship to James is sufficiently extraordinary to sustain a downward departure.").
See *Outline* at VI.C.1.a.

Determining the Sentence

Fines

U.S. v. Turner, No. 93-1148 (7th Cir. July 14, 1993) (Easterbrook, J.) (Remanded: The required cost-of-imprisonment fine, § 5E1.2(i), is authorized by statute. Case is remanded, however, because the district court imposed the fine after finding that defendant was unable to pay a punitive fine under § 5E1.2(a) and (c). Although the appellate court declined to hold that a cost-of-imprisonment fine may never be imposed unless a punitive fine is imposed first, it concluded that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under sec. 5E1.2(i).").
See *Outline* at V.E.2.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Sosa, 997 F.2d 1130 (5th Cir. 1993) (Affirmed: In sentencing defendant for revocation of probation for drug possession to "not less than one-third of the original sentence," 18 U.S.C. § 3565(a), "original sentence" refers to the length of probation and is not limited to the maximum original guideline sentence.).

Three courts have now held that "original sentence" refers to probation; four have held it is limited to the original guideline sentence. The Supreme Court granted certiorari in one of the latter cases. *See U.S. v. Granderson*, 113 S.Ct. 3033 (1993).
See *Outline* at VII.A.2.

U.S. Department of Justice
Executive Office for U.S. Attorneys
Office of Legal Education

Nomination Form

EXHIBIT E

Legal Education Institute
601 D Street, N.W.
Room 10332
Washington, D.C. 20530

(202) 501-7467
FAX (202) 501-7334
(202) 208-7235

(Please Type)

COURSE

Course Name	Course Date(s)	Course Location

NOMINATOR

Name	Title	
Phone Number	**Number of Nominees Submitted:**	**Order of Preference of this Nominee:**

NOMINEE

Name	Title	
Office, Agency or Department Name		**Phone Number**

QUESTIONNAIRE

1. Has the nominee applied for this course in the past and not been selected?

   Yes No (please circle) If yes, how many times?

2. What percentage of nominee's work involves the subject(s) of the course?

3. Indicate the level of skill or knowledge nominee has in this area:

   Novice Intermediate Advanced (please circle)

4. How many years has the nominee worked in this area?

5. What training has the nominee had in this area?

6. If necessary, please indicate any special considerations:

ADDRESS

Return mailing Address: Must be Typed and fit into box

LEI USE ONLY	
ACCEPTED	**NOT SELECTED**