U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
Anthony C. Moscato, Director

Editor-in-Chief:	*Judith A. Beeman*	*(202) 501-6098*
Editor:	*Audrey J. Williams*	*(202) 501-6098*

VOLUME 41, NO. 5 **FORTIETH YEAR** **MAY 15, 1993**

TABLE OF CONTENTS

TABLE OF CONTENTS

Please send name or address changes to:
The Editor, United States Attorneys' Bulletin
Room 6021, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530
Telephone: (202) 501-6098 - Fax: (202) 219-1201

COMMENDATIONS

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

Bill Barnett (Alabama, Northern District), by Thomasina V. Rogers, Legal Counsel, Equal Employment Opportunity Commission (EEOC), Washington, D.C., for his outstanding representation and professionalism in the remand of a criminal prosecution of a former EEOC employee.

Frank L. Butler (Georgia, Middle District), by Patricia W. Bass, Assistant Dean, Walter F. George School of Law, Mercer University, Macon, for his excellent presentation at the Federal Rules Seminar at the Macon Conference Center. Also, by Amy Levin Weil, Chief, Appellate Division, United States Attorney's Office, Atlanta, for his participation as a speaker at the Third Annual United States Attorney's Office Conference in Atlanta.

Robert Cessar (Pennsylvania, Western District), by James B. Thomas, Jr., Inspector General, Department of Education, Washington, D.C., for his successful prosecution of a complex fraud case involving the student financial assistance program.

Barbara D. Cottrell (New York, Northern District) was presented a Certificate of Appreciation by Kevin C. Whaley, Resident Agent in Charge, Drug Enforcement Administration, Albany, in recognition of her outstanding contributions in the field of drug law enforcement, and for her valuable participation in a year-long multi-agency investigation which targeted a large drug trafficking organization.

Todd A. Foster, Gary H. Montilla, Robert A. Mosakowski, and ***Eduardo E. Toro-Font*** (Florida, Middle District), by Maurice L. Dettmer, Chief, Criminal Investigation Division, Internal Revenue Service (IRS), Jacksonville, for their valuable participation and contribution to the success of the annual Criminal Justice Institute training program for IRS special agents, aides and managers held recently in St. Petersburg.

M. Chinta Gaston (New York, Southern District), by Michael J. Matheson, Acting Legal Adviser, Department of State, Washington, D.C., for her outstanding representation of the United States in a difficult and complex case, and for undertaking the sensitive diplomatic and legal measures connected with the litigation.

Gregory C. Graf (District of Colorado), by Richard M. Pence, Jr., United States Attorney, Eastern District of Arkansas, for his professionalism and legal skill in obtaining a conviction in a criminal case in the District of Colorado, and for securing the transcript, jury instructions and exhibits for a subsequent trial in Little Rock.

Bruce Green (Oklahoma, Eastern District), by John Chronister, Assistant District Counsel, Army Corps of Engineers, Tulsa, for his outstanding efforts in successfully resolving a case pending since 1984, and for obtaining a decision in favor of the government.

James C. Hair, Jr. (District of Arizona), by Fritz L. Goreham, Field Solicitor, Department of the Interior, Phoenix, for his excellent representation and vigorous defense of a case on behalf of the Solicitor's Office, leading to dismissal with prejudice.

Ralph E. Hopkins and ***Ralph J. Lee*** (Florida, Middle District), by William H. Reed, Director, Defense Contract Audit Agency, Alexandria, Virginia, for their outstanding success in obtaining a directed verdict in the government's favor in two complex Title VII discrimination cases.

Thomas J. Hopkins (California, Eastern District), by Richard H. Ross, Special Agent in Charge, FBI, Sacramento, for his valuable assistance and support in the investigation of an armored car robbery and murder case, and for his cooperative efforts within the law enforcement community.

Mel S. Johnson (Wisconsin, Eastern District), by Julius C. McGruder, Special Agent in Charge, U.S. Customs Service, Milwaukee, for his successful prosecution of a conspiracy case involving a scheme to import chemicals form East Germany while showing a false country of origin in order to avoid high duty rates.

Gail Killefer (California, Northern District), by Richard W. Held, Special Agent in Charge, FBI, San Francisco, for her successful resolution of a litigation against several FBI Special Agents involved in an investigation of a private residence.

Mark J. Krum (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding prosecutive efforts and ultimate success of a complex drug and firearms case.

Stephen M. Kunz (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a financial institution fraud case involving forty four loans totalling approximately $103 million, either solicited or obtained from fourteen different lenders to be utilized on ten real estate developments.

Elizabeth Lee (California, Northern District), by B. L. Smith, Postal Inspector in Charge, U.S. Postal Service, San Francisco, for her assistance and cooperation in resolving complications relating to the execution of a search warrant in California by a postal inspector domiciled in Hawaii.

Robert R. Leight (Pennsylvania, Western District), by Colonel David A. Lawrence, Director of Contracting, Air Force Development Test Center, Eglin Air Force Base, Florida, for his valuable assistance and support in court proceedings to clear the way for the award of the Civil Engineering Support Agency's number one program.

Terry L. Lloyd (Georgia, Southern District), by David C. Williams, Inspector General, Nuclear Regulatory Commission (NRC), Washington, D.C., for his valuable assistance and spirit of cooperation in the investigation of a major case for NRC, and for bringing the matter to a successful conclusion.

Beth McGarry (California, Northern District), by Sharon M. Fujii, Regional Administrator, Administration for Children and Families, Department of Health and Human Services, San Francisco, for her professionalism and legal skill in successfully obtaining a settlement of a difficult and complex case in the government's favor.

Richard Mark and ***Robert Sadowski*** (New York, Southern District), by Robert M. Fenner, General Counsel, National Credit Union Administration (NCUA), Washington, D.C., for their valuable assistance and prompt action in successfully averting a temporary restraining order challenge in U.S. District Court on behalf of an insolvent credit union located in the Bronx.

Celeste K. Miller (District of Idaho), by James P. Perry, Assistant General Counsel, Natural Resources Division, Department of Agriculture, Washington, D.C., for her successful resolution of a Forest Service condemnation action for the Sawtooth National Recreation Area after several years of protracted litigation.

Jerry W. Miller (North Carolina, Western District), by Joseph P. Schulte, Jr., Special Agent in Charge, FBI, Charlotte, for his outstanding prosecutive efforts in two criminal cases--one resulting in a sentence of 405 months imprisonment and a $5,000 fine, and another resulting in a 10-year, no parole sentence.

John A. Morano, Jr. (Pennsylvania, Middle District), by Anthony R. Conte, Regional Solicitor, Department of the Interior, Newton Corner, Massachusetts, for his excellent representation of the United States in a civil action, and for bringing the matter to a successful conclusion.

David B. Orbuch (District of Columbia), by Patrick E. McFarland, Inspector General, Office of Personnel Management, Washington, D.C., for his success in obtaining an out-of-court settlement of a case against CIGNA Healthplan of Arizona, Inc., which resulted in a recovery of $3,190,595 for the Federal Employees Health Benefit Program.

Rudy Orjales (California, Northern District), by Rear Admiral John L. Linnon, Commander, Joint Task Force Five, U.S. Coast Guard, Alameda, for serving as a translator and for providing other valuable assistance during the recent visit of Admiral Mora Perez, Chief of Naval Operations for the Mexican Navy,

John F. Paniszczyn (Texas, Western District), by James O. Boyd, Associate Regional Attorney, Office of the General Counsel, Department of Agriculture, Temple, for his outstanding representation of the Food and Nutrition Service in a food stamp retailer disqualification case.

Ernest F. Peluso (Florida, Middle District), by Thomas W. Corbett, Jr., United States Attorney, Western District of Pennsylvania, for his cooperative efforts and prompt response to a request for assistance in obtaining and executing simultaneous search warrants in Pittsburgh and in Florida. ***JoAnn Hanke*** and ***Cathy Hirschauer*** provided valuable legal support.

Maxine S. Pfeffer (New York, Southern District), by Robert E. Van Etten, Special Agent in Charge, U.S. Customs Service, New York, for her valuable assistance and cooperative efforts in the successful prosecution of a major importer of electronic equipment.

Timothy Quinlan (Florida, Middle District), by Clabe R. Polk, Administrator, Environmental Crimes Investigation, Florida Department of Environmental Regulation, Tampa, for his excellent presentation on working with the federal system at a seminar for compliance and enforcement personnel.

Crandon Randell (District of Alaska), by Rod Hageman, Special Agent, and Billy D. Johnson, Chief, Criminal Investigation Division, Internal Revenue Service, Anchorage, for his outstanding efforts in obtaining the conviction of a major cocaine dealer, and the Circuit Court's affirmation of the conviction, and for bringing a complex and difficult case to a successful conclusion.

James R. Redford (Michigan, Western District), by C. W. Wilson, Postal Inspector in Charge, U.S. Postal Service, Detroit, for his successful efforts in the prosecution of ten defendants involved in the transportation of 400 to 1,000 kilograms of marijuana via the U.S. mails and other means.

Larry J. Regan (Louisiana, Western District), by Johnny F. Phelps, Special Agent in Charge, Drug Enforcement Administration, Metairie, for his professionalism and legal skill in the successful prosecution of two individuals charged with conspiracy, possession of cocaine with the intent to distribute, and the use of a firearm during the commission of a drug trafficking crime.

Rudy Renfer and ***Linda Teal*** (North Carolina, Eastern District), by David W. Daniel, Clerk, U.S. District Court, Raleigh, for their valuable assistance and prompt response to the service of a subpoena requesting the pre-sentence report of a third party criminal defendant.

Stephen L. Schirle (California, Northern District), by Rollin Klink, Special Agent in Charge, U.S. Customs Service, San Francisco, for his outstanding representation in a Bivens action from the initial filing of suit in 1987 through an arduous jury trial in 1990 and through the Ninth Circuit Court of Appeals.

H. Lee Schmidt (Oklahoma, Western District), by George W. Proctor, Director, Office of International Affairs (OIA), Criminal Division, Department of Justice, for his valuable assistance rendered to OIA and the Government of the Republic of Turkey in effectively administering a mutual legal assistance request.

Richard G. Seeborg (California, Northern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for his excellent representation of the Canadian government in successful extradition proceedings against an individual wanted in Canada to serve the remainder of a 4-year sentence for robbery, forcible confinement, and theft.

Steve Skrocki, Karen Loeffler, and ***Tim Burgess*** (District of Alaska), by Karen Wade, Superintendent, Wrangell-St. Elias National Park/Preserve, Glennallen, for their professionalism and legal skill in successfully prosecuting an illegal wolverine/wolf hunting case, and for their continued efforts in managing wildlife resources throughout Alaska.

Craig Stewart (New York, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his professional skill and expertise crucial to the successful outcome of a major drug trafficking investigation.

Debra J. Stuart (Georgia, Southern District), by Joseph B. Connolly, Division Chief, Financial Fraud Institute, Federal Law Enforcement Training Center, Glynco, for her excellent presentation at the Advanced Financial Fraud Training Program on the problems and issues surrounding the prosecution of complex fraud cases.

Julie F. Tingwall (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for her outstanding success in two noteworthy cases--one involving the theft of approximately $1 million in computer chips by members of a Vietnamese gang, and the other involving a series of bank robberies.

John K. Vincent (California, Eastern District), by Senator Leroy Greene, Chairman, Senate Legislative Ethics Committee, California Legislature, Sacramento, for his contribution to the success of the Senate ethics orientation programs, and for his valuable participation in the panel discussions.

J. Gaston B. Williams (North Carolina, Eastern District), by Joseph P. Schulte, Jr., Special Agent in Charge, FBI, Charlotte, for his outstanding efforts in the successful prosecution of a major bank fraud case resulting in eight convictions, including the Chairman of the Board and Chief Executive Officer, as well as the President.

William Woodard and ***Kathleen Nesi*** (Michigan, Eastern District), by C. W. Wilson, Postal Inspector in Charge, U.S. Postal Service, Detroit, for their excellent presentation on court decisions and agent liability at a training program for postal inspectors.

Gordon Young (Texas, Southern District), by Neil S. Cartusciello, Chief, Environmental Crimes Section, Environment and Natural Resources Division, Department of Justice, for his successful prosecution of an environmental crimes case involving illegal storage, transportation and disposal of hazardous paint and solvent waste.

John W. Zavitz (District of New Mexico), by Arthur J. Waskey, General Counsel, New Mexico State Highway and Transportation Department, for his successful defense of the federal government in an environmental claims matter, thereby allowing reconstruction to proceed of a much needed highway facility for the City of Santa Fe.

SPECIAL COMMENDATION FOR THE DISTRICT OF NEW MEXICO

Don J. Svet, United States Attorney, and ***Rhonda Backinoff, Assistant United States Attorney, District of New Mexico,*** received the following letter signed by Juanico Sanchez, Head Cacique on behalf of the religious leaders of the Pueblo of Acoma, "The Sky City," Acoma, New Mexico:

> We, the religious leaders of the Pueblo of Acoma, would like to express our sincere thanks and appreciation to you and Ms. Rhonda Backinoff in the prosecution of Brian and Gerald Garcia in the case involving Acoma Kachina Doll(s). We further extend our thanks to the Special Agents of the Bureau of Land Management, who conducted the investigation. We were notified that the Garcia brothers have agreed to plead guilty to misdemeanor charges in violation of the Native American Graves Protection and Repatriation Act. We are pleased the investigation was prosecuted to a near successful conclusion.
>
> There are two other cases that your office is prosecuting which involve the theft of religious and ceremonial items from the Pueblo of Acoma. . . .We trust these cases will be pursued with the same vigor as the Garcia case. We strongly believe that successful federal prosecutions which involve the theft of Native American ceremonial and religious items will greatly reduce future illegal removal of our sacred objects and ensure the integrity of religious Indian life throughout the United States.

* * * * *

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF WISCONSIN

Eric J. Klumb and ***Charles A. Guadegnino, Assistant United States Attorneys for the Eastern District of Wisconsin,*** were commended by John W. Magaw, Director, U.S. Secret Service, Washington, D.C., for their outstanding contribution to the success of "Operation Mongoose," a major credit card fraud case. Operation Mongoose involved nearly $2 million in fraud losses and implicated over 500 merchants in thirty seven states and three foreign countries. This credit card fraud investigation was one of the largest ever encountered by the U.S. Secret Service.

* * * * *

HONORS AND AWARDS

District Of Alaska

Wevley William Shea, United States Attorney for the District of Alaska, was awarded plaques of recognition from the largest State and local law enforcement agencies in Alaska. One plaque was presented by Colonel John R. Murphy of the Alaska State Troopers for his support of "Alaska Law Enforcement." Anchorage Chief of Police Kevin M. O'Leary also presented a plaque which stated: "Thank you from the members of the Anchorage Police Department for your dedication and service to the citizens of Alaska."

* * * * *

District Of Columbia

Elisabeth A. Bresee, Assistant United States Attorney for the District of Columbia, was awarded a plaque by Sherman Funk, Inspector General of the Department of State, citing her leadership and guidance in the investigation and prosecution of a series of cases involving State Department personnel. ***Ms. Bresee*** obtained guilty pleas in four State Department cases. A fifth case involved some $25,000 in fraud by the driver of the Ambassador to Russia, which included organizing and presenting complicated and incomplete records, as well as successfully prevailing when the State Department resisted having the Ambassador testify at trial.

Wendy L. Wysong, Assistant United States Attorney for the District of Columbia, was awarded a plaque by agents of the FBI and officers of the Metropolitan Police Department, for her outstanding success in "Operation Inside Track," a joint FBI-MPD undercover investigation of correctional officers at the D.C. Jail who were smuggling narcotics to inmates. In this "reverse sting" investigation, undercover agents bribed jail guards to smuggle cocaine and other contraband to cooperating inmates in the jail, who then were required to return the drugs to investigators. Ten correctional officers and one civilian were convicted of federal and local offenses, including bribery, distribution of narcotics, and smuggling contraband. During the investigation, Ms. Wysong forged and maintained the trust and cooperation of investigators from both the FBI and the MPD, which was a crucial element of the success of the operation.

* * * * *

ATTORNEY GENERAL HIGHLIGHTS

New Leadership In The Department Of Justice

On April 29, 1993, in a ceremony attended by President Clinton in the Department of Justice courtyard, Attorney General Janet Reno announced that the President had nominated several men and women for senior positions at the Department of Justice. The Attorney General said, "I am pleased President Clinton thought it fitting and proper for me to bring before you these excellent nominees so you can meet the people who will help to lead the Department along the path of excellence." The nominees are:

Walter Dellinger for Assistant Attorney General for the Office of Legal Counsel. ***Mr. Dellinger*** was formerly a professor of law at Duke University Law School.

Lani Guinier for Assistant Attorney General for the Civil Rights Division. ***Ms. Guinier*** is a law professor at the University of Pennsylvania in Philadelphia. She also served as a Special Assistant in the Civil Rights Division in 1977.

Frank W. Hunger for Assistant Attorney General for the Civil Division. ***Mr. Hunger*** is the senior partner/managing partner of Lake, Tindall, Hunger & Thackston of Greenville, Mississippi, and specializes in civil litigation.

Anne K. Bingaman for Assistant Attorney General for the Antitrust Division. ***Ms. Bingaman*** is a partner in a Washington, D.C. law firm, the founder and partner of Bingaman and Davenport in Santa Fe, and an associate professor at the University of New Mexico Law School.

Eleanor Dean Acheson for Assistant Attorney General for the Office of Policy Development. ***Ms. Acheson*** has been a partner of Ropes & Gray, a law firm in Boston, since 1983. Her practice included federal and state employment and environmental litigation, patent and antitrust cases and tax, business and civil rights litigation.

Sheila Foster Anthony for Assistant Attorney General for the Office of Legislative Affairs. ***Ms. Anthony*** is a former senior associate of Dow, Lohnes & Albertson in Washington, D.C. where she specialized in intellectual property law, including trademark, copyright, unfair competition, infringement, litigation, licensing and technology transfer.

Gerald Torres for Assistant Attorney General for the Environment and Natural Resources Division. ***Mr. Torres*** is a law professor at the University of Minnesota, on leave from the University of Texas.

Carl Stern was appointed by Attorney General Janet Reno to serve as Director of the Office of Public Affairs. ***Mr. Stern*** has been a law correspondent for NBC Network News since 1967.

United States Attorneys

A current list of United States Attorneys as of May 3, 1993, appears at page 178 of this Bulletin. Further information may be obtained by calling the Executive Office for United States Attorneys. The telephone number is: (202) 514-2121.

* * * * *

Designation Of Acting Associate Attorney General

On April 8, 1993, Attorney General Janet Reno designated Webster Hubbell to serve as Acting Associate Attorney General. Mr. Hubbell was also authorized to perform all functions and duties of the Deputy Attorney General. The Attorney General's directive follows:

> Pursuant to the authority vested in me by 28 U.S.C. §§ 509 and 510, I hereby authorize you to perform the following functions and duties:
>
> (1) All functions and duties of the Associate Attorney General, including, but not limited to, those set forth in 28 CFR § 0.19, as well as responsibility for management of those components that report to the Associate Attorney General on the Department's Organization Chart.
>
> (2) All functions and duties of the Deputy Attorney General, including, but not limited to, those set forth in 28 CFR § 0.15, as well as responsibility for management of all those components that report to the Deputy Attorney General on the Department's Organization Chart.
>
> (3) Such other functions and duties as I may assign.

* * * * *

Attorney General Meets Department Of Justice Employees

In an address to all Department of Justice employees in the Department of Justice Courtyard on April 6, 1993, Attorney General Janet Reno stated as follows:

> It is a great honor for me to have the opportunity to work with each one of you -- with the wonderful members of the support staff, who have made me feel so welcome throughout the Department, with the lawyers who I would match with the very best in this Nation, with law enforcement personnel that I think are an example for all in the criminal justice system throughout America. All the divisions and the agencies of the Department have impressed me with their excellence, and their professionalism, and their commitment to what is right.

* * * * *

Attorney General And "The Fires Of Justice"

Only weeks after Attorney General Janet Reno was sworn in as the first woman Attorney General in our nation's history on March 12, 1993, she was thrust into what she has referred to as "one of the great tragedies of our time" -- the fiery end to the siege on the Waco, Texas compound of cult leader David Koresh. A joint statement was issued on April 20, 1993, with the Honorable Lloyd Bentsen, Secretary of the Treasury, as follows:

> We deeply regret the terrible tragedy that occurred in the Branch Davidian compound outside Waco yesterday (April 19). It is a shocking end to a long siege, something that goes beyond immediate comprehension. The President has asked us to conduct a joint investigation of the entire episode to try to prevent anything like this from every happening again. We have instructed our staffs to meet and complete the details of how the investigation will be undertaken, and to ensure a full, complete inquiry. In this process, we will involve independent, professional law enforcement officials to assist us in this review.
>
> We want to cooperate fully and completely with all Congressional inquiries to make sure there is a thorough and independent review of all our actions and that we are fully accountable to Congress and the American people. We are deeply saddened by the terrible loss of lives, including the ATF agents and those who died yesterday.

On April 28, 1993, the Attorney General testified at a hearing of the House Judiciary Committee concerning the decision-making process and the chain of events that led to the fiery end of the standoff at the Branch Davidian compound. Director William Sessions, FBI, and Director Stephen Higgins, Bureau of Alcohol, Tobacco and Firearms, also testified. In her statement, Ms. Reno stated that at the President's request, she and Secretary Bentsen are developing a process whereby the events at Waco will be examined by experts both within and outside government to consider the following questions:

(1) In the execution of the arrest and search warrants by the Bureau of Alcohol, Tobacco and Firearms (ATF), were established procedures followed and, if so, were they adequate?

(2) Is federal law enforcement adequately prepared to negotiate in dangerous situations, in terms of training, staffing, and available techniques?

(3) Is training for the execution of warrants involving barricaded suspects who may be holding innocent third parties adequate for all law enforcement agencies?

(4) Are improvements needed in coordinating the activities of the various investigative agencies?

(5) How should federal law enforcement agencies marshal resources in various disciplines, including psychology and psychiatry, in situations involving cults and other groups using barricades and holding innocent people?

(6) What systems and understandings about command and control should guide the relationships among leaders of the Departments and career officials in operating units when field operations impose a substantial risk of danger to law enforcement officials and others?

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

* * * * *

Attorney General Addresses Civil Chiefs Seminar In Arlington, Virginia

On April 20, 1993, Attorney General Janet Reno addressed the Civil Chiefs Seminar at the Stouffer Concourse Hotel in Arlington, Virginia. The Seminar, conducted by the Office of Legal Education of the Executive Office for United States Attorneys, was designed to permit Civil Chiefs from the largest United States Attorneys' offices to meet and discuss the current issues affecting their offices. While the Attorney General's remarks were general in nature, many topics were discussed at the day-long session, such as the budget, personnel, security, adverse actions, supervision and management, debt collection, and Legal Counsel concerns. Kenneth E. Melson, United States Attorney for the Eastern District of Virginia, delivered the welcoming remarks, followed by Anthony C. Moscato, Director, Executive Office for United States Attorneys.

The Civil Division Chiefs who attended the Seminar were: ***Herbert Lewis, III,*** Northern District of Alabama; ***James Loss*** and ***Don Overall,*** District of Arizona; ***Mary Grad,*** Eastern District of California; ***John Neece;*** Southern District of California; ***Mary Beth Uitti,*** Northern District of California; ***Leon Weidman,*** Central District of California; ***John Bates, Wilma Lewis,*** and ***John Oliver Birch,*** District of Columbia; ***John Hughes,*** District of Connecticut; ***Robyn Hermann,*** Southern District of Florida; ***Gary Takacs,*** Middle District of Florida; ***Curtis Anderson,*** Northern District of Georgia; ***Thomas Walsh*** and ***Linda Wawzenski,*** Northern District of Illinois; ***Nancy Nungesser,*** Eastern District of Louisiana; ***Juliet Eurich,*** District of Maryland; ***Suzanne Durrell*** and ***Annette Forde,*** District of Massachusetts; ***Robert Small,*** District of Minnesota; ***Alleen Castellani,*** Western District of Missouri; ***Edwin Brzezinski,*** Eastern District of Missouri; ***Ellen Christensen, L. Michael Wicks,*** and ***Pamela Thompson,*** Eastern District of Michigan; ***David Moynihan,*** District of Nevada; ***Lowell Harris,*** District of New Mexico; ***Robert Begleiter,*** Eastern District of New York; ***Richard Mark,*** Southern District of New York; ***Mark Perla,*** Western District of New York; ***Louis Bizzarri, Susan Cassell,*** and ***Bette Uhrmacher,*** District of New Jersey; ***David Bauer*** and ***Marcia Johnson,*** Northern District of Ohio; ***Jeffery Hopkins*** and ***Gerald Kaminski,*** Southern District of Ohio; ***Roger Griffith,*** Western District of Oklahoma; ***Lance Caldwell,*** District of Oregon; ***Joan Garner, Catherine Votaw,*** and ***Virginia Gibson-Mason,*** Eastern District of Pennsylvania; ***Amy Hay,*** Western District of Pennsylvania; ***Charles Cabaniss,*** Northern District of Texas; ***Hays Jenkins, Jr.*** and ***Marianna Tomecek,*** Southern District of Texas; ***Raymond Nowak,*** Western District of Texas; ***Robert Jaspen*** and ***Ruth Harris Yeager,*** Eastern District of Texas; ***Richard Parker,*** Eastern District of Virginia; and ***Christopher Pickrell,*** Western District of Washington.

* * * * *

Candlelight Vigil For Victims Of Crime

On April 25, 1993, Attorney General Janet Reno attended the Eighth Annual Victims' Rights Week Candlelight Vigil in New York City. The Vigil, sponsored by the National Victims' Rights Week Coalition, began a week of activities aimed at highlighting the plight, rights and needs of crime victims. In her address before approximately 500 people at the Church of St. Paul & St. Andrew, for which she received a standing ovation, the Attorney General stressed the need for an expanded effort to control the violence in the home, on the streets, and in popular entertainment, and stated, "We have got to put the children first." The Coalition is comprised of forty nine public and private agencies, and includes crime victims and their advocates, law enforcement and criminal justice agencies, religious organizations, and civic and labor groups.

* * * * *

National Forum On Preventing Crime And Violence

On April 29, 1993, Attorney General Janet Reno addressed the National Forum on Preventing Crime and Violence in Washington, D.C. The Forum is sponsored by the Crime Prevention Coalition, a group of 122 national and state organizations and federal agencies, including the Bureau of Justice Assistance and the Federal Bureau of Investigation, that work together to combat crime and drug abuse. Its major purpose is to help national, state, and local organizations increase citizen understanding of and support for programs that prevent violence, drug abuse, and other crimes.

Topics that were discussed among more than 300 criminal justice leaders in attendance included medical and health perspectives on crime and violence; mobilizing for effective neighborhood action; building community and police partnerships; strategies for safer schools; and creating opportunities for young, minority males.

* * * * *

DEPARTMENT OF JUSTICE HIGHLIGHTS

1994 BUDGET

On April 8, 1993, the Department of Justice announced that it will seek a fiscal year 1994 budget of $11.187 billion. The request includes $390 million for FY 1994 as part of the Administration's investment strategy, with a five-year investment of $4 billion. These long-term investments are targeted towards anti-crime initiatives that emphasize building partnerships between federal, state and local governments to put resources back into our communities. The Department's 1994 budget submission also supports the Administration's commitment to put more police on the streets and more violent career criminals behind bars. At the same time, the budget request meets the President's directives to streamline the Department by including $116 million in administrative and personnel reductions. This budget reflects the President's and the Attorney General's goal to carefully and wisely use limited federal resources.

On April 22, 1993, Attorney General Janet Reno testified before the Senate Subcommittee on Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, concerning the 1994 budget. If you would like a copy of the testimony, or a copy of the press release, please call the United States Attorneys' Bulletin staff, at (202) 501-6098.

The following is a summary of the 1994 Budget:

Combating Crime

The 1994 budget requests a total of $100 million for new federal/state and local partnership initiatives to invest in state and local police officers, community policing programs and training, and scholarships to college students pursuing careers in state and local law enforcement. These new partnerships will increase to $707 million by 1998, will also fund a background check system to assist firearms dealers in the prevention of handgun sales to unauthorized persons, thus supporting the Brady Handgun Violence Prevention Act.

A Presidential investment of $50 million in 1994 for community policing will direct resources to the State and local levels to implement policing techniques that promote interaction and cooperation between the police and the public they serve. State and local governments, as well as qualified community organizations, may apply for these grants to create or supplement community-policing programs, which may include hiring new officers or redeploying existing officers. A second Presidential investment of $25 million will support a Police Corps program that will provide scholarships to college students interested in pursuing a career in law enforcement in exchange for a commitment to serve as state or local police officers.

Operation Weed and Seed

The 1994 budget submission requests $13.5 million for Operation Weed and Seed, a neighborhood revitalization effort, to provide continued assistance to state and local law enforcement agencies engaged in the investigation and prosecution of violent crimes and drug offenses in designated communities.

Criminal Recordkeeping And The Brady Bill

A Presidential investment of $25 million in 1994 will establish a criminal records upgrade program that will ultimately be used to implement the requirements of the Brady bill. These upgrades will enable a national background check that may be used to screen unauthorized persons from illegally purchasing handguns, thus protecting our police and citizens without abridging the right to bear arms for self-protection, hunting, and sports.

Fingerprint Identification

The FBI's 1994 budget submission includes a $9 million Presidential investment for the continued development of the Integrated Automated Fingerprint Identification System, which will provide for a state of the art paperless comparison of fingerprints against a national database. This will provide states with improved access to vital FBI criminal information databases and will also help implement provisions of the Brady bill. The FBI is also requesting $16,700,000 in 1993 supplemental funding for costs related to the transfer of 506 employees from the Identification Division at FBI Headquarters to the Clarksburg, West Virginia, area.

Juvenile Justice And Anti-Drug Programs

The 1994 budget request includes funding for the Juvenile Justice and Delinquency Prevention Program at the 1993 level of $73.5 million. The request also includes $665.7 million for the Office of Justice Programs, of which $496 million will be targeted for anti-drug abuse grants. Within the discretionary Anti-Drug Abuse grant program, $8 million will be earmarked for boot camps, and $16 million for cooperative agreements with state and local governments.

Prison Population

The Department's 1994 budget request continues the commitment to ensure that violent criminals serve their sentences, and a major objective is to adequately address the prison population growth. During 1994, the Federal Prison System (FPS) is scheduled to activate over 4,600 new prison beds at Allenwood, Pennsylvania; Florence, Colorado; Miami; Atlanta; Fort Worth; and Fort Dix, New Jersey. To staff these new facilities, the budget includes a Presidential investment of over $100 million and over 2,800 positions. This increase will also cover the initial costs to activate the maximum security prison at Florence, three medium security prisons at Cumberland, Maryland; Pekin, Illinois; and Greenville, Illinois; a witness security unit at Allenwood, and expansion projects at Big Spring, Texas and El Reno, Oklahoma. In addition, the FPS budget includes $142 million for the construction of additional prison facilities, adding 1,563 new beds when completed.

Cuban And Haitian Refugees

The Community Relations Service requests a Presidential investment of $6.6 million for the settlement of Cuban and Haitian refugees and to provide medical services for refugees already in the United States. This program will ease the transition of these individuals into society in a humane and orderly fashion.

Immigration And Naturalization Service

The Immigration and Naturalization Service (INS) request includes a Presidential investment of $14.5 million for additional immigration inspectors; improvements in the Institutional Hearing Program; and staff associated with the legal proceedings program. These resources will enable INS to hire 163 immigration inspectors at land border ports-or-entry, allowing the operation of 27 additional traffic lanes to keep pace with the increases in land border traffic. This will not only enhance INS's ability to detect undocumented aliens and contraband substances being smuggled into the United States, but also facilitate international travel of U.S. citizens into and out of its borders. INS will increase its resources for the Institutional Hearing Program to allow for the immediate removal from the United States of convicted criminal alien felons upon completion of their sentences by identifying them and initiating their deportation while they are still incarcerated. INS is also requesting an additional 40 positions to provide the necessary support staff to enhance the ability of INS attorneys to represent INS in deportation cases of criminal and other illegal aliens, exclusion and rescission hearings before the Immigration courts, and provide legal advice and counsel to the operating components in the field.

Administrative And Personnel Resources

As part of the largest deficit reduction package in history, the Department of Justice is requesting $116 million in across-the-board reductions in administrative and personnel resources. The 1994 budget request will be reduced by $34 million in administrative expenses to improve the productivity and efficiency of the Department. Similarly, the Department will reduce its 1994 budget by $892 million by limiting hiring and taking other actions necessary to meet a total reduction of 4 percent of its civilian personnel levels by 1995.

* * * * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

On April 7, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys (EOUSA), issued a memorandum to all United States Attorneys concerning the severe budget situation for the offices of the United States Attorneys and EOUSA, and requested full cooperation in implementing budget restraints. If you would like a copy of Mr. Moscato's memorandum, please call the United States Attorneys' Bulletin staff, at (202) 501-6098.

* * * * *

BCCI

Justice Department Moves To Dismiss Indictment In BCCI Case

On April 7, 1993, the Department of Justice moved to dismiss a federal indictment against Clark M. Clifford and Robert A. Altman. This action is being taken, among other reasons, so as not to prejudice or interfere with the ongoing state prosecution of Mr. Altman in New York. Clifford and Altman were indicted by a federal grand jury in Washington on July 29, 1992, on charges of conspiring to defraud the Board of Governors of the Federal Reserve System and concealing material facts in connection with the investigation of the BCCI. The Department stressed in its motion that, despite a dismissal, the government would remain free to bring new and even broader charges against Clifford and Altman in the future and would take appropriate action at the conclusion of the state prosecution. Both Clifford and Altman have agreed that they will not contest the government's right to bring more far-reaching charges against them by criminal information.

The case is set to go to trial on June 1, in Washington, D.C. As stated in the motion, if this trial date is kept, preparation for a federal trial will burden the New York prosecutors. A concurrent federal prosecution inevitably will interfere with the state case, since evidence overlaps and witnesses necessary to both cases will be on call in both Washington and New York.

* * * * *

First Trial Completed In Most Recent Series Of BCCI-Related Indictments

On March 31, 1993, the Department of Justice announced that a federal jury in the Northern District of Georgia returned two guilty verdicts against a former senior official of the National Bank of Georgia (NBG) in a case that grew out of the government's investigation of the Bank of Credit and Commerce International (BCCI). The guilty verdicts on the felony counts were returned against William W. Batastini, former senior officer and director of both NBG and NBG Financial Corporation. This is the first trial completed in the most recent series of BCCI-related indictments.

Mr. Batastini, formerly an IRS agent, facilitated the sale of NBG to the holding company which controls First American Bank. He also failed to include a $95,000 payment from officials of BCCI as income in his 1987 return. This payment was disguised as a "gift" to his wife upon the birth of their daughter in January, 1987. Mr. Batastini was acquitted on charges of misapplication of bank funds, making false entries in bank records, receipt of an unlawful gratuity, and money laundering.

* * * * *

TAX DIVISION

Policy Change In Tax Cases Involving Lesser Included Offenses

On February 12, 1993, the Tax Division circulated a memorandum providing guidelines concerning the government's handling of lesser included offense issues in certain kinds of tax cases. (See, United States Attorneys' Bulletin, Vol. 41, No. 3, dated March 15, 1993, at p. 76.)

In that memorandum, the Tax Division referred to Becker v. United States (S. Ct. No. 91-410), where defendant sought certiorari on the ground that the misdemeanor of failure to file a tax return (26 U.S.C. § 7203) is a lesser included offense of the felony of attempted tax evasion (26 U.S.C. § 7201) and that cumulative punishment for the greater and lesser offenses is therefore unconstitutional. The government opposed certiorari, arguing that Congress intended to authorize cumulative punishment for the two offenses and, in any event, that the willful failure to file a tax return is not a lesser included offense of attempted tax evasion. As noted in the February 12, 1993 memorandum, the latter argument reflects an adoption of the strict "elements" test set forth in Schmuck v. United States, 489 U.S. 705 (1989), and, consequently, a change in Tax Division policy.

On March 8, 1993, the Supreme Court denied the petition for a writ of certiorari in Becker. Accordingly, there will be no change in the guidelines set forth in the February 12 memorandum and they will remain in effect until further notice.

If you have a tax case that raises questions regarding lesser included offenses, please call the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

* * * * *

Tax Non-Filers

On April 13, 1993, the Department of Justice announced that more than 100 individuals have been charged with failing to file their income tax returns between November 1, 1992, and April 1, 1993. The indictments were returned in thirty nine different judicial districts across the country, and the Justice Department intends to seek indictments or file informations in approximately eighty additional cases during the next several weeks. Among the individuals charged with failing to file their returns were tax return preparers, roofers, building contractors, certified public accountants, car dealers, salespersons, realtors, attorneys, sole proprietors, doctors and factory workers. The income unreported by these individuals ranged from less than $10,000 to more than $1 million.

The Internal Revenue Service (IRS) estimates that more than $7 billion in tax revenue is lost annually due to individuals not filing their tax returns. These non-filers account for a significant portion of the so-called "tax gap" -- the difference in the amount of tax that should be collected from taxpayers and the amount of tax that is voluntarily paid by taxpayers with their returns. It is the primary mission of the Department and the IRS to increase taxpayer's compliance with the tax laws and to help minimize the "tax gap." Both organizations are committed to enhanced enforcement efforts over the next year. Michael L. Paup, Acting Assistant Attorney General in charge of the Tax Division, said, "The Internal Revenue Service has been working hard in recent months to encourage non-filers to return to the taxpaying rolls voluntarily. These criminal prosecutions make clear the serious consequences of not heeding that call and of ignoring the legal responsibility to file tax returns."

* * * * *

CIVIL RIGHTS DIVISION

Americans With Disabilities Act Of 1990

On March 31, 1993, the Department of Justice announced a $2.5 million federal grant program to speed compliance with the American With Disabilities Act of 1990 (ADA). The Department also announced the installation of telecommunication devices for deaf persons (TDDs) for access to its automated ADA telephone services.

Grant Applications

The Department will award grants in amounts ranging from $85,000 to $200,000 to applicants who propose cost-effective and efficient approaches to disseminating information to individuals with disabilities and organizations covered by the Act about their rights and responsibilities under Titles II and III of the ADA. Individuals and not-for-profit organizations, as well as state and local government agencies, may apply for the grants, but only those applications that are national in scope or significance will be considered for funding. Applications for grant proposals are being accepted by the Public Access Section of the Civil Rights Division until close of business May 14, 1993. The Solicitation for Applications also appeared in the Federal Register on March 15, 1993.

Telecommunications Devices For Deaf Persons (TDDs)

The Department announced that users of telecommunication devices for deaf persons (TDDs) may now receive automated telephone information service through the ADA Information Line and the ADA Technical Assistance Grant Information Line operated by the Public Access Section of the Civil Rights Division. Until recently, TDD users could contact information line operators but could not use the automated services that are also available. Individuals with a TDD and either a rotary dial or touch-tone telephone may call the following information lines:

ADA Information Line -- Callers may reach this line by dialing (202) 514-0383 (TDD) or (202) 514-0301 (voice). Operators are available to answer ADA questions from 1:00 - 5:00 p.m. E.D.T., Monday through Friday. The automated information system, however, is available 24 hours a day, seven days a week.

Grant Information Line -- This line was only in operation during the 60-day application period from March 15, 1993 to May 14, 1993, and by using the automated system, callers could obtain pre-recorded information concerning the 1993 grant solicitation, including application deadlines and procedures; and order a grant application package.

* * * * *

CRIME/DRUG ISSUES

Juvenile Detention And Correctional Facilities

On April 18, 1993, Attorney General Reno announced that a Justice Department study on conditions of confinement in juvenile detention and correctional facilities has found crowding to be a pervasive and serious problem across the nation. The study, funded by the Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP), found that more than 75 percent of confined juveniles were housed in facilities that violated one or more standards related to living space (design capacity or size of sleeping area or living unit). The percentage of juveniles living in crowded facilities increased from 36 to 47 percent between 1987 and 1991. Such crowding was associated with higher rates of violence, suicidal behavior, and greater use of short-term isolation as a disciplinary measure.

The study was conducted for OJJDP by Abt Associates, Cambridge, Massachusetts and is the first nationwide investigation of conditions in secure juvenile detention and correctional facilities. Using nationally recognized standards, researchers assessed how juvenile offenders' basic needs are met, how security and resident safety are maintained, what treatment programs are provided and how juveniles' rights are protected in institutions. Data were collected through surveys mailed in 1991 to 984 public and

private juvenile detention centers, reception and diagnostic facilities, training schools, and ranches. In addition, experienced juvenile correctional practitioners conducted two-day site visits to a representative sample of almost 100 facilities in 1991. Researchers concluded that, while facilities generally provided adequate food, shelter and hygiene, serious and widespread problems existed in the areas of living space, health care, institutional security and safety, and control of suicidal behavior. In the institutions in the twelve months preceding the mail survey, researchers estimated that:

- 6,900 staff members and 24,200 juveniles were injured by other juveniles. More than 18,600 incidents required emergency medical care.
- 11,000 juveniles committed over 17,600 acts of suicidal behavior, with 10 suicides in 1990.
- More than 435,800 juveniles were held in short-term isolation lasting between one and 24 hours. Almost 84,000 were in isolation for more than 24 hours.

As a result of these findings, and concern in the juvenile justice community that conditions have worsened due to budget constraints and an increase in the high-risk juvenile population, a consortium of national organizations, private foundations and federal, state and local government agencies is being formed to plan and promote long-term improvements in conditions of confinement for juveniles in custody.

Copies of the Executive Summary of "Conditions of Confinement: A Study to Evaluate Conditions in Juvenile Detention and Correctional Facilities" are available. Please call the Juvenile Justice Clearinghouse at (800) 638-8736, or in the Washington, D.C. area, at (301) 251-5500.

* * * * *

Videotaping Police Interrogations

According to the National Institute of Justice (NIJ), the Department of Justice's principal research agency, videotaping police interrogations is growing rapidly. It is relatively inexpensive, it improves evidence quality and few disadvantages have been identified. NIJ said that as of 1990, one-third of all police departments serving communities of 50,000 inhabitants or more were videotaping at least some interrogations. By the end of this year, NIJ estimates that 60 percent of such agencies will be using the technology.

The findings resulted from a nationwide survey of police agencies combined with interviews with judges, prosecutors, defense attorneys and other criminal justice professionals in eleven cities and counties. The results, confirmed in many interviews of law enforcement officers, indicated that because of videotaping, defense attorneys made fewer allegations of coercion or intimidation. The on-camera administration of the Miranda warning was one major reason. Police officers also pointed out that when a case came to trial they were under less pressure in the courtroom from defense claims of fabricated confessions. Prosecutors were especially impressed and commented that they "were in virtually unanimous agreement that videotaping helped them assess the State's case and prepare for trial." They told researchers that audio tapes or police notes simply cannot capture the conduct of the police during the interrogation nor the suspect's physical condition, attire, body language or non-verbal clues.

The study pointed out that law enforcement interrogations are not the only use to which taping can be put. Other uses to which police were putting the technology in 1990 included the following:

- Documenting crime scenes - (63 percent of the surveyed local police and sheriff's departments employed videotape for this purpose at least occasionally).
- Recording victim statements - 51 percent.
- Testing drunk driving suspects - 49 percent.
- Documenting traffic accident scenes - 41 percent.
- Monitoring prisoners in lockups - 31 percent.
- Recording crime reenactments by suspects - 20 percent.
- Preserving eye-witness statements - 8 percent.
- Documenting police lineups - 4 percent.

The NIJ Research in Brief article entitled "Videotaping Interrogations and Confessions" (NCJ-139962) is available from the National Criminal Justice Reference Service, Rockville, Maryland. The telephone number is (301) 251-5500 or (800) 851-3420.

* * * * *

SENTENCING REFORM

Sentencing Guidelines Amendment

On April 19, 1993, the United States Sentencing Commission voted 5-0 to amend the Sentencing Guidelines to increase the offense level for tax offenses and also to simplify the definition of "tax loss." Previously, the Sentencing Guidelines permitted a significant number of tax violators to avoid imprisonment and, thus, they greatly reduced or eliminated the deterrent value of tax prosecutions. Tax Division attorneys are hopeful that the amendments will enhance their ability to enforce the nation's tax laws through criminal enforcement.

* * * * *

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 5, No. 10, dated April 9, 1993, and Volume 5, No. 11, dated April 22, 1993, is attached as Exhibit A at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

* * * * *

Federal Sentencing And Forfeiture Guide

Due to budget constraints, the Federal Sentencing and Forfeiture Guide Newsletter, published by James Publishing Group, Santa Ana, California, will no longer be included as an attachment in the United States Attorneys' Bulletin. If you would like a copy of the current issues of the Newsletter, please call the United States Attorneys' Bulletin staff, at (202) 501-6098.

* * * * *

POINTS TO REMEMBER

United States Attorneys' Bulletin

In compliance with the recent directive concerning cost-cutting measures issued by Anthony C. Moscato, Director of the Executive Office for United States Attorneys, the distribution of the United States Attorneys' Bulletin will be reduced. Each District will receive about half the number of copies currently being received. We appreciate your patience during these tight budget times.

If you have any questions, please contact the United States Attorneys' Bulletin staff, at (202) 501-6098.

* * * * *

LEGISLATION

Terrorism

On April 21, 1993, the Senate Judiciary Committee began two days of hearings on the threat of terrorism in the United States. Areas of interest to the Committee included the reorganization at the State Department and the importance of counter-terrorism in the new structure; the number of suspected terrorists in the United States who may be illegal aliens; the effect that technology advances in digital telecommunications, which lack design features to allow wiretapping, will have on counter-terrorism investigations and intelligence gathering; the most significant terrorist countries and organizations; fund-raising efforts in the United States with ties to terrorist activity; adequacy of intelligence gathering resources; and the status of a central criminal history data base.

The panel of government witnesses included Mike Cronin, Assistant Commissioner for Inspections, Immigration and Naturalization Service (INS), and Mark Richard, Deputy Assistant Attorney General, Criminal Division. The primary focus was on State/INS procedures for intercepting inadmissible aliens, including would-be terrorists, who seek to enter the United States, particularly at U.S. airports.

* * * * *

Hatch Act

On April 27, 1993, the Senate Governmental Affairs Committee held a hearing on S. 185, the Senate version of the Hatch Act Reform Amendments of 1993. The Director of the Office of Personnel Management, James B. King, testified for the Administration and expressed strong support for any reform produced by the Congress. He said the Administration has no preference between the House bill (H.R. 20), passed earlier in this Congress, and S. 185, and that S. 185 will not open the floodgates of corruption and political coercion. The Administration would oppose any exclusion of any Federal employee group from the provisions of an amended Hatch Act, and he does not foresee any concern or difficulty with applying this legislation to the Internal Revenue Service, the FBI or the Department of Justice.

* * * * *

Immigration Legislation And Related Issues

On April 27, 1993, Chris Sale, Acting Commissioner, Immigration and Naturalization Service (INS), testified before the House Judiciary Subcommittee on International Law, Immigration and Refugees regarding pending immigration inspections, asylum reform, and summary exclusion authority legislation. A consensus appears to exist in support of some kind of "summary exclusion" authority, as well as reform of perceived abuses in the political asylum system. In addition, significant attention was focused on the establishment of pre-inspections overseas. Acting Commissioner Sale stated that the White House had all proposals in this area under ongoing review by the Domestic Policy Council, the National Security Council, and the Border Security Working Group.

* * * * *

Brady Handgun Violence Prevention Act

Department of Justice representatives have serious concerns with the current version of the Brady bill. The FBI, the Criminal Division and the Office of Justice Programs have reservations about whether the Department would be able to implement the legislation as it is now drafted. Among other things, the Department and the States would be required to have up and running a nationwide instant criminal background check system within two and a half years of the bill's enactment. Compliance would be difficult if not impossible to achieve. Failure to comply by the target date would subject the Department to significant penalties in terms of reductions in the administrative appropriations.

* * * * *

SUPREME COURT WATCH

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

Selected Cases Recently Decided

Civil Cases:

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

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

Criminal Cases:

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

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

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

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

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

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

Selected Cases Recently Argued

Civil Cases:

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

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

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

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

Criminal Cases:

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

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

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

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

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

Criminal Cases:

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

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

* * * * *

CASE NOTES

CIVIL DIVISION

First Circuit Again Distinguishes Melkonyan In Equal Access To Justice Act Fees Case

In a case brought under the Trade Act of 1974, Cathy Tyler obtained declaratory relief in federal district court against the U.S. Department of Labor. The Trade Act requires that all financial relief come directly from the states, not the federal government. Consequently, the district court's order provided for a remand of Ms. Tyler's claim to the appropriate Maine administrative agency to determine the extent of her financial recovery. After the state agency ruled, Ms. Tyler applied for Equal Access to Justice Act (EAJA) attorneys' fees with the district court. EAJA requires that applications for fees be filed within thirty days of the final judgment in the action. Ms. Tyler's filing was within thirty days of the state administrative decision, but more than thirty days after the final federal court decision. The district court held that Ms. Tyler had waited too long to apply for her EAJA fees.

The First Circuit has now reversed. The court recognized that in 1991 the Supreme Court had said in Melkonyan v. Sullivan that similar applications in the Social Security context would be untimely, but added that this was mere dicta that did not displace the high court's contrary view in the 1989 Hudson v. Sullivan decision concerning cases remanded to federal administrative agencies. The court of appeals also indicated that the district court's remand should be treated as though the court were retaining jurisdiction while the case was in state proceedings.

Tyler v. Fitzsimmons, No. 92-1559 (April 7, 1993) [1st Cir.; D. Me.]. DJ # 145-10-3347

Attorneys: William Kanter - (202) 514-4575
William G. Cole - (202) 514-4549

* * * * *

Third Circuit Reverses District Court's Conclusion That Plaintiffs Were Not Entitled To Attorney's Fees Under The Equal Access To Justice Act And Remands For Determination Of An Appropriate Award

Plaintiffs brought this suit to challenge, on substantive grounds, the Food and Drug Administration's rule banning sulfites on "fresh" potatoes. Ultimately, the district court struck down the rule because FDA failed to place a large portion of the administrative record in its public reading room during the notice and comment period. A Third Circuit panel, accepting our proffer, remanded the case to allow FDA to defend its rule on the basis of the publicly available documents. Sitting en banc,

however, the appellate court affirmed the district court's decision, without opinion, by a 5-5 vote. Thereafter, plaintiffs returned to district court, seeking approximately $500,000 under the Equal Access to Justice Act. The district court denied the request, concluding that the government's position was substantially justified. Plaintiffs appealed.

The Third Circuit (Nygaard, Mansmann, Dalzell) has now reversed and remanded for calculation of an appropriate fee award. The court found that both the agency's prelitigation conduct and its key "no prejudice" argument were unreasonable. Although the result is disappointing, the opinion does contain some language that should help us in other cases. First, the court held that it is not unreasonable for a government agency to assert a position in one court merely because that argument has been rejected in another. Second, the court expressly stated that it was not holding that every argument made by an administrative agency must be substantially justified; nevertheless, district courts must evaluate every significant argument in making the substantial justification determination.

Hanover Potato, et al. v. Shalala, No. 92-7229 (March 19, 1993)
[3d Cir; M.D. Pa.]. DJ # 21-63-84.

Attorneys: Michael J. Singer - (202) 514-5432
Mary K. Doyle - (202) 514-4826

* * * * *

Fourth Circuit Rules That, To Prove Constructive Discharge In Rehabilitation Act Case, Worker Must Show That Employer Intentionally Drove Her From Her Job

Dr. Sharon Johnson worked from 1984 to 1986 as the Executive Secretary to an NIH Study Section that reviewed research grant applications. Unfortunately, she had various ailments, one of which was a form of narcolepsy, a condition that caused her to fall asleep during Study Section meetings. Because her ailments classified her as a handicapped employee, she requested that the NIH make numerous accommodations under the Rehabilitation Act of 1973. While NIH made several accommodations, it failed to satisfy Dr. Johnson's requirements and she resigned. She then filed this lawsuit claiming that she had been constructively discharged. The district court awarded backpay and reinstatement.

The Fourth Circuit has now reversed that decision. In a unanimous opinion written by Judge Wilkinson, the court explained that it was not enough to prove that the NIH's accommodation of Dr. Johnson's handicaps fell short of meeting the Rehabilitation Act's requirements. Since Dr. Johnson had resigned, she had to show that this resignation was actually a constructive discharge; and a constructive discharge requires "a deliberate effort by the employer to force the employee to quit." While the court of appeals noted that Dr. Johnson's supervisors at NIH may well have lacked flexibility and magnanimity in dealing with her handicaps, it added that she had not shown that the agency "intentionally sought to drive her from her position." Absent such a showing, the government was not liable.

Johnson v. Shalala, No. 92-1109 (April 20, 1993)
[4th Cir.; D. Md.]. DJ # 35-35-343.

Attorneys: Robert V. Zener - (202) 514-1597
William G. Cole - (202) 514-4549

* * * * *

Sixth Circuit Upholds Medicaid Provision Requiring Applicants To Cooperate In Establishing Paternity For Children Born Out Of Wedlock

Douglas, who was pregnant and had two minor children, was denied Medicaid benefits because she failed to cooperate in establishing the paternity of her oldest child. She sued, contending that the requirement did not apply to pregnant women and that the Secretary's interpretation of the statute violated equal protection. The district court agreed with Douglas's reading of the statute. While HHS's appeal was pending, Congress amended the Medicaid statute to exempt certain pregnant women from the cooperation requirement. The Sixth Circuit remanded the case and on remand, the district court concluded that the plain language of the statute required Douglas to cooperate. The district court also rejected plaintiff's equal protection claim.

The Sixth Circuit (Ryan, Guy; Merritt, dissenting) has now affirmed. After conducting "an eye-glazing examination of a labyrinthine maze of sections," the court accepted our argument that the statute required plaintiff to cooperate. Citing "fundamental concerns" with the Second Circuit's reasoning in Lewis v. Grinker, a case involving undocumented aliens' entitlement to pregnancy-related Medicaid benefits, the Sixth Circuit declined to rely on "perceived legislative history" or "Congress's unlegislated intent." The court also held that HHS's interpretation of the statute did not violate equal protection. Chief Judge Merritt dissented, criticizing the majority's failure to consider legislative history or congressional intent. This decision enables HHS to continue its successful program of recouping medical costs from fathers. In addition, the decision will be useful in our attempts to limit the impact of the unfavorable decision in Lewis.

Douglas v. Babcock, et al., No. 92-1231 (March 25, 1993) [6th Cir.; E.D. Mich.]. DJ # 137-37-2025.

Attorneys: Michael J. Singer - (202) 514-5432
Jennifer H. Zacks - (617) 576-4647

* * * * *

Ninth Circuit, In Response To Government's Rehearing Petition, Removes Troublesome Language In FTCA Decision Involving A Claim For Negligent Processing Of A Security Clearance

Walter Mundy was an employee of a defense contractor who was denied a "special access" security clearance to work on a classified government project and, as a result, eventually lost his job. Mundy filed an action against the United States under the Federal Tort Claims Act, alleging that his security clearance application had been negligently processed and that he would have received the clearance if certain documents not been misfiled by the FBI and Defense Investigative Service. The government moved to dismiss the claim on the ground that, rather than negligence, Mundy's complaint was really an action for misrepresentation, libel, or interference with contract rights, for which the FTCA has not waived the government's immunity. The district court granted the motion and dismissed the case.

On appeal, the Ninth Circuit disagreed that the cited exceptions to the FTCA applied to the case and it thus reversed and remanded. In the penultimate two paragraphs of its published opinion, the court also addressed a point never briefed but raised by the government only in a Rule 28(j) letter. In that letter, the government cited Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 111 S. Ct. 1104 (1991), which held that courts have no jurisdiction to hear a challenge to the merits of a security clearance denial. The court distinguished Dorfmont on the ground that Mundy was not really seeking

merits review of the denial of his clearance and that, in ruling on his claim of "negligent misfiling," there would be no need for the court to second-guess a discretionary, national security decision of the government. The government sought rehearing, objecting solely to the portion of the court's opinion distinguishing Dorfmont. The petition pointed out that the reasons for, and thus the merits of, Mundy's clearance denial will inevitably have to be considered by the court. We also argued that Congress did not intend to create a cause of action under the FTCA for the negligent processing of a security clearance. Although the court denied the rehearing petition, it first amended its opinion by removing the two paragraphs discussing Dorfmont. The court also added a footnote stating that it would not consider the matter noted in the government's Rule 28(j) letter, because it was raised for the first time on appeal. As a result of the elimination of the troublesome language from the opinion, the government is not precluded from raising on remand its arguments that there is no cause of action under the FTCA at all in this case, and that the discretionary function exception bars jurisdiction. This outcome also preserves the government's option to make such arguments in future cases.

Mundy v. United States, No.91-55771 (April 8, 1993) [9th Cir.; C.D. Cal.]. DJ # 157-12C-5264.

Attorneys: Mark B. Stern - (202) 514-5089
Christine N. Kohl - (202) 514-4027

* * * * *

Tenth Circuit Holds VA's Requirement That Chaplains Be Ordained Discriminates Against Women And Violates Title VII

Murphy sought employment as a Roman Catholic chaplain in a VA hospital. She was denied that position because she had not been ordained by the Church as a member of the clergy. Ordination is required by VA regulations on the ground that the agency wished to provide the full range of religious ministration offered by each faith, and, in the Catholic faith, only ordained clergy could provide such ritual assistance as the last rites, confession, and the Eucharist.

The court of appeals held that, since the Catholic faith ordains only men, the VA ordination requirement discriminates against women and thus violates Title VII. The court concluded that the concerns of the VA were sufficiently addressed under the "endorsement" procedure of the various religious denominations, in which each church determines whether the applicant is qualified to represent that religious community in the specialized ministry of service in the VA hospital. This would permit the employment of women as chaplains if the church determined that ordination was not a necessary requisite for VA service. The court dismissed the VA's concern that the endorsement requirement was inadequate because non-ordained personnel could not perform the full range of pastoral services. It noted that numerous alternative arrangements existed and had frequently been utilized by the agency to obtain the services of qualified, fully ordained clergy on a temporary basis when the need arose. We are studying the case to determine whether to seek further review.

Mary Wilson Murphy v. Edward J. Derwinski, Nos. 91-1393/1402 (April 1, 1993) [10th Cir.; D. Colo.]. DJ # 35-13-387.

Attorneys: Robert S. Greenspan - (202) 514-5428
John C. Hoyle - (202) 514-3469

* * * * *

Eleventh Circuit Holds That HHS Is Authorized Under The Older Americans Act To Recover Overpayments Resulting From A State's Improper Use Of Program Funds

Georgia sued the Department of Health and Human Services seeking to preclude recoupment by the federal government of payments made under the Older Americans Act, 42 U.S.C. 3001 et seq., which were allegedly improperly used by the state. Under the Act, the United States provides assistance to the states for the development and administration of a comprehensive system of services for the elderly. The district court entered summary judgment for the state, holding that the Act permitted disapproval of future state plans in order to ensure future compliance, but did not authorize disallowance and recoupment of misused funds. We appealed, and the Eleventh Circuit (Pittman, Kravitch, Clark) has now reversed.

The court held the statutory language (located in a parenthetical, see 42 U.S.C. 3029(a)) clear in allowing the recovery of misused funds as offsets against future payments under the program (with the state, of course, providing the same pre-offset level of services). The court concluded that the compliance procedure was not exclusive, and that the absence of the word "disallowance" from the statutory language, as well as the absence of legislative history supporting a recoupment remedy, were irrelevant. The court did not reach our alternative argument based on a common law right to recoup funds improperly spent.

Ledbetter v. Shalala, No. 91-8914 (March 17, 1993)
[11th Cir.; N.D. Ga.]. DJ # 137-19-601.

Attorneys: Barbara C. Biddle - (202) 514-2541
Marc Richman - (202) 514-5735

* * * * *

ENVIRONMENT AND NATURAL RESOURCES DIVISION

Endangered Species Act's Prohibition Of Interstate Sales Of Species Killed Before Passage Of The Act Sustained

Defendant Clark was convicted of selling or offering for sale two tiger skin rugs in violation of the Endangered Species Act, 16 U.S.C. 1538(a)(1)(F). He was sentenced to one year of supervised probation, six months home detention and 500 hours of community service under the Sentencing Guidelines. The court of appeals affirmed.

The court of appeals found no merit to Clark's argument that the evidence was insufficient to support his conviction of illegally offering for sale a Siberian tiger skin. The court held that the Endangered Species Act makes clear that it is unlawful to sell in interstate commerce endangered species killed before the enactment of the Act and that statutory exemptions, including the "pre-Act" exemption in 16 U.S.C. 1538(b)(1) does not apply in this case.

The court also rejected Clark's "estoppel by entrapment" defense and evidentiary challenges to the admission of a tape recording (and transcript of the recording) of his conversations with an undercover agent. Finally, the court held that Clark's own statement to an undercover agent that he was trying to get $15,000 for the Siberian tiger skin rug (a statement which Clark argued was mere puffery) is evidence of the skin's market value. Because Clark offered no evidence of value to dispute the presentence report's recommendation, the court concluded that the sentencing judge properly found the Siberian skin to be valued at $15,000, warranting an increase in Clark's offense level under Sentencing Guidelines § 202.1(b)(3)(A).

United States v. David Tannehill Clark, 4th Cir. No. 91-5367 (Feb. 11, 1993) (Butzner, Russell, Luttig)

Attorneys: Evelyn Ying - (202) 514-2754
David Klarquist - (202) 514-2731

* * * * *

Federal Employee Held "Person" Subject To Criminal Prosecution Under Clean Water Act

John Curtis, former Fuels Division Director at Adak Naval Air Station on Adak Island, Alaska, appealed from his conviction on one count of knowingly discharging a pollutant and two counts of negligently discharging a pollutant in violation of the criminal provisions of the Clean Water Act (CWA). The jury convicted Curtis after hearing evidence that Curtis had repeatedly directed his subordinates to pump jet fuel through a pipeline that was known to leak into nearby surface water.

Curtis argued that federal employees are not "persons" subject to criminal prosecution under the CWA. Curtis cited definitions of the word "person" in several other federal statutes, some of which expressly identify state and federal officials as "persons." He argued that the CWA's omission of an explicit statement that federal employees are persons, when contrasted with the other statutes' inclusion of statements to this effect, demonstrated Congress' intention to exempt federal employees from CWA prosecution. The court of appeals found that Curtis' references to the definitional provisions of other statutes were irrelevant because the text of the CWA, which defines "persons" to include "individuals," clearly and unambiguously refuted Curtis' immunity claim.

United States v. Curtis, 9th Cir. No. 92-30235 (March 8, 1993) (Farris and Kleinfeld, Circuit Judges, Ezra, District Judge)

Attorneys: Jeffrey P. Kehne - (202) 514-2767
J. Carl Williams - (202) 514-5313

* * * * *

TAX DIVISION

Supreme Court Rules Against The Federal Government In Intergovernmental Immunity Case

On April 26, 1993, the Supreme Court unanimously ruled in United States v. State of California, et al, that the Federal Government could not recover state sales and use taxes that it claimed were wrongfully assessed against a government contractor. The United States sought to recover $11 million in state sales and use taxes improperly imposed on Williams Brothers Engineering Company (WBEC). Pursuant to a contract with WBEC to manage oil drilling operations on federal land in California, the United States reimbursed WBEC for sales and use taxes assessed by the California State Board of Equalization for the years 1975 through 1981. The United States brought this action to recover the taxes as being wrongfully imposed on WBEC, relying on the federal common law action of indebitatus assumpsit (quasi contract) for recovery of federal funds paid by mistake which resulted in the unjust enrichment of California. In turn, we argued that the statute of limitations for assumpsit actions, rather than the shorter state limitations period applicable to suits seeking a refund of states taxes, controlled in those circumstances.

Justice O'Connor, writing for the Court, ruled that the Federal Government's obligation to indemnify a government contractor for state sales and use taxes did not create a federal cause of action to recover those taxes. Noting that the Government had a right to be subrogated to WBEC's claims against the subrogor, the Court concluded that the state statute of limitations had lapsed with respect to any claims by WBEC, and that the claims of the Untied States were therefore also time barred.

* * * * *

Supreme Court Rules That Taxpayer May Amortize The Value Of Newspaper Subscription Lists

On April 20, 1993, the Supreme Court, by a vote of 5-4, reversed the favorable judgment of the Third Circuit in Newark Morning Ledger Co., as Successor to the Herald Co. v. United States, which presented the question whether the purchaser of various newspapers could amortize the amounts attributed to its purchase of the acquired newspapers' subscription lists. The Third Circuit held that an intangible asset is only amortizable, for tax purposes, if it has a value separate and distinct from goodwill and a reasonably determinable finite useful life. It then found that the taxpayer failed to demonstrate that the subscription lists were different from goodwill.

Justice Blackmun, writing for the majority, rejected the Third Circuit's decision, and found that the taxpayer had borne its substantial burden in proving that the subscription lists were different from goodwill. "[I]f a taxpayer can prove with reasonable accuracy that an asset used in the trade or business * * * has a value that wastes over an ascertainable period of time, that asset is depreciable * * * regardless of the fact that its value is related to the expectancy of continued patronage." In reaching this result, the Court emphasized that the trial court had found as a fact that the newspaper's subscribers at the time of the purchase would provide the newspaper with a "regular and predictable source of income over an estimatable period of time," and were not a self-regenerating asset.

Justice Souter (joined by Chief Justice Rehnquist and Justices White and Scalia) dissented. In the dissent's view, "the concept of 'goodwill' [is] * * * anchored in the patronage a business receives from 'constant or habitual' customers," and thus the value attributed to the repeat business of existing customers is non-amortizable. The dissenters also accepted the Government's argument that the taxpayer had not shown that the subscription lists had an ascertainable life.

The General Accounting Office has estimated that $4 billion in revenue turns on the resolution of cases and audits involving this question. In light of these stakes, the decision here will likely draw media attention.

* * * * *

Fifth Circuit Reverses Tax Court's Denial Of Attorney's Fees In Case Involving The IRS's Burden Of Proof When A Taxpayer Fails To Report Income Shown On A Form 1099

On April 13, 1993, the Fifth Circuit reversed the Tax Court's denial of attorney's fees in Portillo v. Commissioner. In this case, the Fifth Circuit previously ruled that the Commission was not entitled to the normal presumption of correctness when he determined that a taxpayer had understated income by failing to include all amounts of income reported on a Form 1099 filed by a contractor who had employed the taxpayer. Rejecting reliance on both the Form 1099 and the payor's testimony, the court of appeals reversed the decision of the Tax Court upholding the deficiency.

The court of appeals has now taken this matter one step further, The Tax Court, finding that the Government's position was substantially justified, denied the taxpayer's request for attorney's fees. The Fifth Circuit reversed, characterizing the deficiency notice as a "naked assessment" and concluding that the Internal Revenue Service did not have a reasonable basis for defending it. The court of appeals thus failed to give any credence to the issuer's testimony (which the Tax Court had found credible) for the purpose of determining whether the Internal Revenue Service was substantially justified in defending the deficiency. The court of appeals also noted that it would refrain "at this time" from imposing sanctions against counsel for defending the Tax Court's ruling.

Because thousands of deficiency determinations are made each year based on a matching of Forms 1099 and related income tax returns, this case could pose serious administrative problems.

* * * * *

Fifth Circuit Rules That Plaintiffs Lacked Standing To Challenge The Constitutionality Of Statutory Provisions Extending Benefits To Others In En Banc Rehearing

On April 9, 1993, the Fifth Circuit, sitting en banc, issued its opinion in Apache Bend Apartments, Ltd. v. United States, holding that the plaintiffs lacked standing to maintain this suit. The plaintiffs sought declaratory and injunctive relief with respect to certain targeted transition rules enacted as part of the Tax Reform Act of 1986, claiming that these rules violated the Equal Protection Clause of the United States Constitution. Among the provisions challenged were those excepting certain taxpayers (not the plaintiffs) from the repeal of the investment credit and of accelerated depreciation.

The Government filed a motion to dismiss, contending that the plaintiffs lacked standing to contest benefits granted to other taxpayers. The District Court refused to dismiss the complaint on this basis, but later granted summary judgment in favor of the Government, reasoning that Congress had a rational basis for granting specific transitional relief to certain classes of taxpayers. On appeal, the Tax Division defended the judgment of the District Court on the merits, but again argued that the District Court lacked subject matter jurisdiction over the action. The Fifth Circuit affirmed the District Court's decision in all respects, with one judge dissenting on the basis that the plaintiffs did not have standing to maintain the suit. On September 24, 1992, the Fifth Circuit entered an order granting rehearing en banc sua sponte.

On rehearing, the Fifth Circuit held (10-4) that the plaintiffs lacked standing to maintain the suit, finding that the "injury" asserted by them merely amounted to a "generalized grievance," and that their "stake in the outcome of this dispute is no greater than any other taxpayer's."

* * * * *

Second Circuit Sustains District Court In Case Involving The Imposition Of Penalties For Promoting An Abusive Tax Shelter

On March 22, 1993, the Second Circuit affirmed the judgment of the district court in In re Tax Refund Litigation, imposing $15.7 million in penalties against the organizers and promoters of a book-publishing tax shelter, finding ample evidence to sustain the decision that the corporate purchase agreed to a grossly excessive purchase price for book works in order to inflate the tax benefits available to investors. On Government cross-appeal, the court of appeals also affirmed the District Court's decision, refusing to permit the IRS to impose the penalty against both a partnership and its partners.

* * * * *

OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Carol DiBattiste, Director, Office of Legal Education and the members of the OLE staff, thank the following Assistant United States Attorneys (AUSAs), Department of Justice officials, and Department of Justice and Federal agency personnel for their outstanding teaching assistance and support during courses conducted from March 15 - April 16, 1993. (All persons listed below are Assistants United States Attorneys unless otherwise indicated).

Land Acquisitions (Washington, D.C.)

Virginia Butler, Assistant Chief, Land Acquisition Section; ***J. Steven Rogers,*** Assistant Chief, Environmental Defense Section; ***James Brookshire,*** Deputy Chief, General Litigaton Section, ***Jim Eaton,*** Assistant Chief Appraiser, Land Acquisition Section; ***Bruce Gelber,*** Assistant Chief, Environmental Enforcement Section; all from the Environment and Natural Resources Division. ***David Coursen,*** Senior Takings Attorney, Office of General Counsel, Environmental Protection Agency.

Advanced Narcotics (Albuquerque, New Mexico)

David Margolis, Acting Deputy Assistant Attorney General, Criminal Division; ***Miguel Estrada,*** Assistant to the Solicitor General; ***Lawrence Finder,*** United States Attorney, Southern District of Texas; ***Reid Pixler*** and ***David Shapiro,*** District of Arizona; ***Rory Little,*** Chief, Appellate Section, Northern District of California; ***John Kennedy,*** Attorney Coordinator, Northwest Region, Organized Crime/Drug Enforcement Task Force, Northern District of California; ***Mike McCrum,*** Western District of Texas; ***Alexandra Rebay,*** Chief, Special Narcotics and Investigative Unit, Southern District of New York; ***Paul Fishman,*** First Assistant United States Attorney, District of New Jersey; ***Michael P. Sullivan,*** Senior Litigation Counsel, ***James McAdams,*** Managing Assistant, and ***Guy Lewis,*** Southern District of Florida; ***John Vaudreuil,*** Senior Litigation Counsel, Western District of Wisconsin. ***Mary Lee Warren,*** Chief, and ***Bruce Pagel,*** Deputy Chief, Narcotic and Dangerous Drug Section; ***Stephen T'Kach,*** Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations, and ***Mary Ellen Warlow,*** Deputy Director, Office of International Affairs, all from the Criminal Division. ***Robert Nieves,*** Director, Office of Major Investigations, and ***Robert Grant,*** Deputy Chief, Financial Investigations, Drug Enforcement Administration.

Examination Techniques (Washincton, D.C.)

Richard Parker and ***Dennis Kennedy,*** Eastern District of Virginia; ***Nathan Fishbach,*** Eastern District of Wisconsin; ***Scott Glick,*** Attorney, Criminal Division; ***Michael Reed,*** Attorney, Environment and Natural Resourses Division; ***David Deutsch,*** Senior Trial Counsel, and ***Poli Marmolejos,*** Special Assistant, Office of Assistant Attorney General, Civil Rights Division; ***Robert Erickson,*** Deputy General Counsel, and ***Jeff DelFucco,*** Associate General Counsel, U.S. Marshals Service. ***Tom Ruane,*** Senior Trial Attorney, Antitrust Division; ***Tarek Sawi,*** Trial Attorney, Torts Branch, Civil Division. ***Richard Foster,*** Chief Attorney, Office of Civil Rights, Department of Education. ***Gary Fox,*** Chief Counsel for Special Litigation, Small Business Administration.

FOIA for Attorneys and Access Professionals (San Antonio, Texas)

Richard Huff, Co-Director; ***Miriam Nisbet,*** Deputy Director; ***Margaret Ann Irving,*** Associate Director; ***Charlene Wright,*** Deputy Chief, Initial Request Unit; ***Michael Hughes,*** Attorney Advisor; ***Anne Work,*** Attorney Advisor; all from the Office of Information and Privacy. ***J. Kevin O'Brien,*** Section Chief, FOI/PA Section, Federal Bureau of Investigation. ***Kenneth Wernick,*** Associate Counsel, Naval Sea Systems Command, Department of the Navy.

Developments in Torts Law (New Orleans, Louisiana)

Joan Garner and ***Susan Dein Bricklin,*** Eastern District of Pennsylvania; ***Julie Zatz,*** Central District of California; ***Steve Mullins,*** Western District of Oklahoma; ***David Collins,*** District of Maine; ***Irene Dowdy*** and ***Bette Uhrmacher,*** District of New Jersey; ***Paula Billingsley,*** Northern District of Texas; and ***Nancy Nungesser,*** Eastern District of Louisiana. From the Torts Branch, Civil Division: ***Jeffrey Axelrad,*** Director; ***Paul Figley,*** Deputy Director; ***Lawrence Klinger,*** Assistant to the Director; ***Roger Einerson,*** Assistant Director; ***Phyllis Pyles,*** Assistant Director; ***Nikki Calvano,*** Special Counsel; ***Mary Leach,*** Senior Trial Attorney; and the following trial attorneys: ***James Touhey, Daniel Unumb, Gail Johnson, Pat Reedy, Paul Boudreaux, Marie Louise Hagen, and Lisa Goldfluss.***

In-House Criminal Asset Forfeiture (Las Vegas and Reno, Nevada)

Art Leach, Northern District of Georgia; ***Terry Derden,*** Eastern District of Arkansas; and ***Daniel Hollingsworth,*** District of Nevada.

Civil Trial Advocacy (Washington, D.C.)

Nina Hunt, Northern District of Georgia; ***Bill White,*** Southern District of Florida; ***Pam Thompson*** and ***Ross McKenzie,*** Eastern District of Michigan; ***Amy Hay,*** Western District of Pennsylvania; ***Monte Clausen,*** District of Arizona, ***Elizabeth Burnett*** and ***Jack Robinson,*** Southern District of California; ***Hays Jenkins, Susan Kempner*** and ***Claude Hippard,*** Southern District of Texas; ***Kathleen Torres,*** District of Colorado; ***Roger Griffith,*** Western District of Oklahoma; ***Eneid Francis,*** Eastern District of Louisiana; ***Lois Davis,*** Eastern District of Pennsylvania; ***Mollie Crosby,*** Western District of Texas; ***Paul Newby,*** Eastern District of North Carolina; ***Bob Williams,*** Western District of Tennessee; ***Robert Desousa*** and ***Robert Long,*** Middle District of Pennsylvania; ***Willis Buell,*** Southern District of Iowa; ***Mattie Compton,*** Northern District of Texas; ***Bill Campbell,*** Western District of Kentucky; ***Stephanie Johnson,*** Eastern District of Washington; and ***Barbara Kammerman,*** Civil Rights Division.

Environmental Law (San Francisco, California)

From the Environment and Natural Resources Division, Washington, D.C.: ***William Cohen,*** Chief, and ***James Brookshire,*** Deputy Chief, General Litigation Section; ***John Cruden,*** Chief, Environmental Enforcement Section; ***Tom Pacheco,*** Assistant Chief; and ***Steve Rogers,*** Assistant Chief, Environmental Defense Section; ***Mark Harmon,*** Unit Chief, Environmental Crimes Section; ***Annie Petsonk,*** Attorney, Policy, Legislation and Special Litigation Section; ***Charles Shockey,*** Attorney, Wildlife and Marine Resources Section. ***Michael Gheleta,*** Attorney, Denver Field Office; ***Maria Iizuka,*** Attorney, Sacramento Field Office, Environment and Natural Resources Division; ***Jim Coda, Pat Bupara,*** and ***Frank Boone,*** all from the Northern District of California. ***Peter Hsiao,*** Central District of California; ***Ed Brennan,*** Eastern District of California; ***Bob Taylor,*** Western District of Washington; ***Lydia Grimm,*** Attorney, Office of General Counsel, Department of Agriculture, San Francisco; ***Thomas Hagler,*** Office of Regional Counsel, Environmental Protection Agency, San Francisco; ***Ralph Mihan,*** Field Solicitor, Department of Interior, San Francisco; and ***Stephanie Smith,*** Director, Alternative Dispute Resolution Programs, United States District Court, Northern District of California.

Basic Paralegal Skills (Washington, D.C.)

Robert Eaton, Chief, Asset Forfeiture Unit, District of Columbia; ***Rachel Ballow,*** Eastern District of Virginia; ***Heather Jacobs,*** Program Manager, Priority Programs Team, EOUSA; ***Curtis Wolf,*** Attorney Advisor, Office of Legal Counsel, EOUSA; and ***Gary Padgett,*** Management Analyst, Evaluation and Review Staff, EOUSA.

Introduction to FOIA (Washington, D.C.)

Carol Hebert, Attorney Advisor; ***Kirsten Moncada,*** Attorney; and ***Michael Hughes,*** Attorney Advisor; all from the Office of Information and Privacy.

In-House Criminal Asset Forfeiture (Miami and Fort Lauderdale, Florida)

Lee Radek, Director; ***Harry Harbin,*** Assistant Director; ***Karen Tandy,*** Chief, Litigation Unit; and ***Stefan Cassella,*** Staff Attorney; all from the Asset Forfeiture Office, Criminal Division. ***Art Leach,*** Northern District of Georgia.

Health Care Fraud (Columbia, South Carolina)

Margaret Seymour, United States Attorney, District of South Carolina. ***Dan Mills,*** Western District of Texas. ***James Sheehan,*** Civil Chief, ***Judy Smith*** and ***Valli Baldassano,*** from the Eastern District of Pennsylvania. ***David Bosely*** and ***Deborah Solove,*** Southern District of Ohio; ***Michael Loucks,*** District of Massachusetts; ***Jeanne Damirgian,*** Southern District of Florida; ***R. Timothy Jansen,*** Middle District of Florida; ***Ellen Silverman-Zimiles,*** Southern District of New York; ***Carol Lam,*** Southern District of California; ***Cedric Joubert,*** Southern District of Texas; ***Thomas Daly,*** Southern District of Illinois; ***Bruce Carter,*** Southern District of Washington; ***Dr. Philip Pitzen, Jr.,*** Administrative Officer, Southern District of Iowa; ***Karen Morrissette,*** Deputy Chief, ***Deborah Smith,*** Senior Litigation Counsel, and the following trial attorneys: ***Laurence Freedman, Ankur Goel,*** and ***Kevin Mattessich,*** all from the Fraud Section, Criminal Division. ***Cassandra Chandler,*** Supervisory Special Agent, ***Everett Cook,*** and ***Jaclyne Zappacosta,*** Special Agents, all from the Federal Bureau of Investigation. ***Sam Littleton,*** Special Agent, Defense Criminal Investigative Service. ***Lewis Morris,*** Office of General Counsel, Office of Inspector General, Health and Human Services, Washington, D.C.; and ***Carolyn Jackson,*** Office of Inspector General, Health and Human Services, Philadelphia.

Alternative Dispute Resolution For Agency Counsel (Washington, D.C.)

Charles Bethal, Deputy Director, Multi-Door Dispute Resolution Division, District of Columbia Superior Court. ***Nancy Miller,*** Senior Attorney, Office of the Chairman, ***David Pritzker,*** Senior Attorney, and ***Sandra Shapiro,*** Distinguished Visiting Executive, all from the Administrative Conference of the United States. ***Michael Terry,*** Deputy Director for Dispute Resolution Programs, U.S. Courts for the District of Columbia Circuit. ***Timothy Nacaratto,*** Special Counsel to the Assistant Attorney General, Civil Division; ***Eileen Hoffman,*** General Counsel, Federal Mediation and Conciliation Service; ***Donale Greenstein,*** Paralegal Specialist, Tax Division; ***Peter J.B. Swanson,*** Alternative Dispute Resolution Coordinator, Office of Field Services and Training, Federal Mediation and Conciliation Service; and ***Debra Kossow,*** Senior Admiralty Counsel, Aviation and Admiralty Section, Torts Branch, Civil Division.

* * * * *

1993 FEDERAL GRAND JURY PRACTICE MANUAL

On April 16, 1993, OLE sent a copy of the Federal Grand Jury Practice Manual on a 5 1/4" diskette to all First Assistant United States Attorneys and asked that they reproduce the diskette locally and distribute copies to AUSAs in Criminal Divisions and to other interested personnel. The Manual was published in early 1993 by the Office of Professional Development and Training of the Criminal Division, Department of Justice.

If you have any questions concerning the diskette, please contact David Downs at (202) 208-7574.

* * * * *

PENNSYLVANIA MANDATORY CONTINUING LEGAL EDUCATION

The Pennsylvania Supreme Court recently determined that they would not grant the Office of Legal Education an exception to Pennsylvania's rules which require that all ethics courses offered to meet Pennsylvania's mandatory CLE requirements must be open to both government attorneys and private practitioners. OLE's mandate is to train "federal" legal personnel, not private practitioners; thus, the Pennsylvania Supreme Court will not certify OLE's ethics courses for credit in Pennsylvania.

Anyone needing ethics credit for Pennsylvania should contact the Supreme Court of Pennsylvania Continuing Legal Education Board at (800) 49PACLE to obtain a list of course offerings and dates.

* * * * *

COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of May through September 1993, for both the Attorney General's Advocacy Institute (AGAI) and the Legal Education Institute (LEI). AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel and to paralegal and support personnel in United States Attorneys' offices.

AGAI Courses

The courses listed below are tentative only. OLE will send an announcement via Email aproximately 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.

May, 1993

Date	*Course*	*Participants*
3-7	Appellate Advocacy	AUSAs, DOJ Attorneys
11-13	Asset Forfeiture Component Seminar	8th Circuit (AUSAs, Support Staff, LECC Coordinators)
12-13	Ethics Seminar - USAOs	Ethics Advisors (AUSAs, Support Staff)
12-14	Civil Chiefs - USAOs	Chiefs (Small and Medium USAOs)
17-21	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
17-28	Basic Civil Trial Advocacy	AUSAs, DOJ Attorneys

June, 1993

Date	Course	Participants
2-4	USAO Attorney Management	Supervisory AUSAs
2-4	Bankruptcy Fraud	AUSAs, DOJ Attorneys
8-10	Prison Litigation	AUSAs, DOJ Attorneys
8-11	Child Sex Abuse	AUSAs, DOJ Attorneys
15-17	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
15-18	Violent Crimes	AUSAs, DOJ Attorneys
21-25	Financial Crimes	AUSAs, DOJ Attorneys
21-25	Basic Narcotics	AUSAs, DOJ Attorneys
21-25	Appellate Advocacy	AUSAs, DOJ Attorneys
22-24	Money Laundering	AUSAs, DOJ Attorneys
22-25	Evidence for Experienced Criminal Litigators	AUSAs

July, 1993

7-9	Criminal Chiefs - USAOs	Chiefs (Small USAOs)
12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
19-23	Financial Litigation For AUSAs	AUSAs
20-23	Basic Attorney Asset Forfeiture	AUSAs, DOJ Attorneys
26-30	Appellate Advocacy	AUSAs, DOJ Attorneys
27-29	Environmental Crimes	AUSAs, DOJ Attorneys
28-30	Criminal Enforcement of Child Support	AUSAs, DOJ Attorneys

August, 1993

Date	***Course***	***Participants***
9-11	Complex Prosecutions	AUSAs, DOJ Attorneys
11-12	Alternative Dispute Resolution - Civil	AUSAs, DOJ Attorneys
11-12	Ethics Seminar - USAOs	Ethics Advisors (AUSAs, Support Staff)
11-13	Criminal Chiefs - USAOs	Chiefs (Large USAOs)
17-19	Advanced Bankruptcy	AUSAs, DOJ Attorneys, Paralegals
17-20	Evidence Seminar for Experienced Criminal Litigators	AUSAs
18-20	Criminal Enforcement of Child Support	AUSA, DOJ Attorneys
24-26	Affirmative Civil Litigation	AUSAs, DOJ Attorneys
30-Sep 3	Appellate Advocacy	AUSAs, DOJ Attorneys

September, 1993

1-3	Appellate Chiefs	Appellate Chiefs - USAOs
8-10	First Assistants - USAOs	FAUSAs (Large USAOs)
14-16	USAO Attorney Management	Supervisory AUSAs
14-17	Computer Crimes	AUSAs, DOJ Attorneys
20-24	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
21-23	Asset Forfeiture Component Seminar	IOth Circuit (AUSAs, Support Staff, LECC Coordinators)
21-23	Basic Bankruptcy	AUSAs, DOJ Attorneys, Paralegals
21-23	International Issues	AUSAs, DOJ Attorneys
28	Executive Session (Debt Collection)	U.S. Attorneys

LEI Courses

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices (indicated by an * below). Approximately eight weeks prior to the commencement of each course OLE will send an announcement via Email to all United States Attorneys' offices officially announcing the course and requesting nominations. The nominations are sent to OLE via Fax. Once a nominee is selected, OLE funds all costs for paralegal and support staff from United States Attorneys' offices.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to Federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. Attached at the Appendix of this Bulletin as Exhibit B 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 *).

May, 1993

Date	*Course*	*Participants*
4-6	Law of Federal Employment	Attorneys
11-13	Basic Negotiations	Attorneys
18-19	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
18-20	Discovery	Attorneys
19-21	Attorney Management	Supervisory Attorneys
20	Privacy Act	Attorneys, Paralegals, Support Staff
26	Statutes and Legislative Histories	Attorneys, Paralegals
27	Computer Acquisition	Attorneys

June, 1993

2-3	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
2-4*	Civil Paralegal	Paralegals (2-4 yrs. experience), USAOs and DOJ Divisions

June, 1993 (Cont'd.)

Date	***Course***	***Participants***
4	Privacy Act	Attorneys, Paralegals, Support Staff
8	Advanced FOIA	Attorneys, Paralegals
8-11	Examination Techniques	Attorneys
14-18*	USAO Support Staff Training (Civil and Criminal)	GS 4-7 - 11th Circuit Region
15	Ethics and Professional Conduct	Attorneys
22-23	Federal Acquisition Regulations	Attorneys
24	Fraud, Debarment and Suspension	Attorneys
29	Computer Law	Attorneys
	July 1993	
7	Computer Assisted Legal Research	Attorneys, Paralegals
7-8	Federal Administrative Process	Attorneys
13-15	Environmental Law	Attorneys
16	Legal Writing	Attorneys
19-22*	Basic Criminal Paralegal	Paralegals, USAOs
	August, 1993	
3	FOIA Administrative Forum	Attorneys, Senior FOIA Processors, and Unit Leaders
3-5	Discovery Techniques	Attorneys
4	Ethics and Professional Conduct	Attorneys, Ethics Officers
9-10	Evidence	Attorneys

August, 1993 (Cont'd.)

Date	*Course*	*Participants*
11-13	Attorney Management	Supervisory Attorneys
17-19	Advanced Bankruptcy	AUSAs, Attorneys, Paralegals
17-20*	USAO Experienced	Civil/Criminal Paralegals (5+ yrs. experience)
23-25	Basic Negotiations	Attorneys
26	Introduction to FOIA	Attorneys, Processors, Technicians
31	Appellate Skills	Attorneys

September, 1993

1-2	Agency Civil Practice	Attorneys
7-10	Examination Techniques	Attorneys
13-24*	Financial Litigation for Paralegals	Financial Litigation Paralegals, USAOs
21-23	Basic Bankruptcy	AUSAs, Attorneys, Paralegals
21-23	Law of Federal Employment	Attorneys, Paralegals
24	Legal Writing	Attorneys
28-30	Discovery	Attorneys

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

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

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

Director..... Carol DiBattiste
Deputy Director..... David Downs
Assistant Directors:
(AGAI-Criminal)..... Ted McBride
(AGAI-Civil & Appellate)..... Ron Silver
(AGAI-Asset Forfeiture)..... Suzanne Warner
(AGAI-Debt Collection and LEI)..... Nancy Rider
(LEI)..... Donna Preston
(LEI-Paralegal & Support)..... Donna Kennedy

* * * * *

ADMINISTRATIVE ISSUES

Use Of The DOJ Diners Club Card

In a memorandum dated January 25, 1993, Anthony C. Moscato, Director, Executive Office for United States Attorneys, reminded all United States Attorneys of the proper and authorized use of the Diners Club card issued by the Department of Justice (DOJ). In order to prevent the misuse of the Diners Club card program, employees should understand that they are not authorized to access funds through the automatic teller system (ATM), obtain airline tickets at a reduced government rate, or purchase goods for their own use without proper authorization. Use of Diners Club cards by DOJ employees for authorized business travel is a privilege -- not a right. Personal use of the Diners Club card under any circumstance is a violation of the contract between Citicorp/Diners Club and DOJ, and such use is specifically prohibited in the application agreement signed by each cardholder.

Use of a DOJ-issued Diners Club card is permitted for authorized business travel and related expenses, and authorized ATM cash withdrawals for business expenses. An employee may only use a Diners Club card for official travel expenses incurred pursuant to a signed DOJ-501 "Official Travel Request and Authorization" form. The DOJ-501 should clearly state whether an ATM cash advance is authorized and specify the amount that is to be obtained if the amount exceeds the base amount authorized per day (currently $40 per day). Diners Club ATM advances are to be obtained solely for authorized DOJ travel.

Although the DOJ supports those employees who participate in military activities, the use of a DOJ Diners Club card for travel or expenses relating to military activities is prohibited. Travel for military activities must be coordinated with the individual's military unit. The Department of Defense, with the concurrence of the General Services Administration, has entered into its own Diners Club contract for related expenses and has issued cards to authorized individuals.

Prohibited uses of DOJ Diners Club card and ATM cash advances include:

* Personal expenses, including but not limited to, goods and services purchased at department stores, drug stores, grocery stores, etc.

* Charging for restaurant meals while not on authorized travel.

* Personal travel and related expenses, including but not limited to, airline tickets, accommodations and rental cars. (The Diners Club card cannot be used to obtain discounts on airline tickets, rental cars, etc., for travel on other than DOJ official business.)

* Travel and/or expenses related to military activities.

* ATM cash withdrawals for personal use or any purpose other than a travel advance.

* ATM cash withdrawals not supported by a properly signed travel authorization form or an "after the fact" supervisory approval of emergency withdrawals while on travel.

* ATM cash withdrawals in excess of amounts necessary for authorized travel expenses.

Misusing a DOJ Diners Club card is considered misconduct and is cause for disciplinary action ranging from a written reprimand to removal. This is true even if the employee promptly and completely pays the bill when it is received. Personal emergencies do not justify using ATM withdrawals and are considered misuse of the card. Cases involving the misuse of the DOJ Diners Club card must be referred to the Office of Legal Counsel, Executive Office for United States Attorneys. These cases may also be referred to the Office of Professional Responsibility for additional review.

If you have any questions about use of DOJ Diners Club cards, call Tracey Splaine in the Legal Counsel's office at (202) 501-6930.

* * * * *

CAREER OPPORTUNITIES

Office Of Attorney Personnel Management

The Office of Attorney Personnel Management, Department of Justice, is seeking an attorney for its areas of responsibility in the management of attorney personnel programs, policies, and operations. The office is responsible for personnel management (e.g., recruitment/hiring, promotions/incentive awards, disciplinary actions/terminations) for the Department's 8,000 attorneys. Please note that this position entails significant legal practice but is primarily a management one. The position is supervisory and has primary responsibilities for: review of the most complex background investigations conducted by the Federal Bureau of Investigation; advising and counselling Department officials on proposed disciplinary and adverse actions; supervision of the recruitment program for experienced attorneys; and formulation/management of the office budget. The attorney will also undertake a wide variety of assignments, including: research on a variety of personnel-related legal issues; review of policy proposals for compliance with statutes, regulations, and guidance from the Office of Personnel Management; review of requests for exceptions to Department policy; and recruitment activities (public speaking). The position requires work of a highly sensitive nature, and much interpersonal contact.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have several years of post-J.D. experience. A background which includes supervisory, budget, private practice and Federal experience is highly desirable. Applicants should submit a resume and writing sample to: Office of Attorney Personnel Management, Room 6150, Department of Justice, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, Attn: Box I.

Current salary and years of experience will determine the appropriate grade and salary levels. The likely hiring range is GS-13 ($47,920 - $62,293) to GS-14 ($56,627 - $73,619). For exceptional experience, a GS-15 ($66,609 - $86,589) can be considered. No telephone calls, please.

* * * * *

Office of United States Trustee
Fresno, California; Columbus, Ohio; Houston, Texas

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney to manage the legal activities of the United States Trustee's office in Fresno, California, Columbus, Ohio, and Houston, Texas.

For the U.S. Trustee's Office in Fresno, California, and Columbus, Ohio, responsibilities include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, and 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 United States Attorney's office for possible prosecution, as well as participating 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 at least three years of bankruptcy law experience. Applicants must submit a resume, salary history and SF-171 (Application for Federal Employment) to:

Department of Justice
Office of the U.S. Trustee
250 Montgomery St., Suite 910
San Francisco, California 94104-3401
Attn: Mark St. Angelo

Department of Justice
Office of the U.S. Trustee
113 St. Clair Ave., NE, Suite 200
Cleveland, Ohio 44114
Attn: M. Scott Michel

Current salary and years of experience will determine the appropriate salary level. The possible range is $52,000 to $94,400. This advertisement is issued in anticipation of a future vacancy. No telephone calls, please.

* * * * *

For the U.S. Trustee's Office in Houston, Texas, responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court.

Applicants must possess a J.D. degree, have at least five years of legal experience, and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential, and litigation experience and familiarity with bankruptcy law and the principles of accounting are important. Applicants must submit a resume and law school transcript to:

Office of the U.S. Trustee
Department of Justice
440 Louisiana St., Suite 2500
Houston, Texas 77002
Attn: Christine A. March

Current salary and years of experience will determine the appropriate salary level. The possible range is GS-14 ($56,627 to $73,619) to GS-15 ($66,609 - $86,589). This advertisement is issued in anticipation of a future vacancy. 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%		
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%		
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%		
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%		
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%		
11-17-89	7.69%	03-08-91	6.46%	06-26-92	4.11%		
12-15-89	7.66%	04-05-91	6.26%	07-24-92	3.51%		
01-12-90	7.74%	05-03-91	6.07%	08-21-92	3.41%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 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	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Joseph W. Bottini
Arizona	Daniel G. Knauss
Arkansas, E	Richard M. Pence, Jr.
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	Robert M. Twiss
California, C	Terree A. Bowers
California, S	James W. Brannigan, Jr.
Colorado	James R. Allison
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	J. Ramsey Johnson
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Roberto Martinez
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Jay D. Gardner
Guam	Frederick A. Black
Hawaii	Elliot Enoki
Idaho	Maurice O. Ellsworth
Illinois, N	Michael J. Shepard
Illinois, S	Frederick J. Hess
Illinois, C	Byron G. Cudmore
Indiana, N	David A. Capp
Indiana, S	John J. Thar
Iowa, N	Robert L. Teig
Iowa, S	Christopher D. Hagen
Kansas	Jackie N. Williams
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Robert J. Boitmann
Louisiana, M	P. Raymond Lamonica
Louisiana, W	William J. Flanagan
Maine	Jay P. McCloskey
Maryland	Gary P. Jordan
Massachusetts	A. John Pappalardo
Michigan, E	Ross Parker
Michigan, W	John A. Smietanka
Minnesota	Francis X. Hermann
Mississippi, N	Alfred E. Moreton, III
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Michael A. Jones

DISTRICT	U.S. ATTORNEY
Montana	Lorraine I. Gallinger
Nebraska	Ronald D. Lahners
Nevada	Monte Stewart
New Hampshire	Peter E. Papps
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Gary L. Sharpe
New York, S	Roger S. Hayes
New York, E	Mary Jo White
New York, W	Dennis C. Vacco
North Carolina, E	James R. Dedrick
North Carolina, M	Benjamin H. White, Jr.
North Carolina, W	Jerry W. Miller
North Dakota	Gary Annear
Ohio, N	Patrick J. Foley
Ohio, S	Barbara L. Beran
Oklahoma, N	Frederick L. Dunn, III
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	John E. Green
Oregon	Jack C. Wong
Pennsylvania, E	Michael J. Rotko
Pennsylvania, M	Wayne P. Samuelson
Pennsylvania, W	Thomas W. Corbett, Jr.
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Edwin J. Gale
South Carolina	Margaret B. Seymour
South Dakota	Ted L. McBride
Tennessee, E	David G. Dake
Tennessee, M	Ernest W. Williams
Tennessee, W	Daniel A. Clancy
Texas, N	Richard H. Stephens
Texas, S	Lawrence D. Finder
Texas, E	Robert J. Wortham
Texas, W	James H. DeAtley
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Hugh Prescott Mabe, III
Virginia, E	Kenneth E. Melson
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Susan L. Barnes
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	Nathan A. Fishbach
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick A. Black

* * * * *

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT A

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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

VOLUME 5 • NUMBER 11 • APRIL 22, 1993

Offense Conduct

DRUG QUANTITY

Fifth Circuit sets method to calculate offense level when drug and precursor chemical are present in single offense. Defendant pled guilty to possession of amphetamine with intent to distribute. A quantity of phenylacetic acid, a precursor chemical, was included as relevant conduct in the offense level. The PSR converted the amphetamine and phenylacetic acid to marijuana equivalents, using the Drug Equivalency Table in § 2D1.1, and added the results for an offense level of 34. Defendant argued that, because his offense occurred after the effective date of § 2D1.11, it was plain error to not use that section for the phenylacetic acid.

The appellate court remanded, agreeing that § 2D1.11 should have been considered. However, the Guidelines "do not provide an express method for combining section 2D1.11 precursor chemicals with section 2D1.1 controlled substances or immediate precursors where, as here, the presence of the precursor chemical is merely conduct relevant to possession of a controlled substance." The equivalency tables in §§ 2D1.1 and 2D1.11 convert to different substances and there is "no cross-equivalency table, nor is there any indication elsewhere in the Guidelines as to how quantities of controlled substances and precursor chemical are to be aggregated when relevant conduct is involved."

The court looked to the multiple counts guideline for an appropriate way to combine the amounts. It determined that they should be treated as separate offenses groupable under § 3D1.2(d), which "mentions sections 2D1.1 and 2D1.11 explicitly and allows grouping on the basis of the quantity of the substance or substances involved." That still left the problem of aggregating the different amounts noted above. "The solution that seems most reasonable to us . . . is to convert the phenylacetic acid to marijuana by equating the amounts of each that would give rise to the same offense level" in their respective quantity tables in §§ 2D1.1 and 2D1.11. Using this method, the phenylacetic acid here would have the same offense level as 400–700 kilograms of marijuana under § 2D1.1. The amphetamine converted to 90.72 kilograms of marijuana, using the Drug Equivalency Table in § 2D1.1(c), comment. (n.10). "Giving the defendant the benefit of lenity," the court used 400 kilograms for the phenylacetic acid, for an offense level of 28 for the combined 490.72 kilogram equivalent.

U.S. v. Hoster, No. 92-8223 (5th Cir. April 7, 1993) (Garwood, J.).

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

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit holds that departure may be permitted for "sentencing entrapment," but was improper in this case. Defendant made seven sales of crack cocaine to an undercover officer. He was convicted on six counts of distribution and one count of possession with intent to distribute. The district court departed pursuant to 18 U.S.C. § 3553(b), finding that the continuation of sales after the fourth transaction constituted "sentencing entrapment" that was not adequately considered by the Sentencing Commission.

The appellate court upheld the principle, but reversed on the facts: "[W]e hold that sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines, but factually was not present in this case . . . . While we are concerned with the government conduct in this case, Barth has failed to demonstrate that the government's conduct was outrageous or that the undercover officer's conduct overcame his predisposition to sell small quantities of crack cocaine." The court added that it would "not attempt to determine in the abstract what is permissible and impermissible conduct on the part of government agents. We share the confidence of the First Circuit that when a sufficiently egregious case arises, the sentencing court may deal with the situation by excluding the tainted transaction or departing from the Sentencing Guidelines." (Reference is to *U.S. v. Connell*, 960 F.2d 191, 196 (1st Cir. 1992).) *Contra U.S. v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992) (rejected sentencing entrapment theory "as a matter of law").

U.S. v. Barth, No. 92-2152 (8th Cir. Apr. 6, 1993) (McMillian, J.).

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

D.C. Circuit holds that definition of "non-violent offense" in § 5K2.13, p.s. is not controlled by § 4B1.2 definition of "crime of violence." Defendant robbed a bank by using a threatening note. He was unarmed, did not harm anyone, and shortly thereafter surrendered to police without struggle. His request for downward departure for "significantly reduced mental capacity," § 5K2.13, p.s., was denied by the district court, which ruled "as a matter of law" that use of the threatening note was an act of violence that precluded a § 5K2.13 departure in a "non-violent offense."

The appellate court remanded, holding that the district court should examine the circumstances of the offense to determine whether it was, in fact, non-violent. The court noted that "'non-violent offense' . . . is not defined in section 5K2.13 or anywhere else in the guidelines, nor does section 5K2.13 provide examples of 'non-violent offense[s].' To give content to that term, a number of courts have looked to the definition of 'crime of violence' found in section 4B1.2" for career offenders. *See, e.g., U.S. v. Poff*, 926 F.2d 588, 591–92 (7th Cir. 1991) (en banc); *U.S. v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990); *U.S. v. Borrayo*, 898 F.2d 91, 94 (9th Cir. 1989); *U.S. v. Maddalena*, 893 F.2d 815, 819 (6th Cir. 1989). Other courts have considered § 5K2.13 without reference to § 4B1.2. *See U.S. v. Philibert*, 947 F.2d 1467, 1471 (11th Cir. 1991); *U.S. v. Spedalieri*, 910 F.2d 707, 711 (10th Cir. 1990).

The court here declined to use the § 4B1.2 definition. First, "[n]othing in the Guidelines themselves or in the Application Notes suggests that section 4B1.2 is meant to control the interpretation and application of section 5K2.13." While "some courts have taken this silence as supporting the decision to rely on section 4B1.2," the court found such reasoning unpersuasive.

Second, "significant policy concerns support the view that section 5K2.13 and section 4B1.2 should be interpreted independently, for the sections address entirely different issues." Section 4B1.2 is designed to identify and maximize sentences for career offenders, and in its purpose and structure "can be read as depriving career offenders of the benefit of the doubt, and assuming the worst." However, "the point of section 5K2.13 is to treat with lenity those individuals whose 'reduced mental capacity' contributed to commission of a crime."

Noting that departure under § 5K2.13 is not allowed if defendant's criminal history indicates "a need for incarceration to protect the public," the court concluded that "the term 'non-violent offense' in section 5K2.13 refers to those offenses that, in the act, reveal that a defendant is not dangerous, and therefore need not be incapacitated for the period of time the Guidelines would otherwise recommend.... A determination regarding the dangerousness of a defendant, as manifested in the particular details of a single crime . . . , is best reached through a fact-specific investigation. We therefore believe that a District Court, when deciding whether a particular crime qualifies as a 'non-violent offense,' should consider all the facts and circumstances surrounding the commission of the crime," and the sentencing court "is not in any way bound by the definition of 'crime of violence' under section 4B1.2."

U.S. v. Chatman, No. 91-3294 (D.C. Cir. Mar. 16, 1993) (Edwards, J.) (Ginsburg, J., concurring in judgment).
See *Outline* at VI.C.1.b.

Sentencing Procedure

Evidentiary Issues

U.S. v. Miele, No. 91-3855 (3d Cir. Mar. 22, 1993) (Becker, J.) (Remanded: District court based drug quantity on testimony of addict–informant without adequately determining whether that testimony had the "sufficient indicia of reliability" required by § 6A1.3, p.s.: "Because of the questionable reliability of an addict–informant, we think it is crucial that a district court receive with caution and scrutinize with care drug quantity or other precise information provided by such a witness before basing a sentencing determination on that information."). *See also U.S. v. Simmons*, 964 F.2d 763, 776 (8th Cir. 1992) (remanded quantity determination—testimony by addict–informant that was "marred by memory impairment" resulting from history of addiction lacked "sufficient indicia of reliability"); *U.S. v. Robison*, 904 F.2d 365, 371–72 (6th Cir. 1990) (remanded quantity determination based on estimates by addict–witness with admittedly "hazy" memory).
See *Outline* at II.A.3 and IX.A.3.

U.S. v. Wise, No. 91-3275 (10th Cir. June 11, 1992) (Barrett, Sr. J.) (Remanded: District court erred in refusing to allow defendant to question probation officer about factual basis for conclusions in PSR. Defendant "was entitled, upon request, to be informed by the probation officer preparing his presentence report, of the factual basis or source of any information contained in the report which may have had an adverse effect on him during the sentencing process. Upon receipt of the factual basis or source of such information, Wise is entitled to a reasonable period of time within which to comment upon the reliability of such information in accordance with Rule 32 as construed in *Burns* [*v. U.S.*, 111 S. Ct. 2182, 2185–86 (1991)]."). [Note: Opinion originally unpublished, released for publication March 1993.]
See *Outline* at IX.A.3.

Criminal History

Armed Career Criminal

U.S. v. Maxey, No. 92-10336 (9th Cir. Mar. 23, 1993) (Hall, J.) (Affirmed: In sentencing defendant as an armed career criminal, district court properly refused to use § 4A1.2 to determine whether two prior convictions were "related" and should be counted as one: "We conclude that section 4B1.4 does not incorporate section 4A1.2's definition of 'related' offenses in determining whether a defendant is subject to sentence enhancement under its provisions, and that the Guidelines do not displace section 924(e) and case law interpreting it."). *Accord U.S. v. Medina-Gutierrez*, 980 F.2d 980, 982–83 (5th Cir. 1992) [5 *GSU* #7].
See *Outline* at IV.D.

Probation and Supervised Release

Revocation of Probation

U.S. v. Diaz, No. 92-2158 (10th Cir. Mar. 22, 1993) (Seymour, J.) (Reversed: When probation is revoked under 18 U.S.C. § 3565(a) for drug possession and defendant must be sentenced "to not less than one-third of the original sentence," the term "'original sentence' . . . refers to the term of incarceration available at the time of sentencing," not the length of probation. Therefore, the revocation sentence must be based on 0–6 month guideline range, not three-year probation term.). *Accord U.S. v. Clay*, 982 F.2d 959, 962–63 (6th Cir. 1993) [5 *GSU* #8]; *U.S. v. Granderson*, 969 F.2d 980, 983–84 (11th Cir. 1992); *U.S. v. Gordon*, 961 F.2d 426, 430–33 (3d Cir. 1992) [4 *GSU* #21]. *Contra U.S. v. Byrkett*, 961 F.2d 1399, 1400–01 (8th Cir. 1992) (per curiam) [4 *GSU* #23]; *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) [4 *GSU* #15].
See *Outline* at VII.A.2.

Revocation of Supervised Release

U.S. v. Tatum, No. 92-2232 (11th Cir. Apr. 7, 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.

Adjustments

Vulnerable Victim

U.S. v. Lallemand, No. 92-2178 (7th Cir. Mar. 29, 1993) (Posner, J.) (Affirmed: Vulnerable victim adjustment, § 3A1.1, was properly applied to extortion defendant who specifically targeted married homosexual who engaged in homosexual sex. While susceptibility to the offense is a "typical feature" of extortion, "[b]lackmail victims are not all susceptible to the same degree" and married homosexuals may be considered "a particularly susceptible subgroup of blackmail victims.").
See *Outline* at III.A.1.a and 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.

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

VOLUME 5 • NUMBER 10 • APRIL 9, 1993

Offense Conduct

DRUG QUANTITY

Second Circuit holds that whether mandatory minimum sentence under 21 U.S.C. § 841(b) applies to conspiracy defendant is determined by "reasonable foreseeability" standard used to determine drug quantity under Guidelines. Defendant was convicted of conspiracy on an indictment that stated the object of the conspiracy was to sell more than five kilograms of cocaine. Evidence indicated that defendant participated in only one transaction of one kilogram right before the conspiracy ended. The district court applied the 10-year mandatory minimum sentence applicable to a conspiracy "involving" five or more kilograms of cocaine, 21 U.S.C. § 841(b)(A). Defendant appealed.

The appellate court remanded, holding that the reasonable foreseeability standard for drug quantity under the Guidelines also applies to conspiracy convictions under 21 U.S.C. § 846 sentenced under § 841(b). The government had argued that because foreseeability is not required for substantive offense mandatory minimums under § 841(b), it should not be required for § 846 conspiracies, especially in light of the 1988 revision of § 846 which directed that conspiracy defendants be sentenced as if they had committed the underlying substantive offense. The appellate court disagreed: "the purpose of § 846 as amended was to synchronize the penalties for conspiracies and their underlying offenses. . . . [T]here is nothing in the legislative history to indicate that Congress intended the revision to expand the accountability of defendants beyond their substantive offenses. . . . If the government's argument were to prevail, § 846 would effectively eviscerate the Guidelines' approach to fixing accountability in drug conspiracies."

"We find that Congress did not intend to overrule the Guidelines in its revision of § 846 and require strict liability in any case where an individual small-time dealer becomes associated with a large-scale conspiracy. The Guidelines . . . require reasonable foreseeability in order to hold a conspirator accountable for the acts of a coconspirator. This is not inconsistent with § 846, which only requires that a conspirator be sentenced to the same penalty applicable to the underlying conduct." *Accord U.S. v. Jones*, 965 F.2d 1507 (8th Cir. 1992).

U.S. v. Martinez, No. 92-1461 (2d Cir. Mar. 8, 1993) (Altimari, J.).

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

Departures

CRIMINAL HISTORY

Third Circuit holds that criminal history departure under § 4A1.3, p.s. is not subject to the "not adequately taken into consideration" requirement of § 5K2.0, p.s. and 18 U.S.C. § 3553(b). At the initial sentencing, the district court departed downward for several reasons, including the belief that career offender status overstated defendant's criminal history, but it did so under § 5K2.0. The appellate court reversed, holding that the cited factors were adequately considered by the Commission and could not support a § 5K2.0 departure. *See U.S. v. Shoupe*, 929 F.2d 116 (3d Cir. 1991). On remand, defendant specified that he sought departure under § 4A1.3 because his career offender status significantly overrepresented the seriousness of his criminal history. The district court denied the motion, concluding that the appellate court opinion precluded departure.

The appellate court again remanded, holding that departure under § 4A1.3 could be considered. "[I]n Guidelines § 4A1.3, the Commission specifically provided district courts with flexibility to adjust the criminal history category calculated through the rigid formulae of § 4A1.1 or § 4B1.1 . . . . Section 4A1.3 is both structurally and in its purpose unlike § 5K2.0 and 18 U.S.C. § 3553(b), which allow district courts to depart from the sentencing range calculated under the Guidelines for mitigating circumstances not adequately considered by the Commission in formulating the Guidelines. . . . We therefore conclude that the statutory authority for the promulgation of § 4A1.3 lies not in 18 U.S.C. § 3553(b), as the government urges, but in the basic provision of the Sentencing Reform Act that gives the Sentencing Commission the authority to promulgate the Guidelines and to take into account, where relevant, the defendant's criminal background. *See* 28 U.S.C. §§ 994(a) & 994(d)(10). . . . We hold that as the plain language of § 4A1.3 provides, a district court considering a § 4A1.3 departure may weigh 'reliable information [that] indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct' . . . , including factors that the Commission may have otherwise considered in promulgating other provisions of the Guidelines."

U.S. v. Shoupe, No. 92-7204 (3d Cir. Mar. 12, 1993) (Becker, J.).

See *Outline* at VI.A.1 and 2.

Second Circuit holds that upward departure may not be based on fact that defendant is awaiting sentencing under the Guidelines on another federal offense. Defendant was convicted on drug charges. The district court departed upward by two criminal history categories (CHC) on the grounds that defendant committed the crime after being released to allow cooperation with the government in another offense and because defendant had not yet been sentenced for a prior federal offense. Although the first departure ground was proper, the appellate court remanded for clarification of the extent of departure and because the second departure ground was improper.

The court distinguished prior cases that "upheld CHC departures for defendants awaiting sentencing on various other crimes. Those cases . . . involved defendants who were to be

sentenced in state court for state offenses. Since state-court sentencing is not governed by the federal Guidelines, we viewed the district court as having discretion to depart on that basis because if the federal court does not depart to take account of the unsentenced state crimes, there is no assurance that the entire range of defendant's pertinent history will be considered in either proceeding." Here, however, defendant would be sentenced for the other federal offense under the Guidelines, and the instant offense would be accounted for there. Thus, "since ... the overall Guidelines scheme provides for effect to be given to both offenses in specified ways, ... a departure on this basis for a defendant awaiting sentencing on a federal offense would result in a double counting that was not intended by the policy statement in Guidelines § 4A1.3, and ... a departure on this basis is impermissible."

U.S. v. Stevens, 985 F.2d 1175 (2d Cir. 1993).

See *Outline* at VI.A.1.f and B.1.

Aggravating Circumstances

Eighth Circuit holds that pregnancy resulting from rape may be proper ground for departure. Defendant was convicted of raping a 15-year-old. She became pregnant with twins—one died in utero and, after complications, hospitalization, and a cesarean, the other was born with a fatal disease and died three weeks later. The government moved for an offense level increase under § 2A3.1(b)(4), arguing that the pregnancy and its consequences constituted a "serious bodily injury." Alternatively, the government argued that upward departure was warranted under these circumstances. Both motions were denied.

The appellate court affirmed the denial of an increase under § 2A3.1(b)(4): "As defined in the guidelines, serious bodily injury easily includes any immediate serious physical trauma resulting from a rape. In contrast, interpreting the language of the guideline definition to include the life altering consequences of a rape-induced pregnancy stretches that language too far."

However, the court determined that pregnancy resulting from rape may be an unusual circumstance that warrants departure and remanded: "We are not aware of any facts that indicate a pregnancy 'commonly' results from a single instance of rape. Nor are we aware of any guideline provision or records that indicate the Commission considered rape-induced pregnancy as a basis for an adjustment or departure. Rather, we are loathe to conclude that when formulating U.S.S.G. § 2A3.1(b)(4), the Commission considered both the trauma of an unwanted rape-induced pregnancy and of an immediate obvious physical injury, but chose to increase punishment only for the physical injury."

U.S. v. Yankton, No. 92-1404 (8th Cir. Mar. 1, 1993) (Hansen, J.).

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

U.S. v. Merritt, No. 91-1637 (2d Cir. Feb. 9, 1993) (Leval, Dist. J.) (Affirmed upward departure based on danger to public health, disruption of a governmental function, and defendant's attempts to keep the proceeds of his crime (nearly $1 million) through continued fraudulent conduct. The district court also factored into the departure defendant's "continuing dishonesty and greed, and his cynical determination to profit from his crime after service of his jail time." The appellate court concluded that the Sentencing Reform Act allows, and the Guidelines do not prohibit, consideration of personal characteristics in unusual cases and that it was appropriate here: "[T]he departure was attributable to conduct and characteristics that went well beyond simple 'failure to pay voluntary restitution' and 'concealment of assets.' It is clear that Merritt's profound corruption and dishonesty, and his elaborate fraudulent manipulation—even after his guilty plea—designed to preserve the huge benefits of his crime after service of jail time, are not" adequately considered under the Guidelines.). *Cf. U.S. v. Bryser*, 954 F.2d 79, 89–90 (2d Cir. 1992) (departure for failure to return stolen money); *U.S. v. Valle*, 929 F.2d 629, 631–32 (11th Cir. 1991) (same) [4#3].

See *Outline* at VI.B.1.

Substantial Assistance

U.S. v. Love, 985 F.2d 732 (3d Cir. 1993) (Affirmed: District court properly held that the § 5K1.1, p.s. requirement for a government motion applies to assistance to state authorities, not just federal: "There is no indication in the language of § 5K1.1 or in the accompanying commentary that the Commission meant to limit 'assistance to authorities' to assistance to federal authorities. The provision is entitled 'Substantial Assistance to Authorities,' and describes the assistance as 'substantial assistance in the investigation or prosecution of another person who has committed an offense.'").

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

Extent of Departure

U.S. v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc) (Affirmed: Resolving inconsistent opinions within the circuit, the en banc court held that to depart under § 4A1.3, p.s., district courts must follow the procedure in that section and "evaluate each successive criminal history category above or below the guideline range for a defendant as it determines the proper extent of departure.").

See *Outline* at VI.D.

Criminal History

Invalid Prior Sentences

U.S. v. Vea-Gonzales, 986 F.2d 321 (9th Cir. 1993) (Remanded: District court erred in not allowing defendant to challenge validity of prior conviction at sentencing hearing. "[T]he Constitution requires that defendants be given the opportunity to collaterally attack prior convictions which will be used against them at sentencing." Even though a 1990 amendment to § 4A1.2, comment. (n.6) indicates consideration of such claims is discretionary, and some circuits have so held, "we have previously held that a defendant is constitutionally entitled to collaterally attack allegedly unconstitutional prior convictions. The Guidelines cannot have changed that.").

See *Outline* at IV.A.3.

Adjustments

Obstruction of Justice

U.S. v. Kirkland, 985 F.2d 535 (11th Cir. 1993) (Remanded: Bank's investigation, conducted by bank employees prior to any law enforcement activity, was not an "official investigation" under § 3C1.1, comment. (n.3(d)). Therefore, district court erred in applying obstruction of justice enhancement to defendant who caused someone else to lie to bank investigators in an attempt to hide embezzlement.).

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

EXHIBIT B

Nomination Form

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

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**