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TABLE OF CONTENTS

TABLE OF CONTENTS

Please send name or address change to:

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COMMENDATIONS

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

Susan Badger (California, Northern District), by W. Gordon Gibler, Supervisory Special Agent in Charge, FBI, San Francisco, for her professionalism, legal skill, and swift action in arranging for the arrest of an individual for threats of violence against a District Court judge.

Linda C. Boone (District of Arizona), by C. M. Macho, Postal Inspector in Charge, U.S. Postal Service, Phoenix, for his outstanding professionalism and legal skill in obtaining an indictment of four individuals in a health care insurance fraud case. ***Diana May*** and ***Susan Enk*** provided valuable assistance and support.

Ted Borek (District of Arizona), by Jo Ann Zirkle, Offfice of the Clerk of the Court, State of Arizona Court of Appeals, Tucson, for his excellent presentation on the "three strikes" proposal at the recent Pima County Bar Association luncheon.

John S. Bowler (North Carolina, Eastern District), by Joseph P. Schulte, Jr., Special Agent in Charge, FBI, Charlotte, for his successful prosecutive efforts in a complex case involving convoluted paper trails, "shell" companies, transfer of assets, and deceptive witnesses.

Edmund Brennan (California, Eastern District), by Major General Tandy K. Bozeman, The Adjutant General, and Lt. Col. William F. Weir, California National Guard, Departments of the Army and Air Force, Sacramento, for his valuable assistance and cooperative efforts in the defense of a complex case requiring extensive knowledge of the dual status of the National Guard and the applicability of regulations, internal promotion, and organizational structure and procedure.

James A. Brunson (Michigan, Eastern District), by Lt. Col. Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Arlington, Virginia, for his outstanding efforts in the defense of a tort claim case which resulted in the plaintiff's voluntary dismissal.

Dan Caldwell (Georgia, Northern District), by Frank Nicholson, Regional Program Director, Administration on Aging, Department of Health and Human Services, Atlanta, for his valuable assistance and representation in a time consuming case of long standing against the Georgia Department of Human Resources.

Mary Jude Darrow and ***Michael Magner*** (Louisiana, Eastern District), by Nick A. Congemi, Chief of Police, Kenner Police Department, for their outstanding success in obtaining the conviction of four career criminals dealing illegal narcotics in Kenner, Louisiana.

Roger L. Duncan (District of Arizona), by Harlan W. Penn, Regional Counsel, Federal Bureau of Prisons, Dublin, California, for his successful efforts in obtaining a defense judgment in a case against two Bureau of Prisons employees accused of deliberate indifference to the medical needs of the plaintiff.

Alan Gershel (Michigan, Eastern District), by Cornelius L. Jackson, Supervisor-in-Charge, Inspection Division, Internal Revenue Service, Cincinnati, for his outstanding prosecutive efforts resulting in the conviction of a former Department of Justice Tax Division attorney for unlawfully disclosing grand jury information.

Stephen R. Graben (Mississippi, Southern District), by Donald R. Kronenberger, Jr., Regional Attorney, Office of the General Counsel, Department of Agriculture, Atlanta, for his valuable assistance and representation in the successful resolution of a case involving the closing of a Forest Service road which serves as an important access to the National Forest in Mississippi.

Charles E. Hamilton, III (North Carolina, Eastern District), by Lt. Col. Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Arlington, Virginia, for his professionalism and legal skill in obtaining voluntary dismissal of a cause of action.

Christine B. Hamilton (North Carolina, Eastern District), by Paul Lyon, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Charlotte, for her outstanding prosecutive efforts in the trials of the Fletcher Johnson gang for illegal possession and sale of over 1,400 firearms in North Carolina, Virginia, and Washington, D.C., the Big Mass Organization for illicit, armed narcotics trafficking, and the Anthony Connors Organization for violations of federal firearms, RICO and narcotics laws.

Michael A. Hirst (California, Eastern District), by Lt. Col. Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Arlington, Virginia, for his outstanding legal representation and successful defense in two cases regarding complex and novel tort issues.

David Hoff (Illinois, Central District), by Hayes P. Haddox, District Counsel, U.S. Army Corps of Engineers, Louisville, Kentucky, for his excellent representation in a civil case, and for his outstanding efforts in obtaining a settlement in favor of the United States government.

Mark C. Jones (Michigan, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for his successful prosecution of a drug trafficker and twelve of his associates, as well as other outstanding prosecutive efforts on behalf of the FBI in the Eastern District of Michigan.

Daniel G. Knauss, Joelyn Marlow, and ***Thomas Fink*** (District of Arizona), by Paul E. Coffey, Chief, Organized Crime and Racketeering Section, Criminal Division, Department of Justice, for their outstanding efforts in the successful prosecution of a difficult and complex case, the presentation of which required great skill and expertise.

Michael Lasater (California, Southern District), by Julius C. Beretta, Special Agent in Charge, Drug Enforcement Administration, San Diego, for his valuable contribution to the success of Operation Rainbow, a major enforcement effort involving numerous documented violent gang members in the San Diego area.

James H. Leavey, Michael E. Davitt, and ***Michael P. Iannotti*** (District of Rhode Island), by Louis J. Freeh, Director, FBI, Washington, D.C., for their outstanding efforts in Operation Buckswap, the most significant money laundering network ever investigated by the FBI, resulting in the conviction of the leader of the money laundering ring, his wife and their associates.

Dorothy McMurtry (Missouri, Eastern District), by Robert J. Hillman, Regional Inspector General for Investigations, Department of Agriculture, Kansas City, for her professional skill in two successful prosecutions of an individual with a long history of food stamp trafficking and conspiracy.

Michael Magna (Louisiana, Eastern District), by Sheriff Johnny Marino, St. Charles Parish, Hahnville, Louisiana, for his valuable assistance in the arrest of a career criminal for drug trafficking -- the first enforcement of the Brady bill in St. Charles Parish.

Mark Marshall and ***Sue Posey*** (Texas, Western District), by Captain Cecil Huff, Commander, Special Investigations Division, Austin Police Department, for their success in prosecuting the leader of a street gang known as Latin Kings, and for participating in the removal of a serious threat to the Austin community.

Chalk S. Mitchell (District of Colorado), by Jeffrey S. Morris, Assistant Regional Counsel, General Legal Services, Internal Revenue Service, Cincinnati, for his excellent representation and professional skill in bringing a recent case to a successful conclusion.

Jack Moynihan (Texas, Western District), by Colonel Harlan G. Wilder, Chief, General Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Washington, D.C., for his excellent representation and dedicated efforts in a difficult employment discrimination case.

Michael O'Leary, David Nutter, John Malcolm and ***James Fagan*** (Georgia, Northern District), by Robin A. Luers, Inspector in Charge, U.S. Postal Service, Atlanta, for their outstanding success in prosecuting numerous mail and insurance fraud cases, and for their major accomplishments in the war on white collar crime.

Don B. Overall and the ***Tucson Office Staff*** (District of Arizona), by Gary R. Spratling, Chief, Antitrust Division, Department of Justice, San Francisco, for their valuable assistance and support during antitrust negotiations between two construction companies, and for their contribution to the successful outcome of the matter.

John F. Paniszczyn (Texas, Western District), by Lynette Word, Assistant Chief Counsel, Southwest Region, Federal Aviation Administration, Fort Worth, for his excellent representation and success in obtaining the dismissal of a complex employment discrimination case.

Janet L. Parker (Michigan, Eastern District) received a Certificate of Appreciation from Charles R. Gillum, Acting Inspector General, Department of Agriculture, Washington, D.C., for her outstanding leadership and invaluable assistance in the successful prosecution of numerous fraud cases over the past eight years.

William Pericak (New York, Northern District), by Robert A. Bryden, Special Agent in Charge, Drug Enforcement Administration, New York Field Division, for serving as an instructor on several occasions at DEA-sponsored asset forfeiture seminars for state and local law enforcement officers.

Andrea M. Pogue (District of Idaho), by William A. Preston, District Counsel, and Norman S. Jensen, Assistant District Counsel, Department of Veterans Affairs, Boise, for her excellent representation and successful prosecution of a medical malpractice litigation involving complex psychiatric issues.

Michael Quinley (Illinois, Southern District), by Captain Jeff Trego, District 13 Commander, Illinois State Police, Springfield, for his valuable assistance and guidance in a major investigation conducted by the Illinois State Police, the Southern Illinois Drug Task Force, and other investigative agencies, involving fourteen distributors of crack cocaine in the Metropolis, Illinois and Paducah, Kentucky areas.

Eduardo Roy (California, Northern District), by Russell G. Miller, Special Agent in Charge, U.S. Secret Service, San Francisco, for his outstanding efforts in successfully prosecuting the ringleader of a counterfeit group that manufactured and distributed $20 Federal Reserve Notes.

Richard Seeborg and ***Marcia Jensen*** (California, Northern District), by Gerald M. Stern, Special Counsel for Financial Institution Fraud, Office of the Deputy Attorney General, Department of Justice, for their successful prosecution of several individuals engaged in a large-scale fraud designed to conceal the true ownership of a savings and loan bank.

Andrew Scoble (California, Northern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for his valuable assistance and cooperative efforts in a highly sensitive extradition case involving a consular officer at the Philippine Consular General in San Francisco who enjoyed full diplomatic immunity.

Andrew Vogt (District of Colorado), by Joseph D. Martinolich, Jr., Special Agent in Charge, FBI, Denver, for his outstanding success in obtaining the conviction of an individual on all six counts involving mail fraud and tax charges following a week-long trial.

William D. Welch (District of Colorado), by Charles J. Gutensohn, Special Agent in Charge, Drug Enforcement Administration, Quantico, Virginia, for his excellent presentation at a conspiracy seminar for DEA agents, Task Force officers, and police officers, on the subject of Assistant United States Attorney/Agent coordination and use of the investigative grand jury.

David T. Wood and his Assistants, ***Erlinda Dumatol*** and ***Amy Trammell*** (District of Guam), by Frank Strasheim, Regional Administrator, Occupational Safety and Health Administration, Department of Labor, San Francisco, for their invaluable assistance and support in their mission to ensure a safe working place for the employees of Saipan, Commonwealth of the Northern Mariana Islands.

Sally Q. Yates and ***William L. McKinnon*** (Georgia, Northern District), by Attorney General Janet Reno, for their successful prosecution of a massive fraud and corruption case involving a former Atlanta Councilman and Airport Commissioner, and a major concessionaire at the Atlanta airport and other airports throughout the country.

SPECIAL COMMENDATION FOR THE DISTRICT OF COLUMBIA

John Bates, Mike Ryan, and ***Craig Lawrence, Assistant United States Attorneys for the District of Columbia,*** were commended by Rear Admiral H. E. Grant, Judge Advocate General, Department of the Navy, Alexandria, Virginia, for their valuable assistance and guidance in a case involving forty-eight midshipmen at the U.S. Naval Academy in Annapolis, Maryland, who attempted to block the Navy from holding disciplinary hearings in connection with an electrical engineering final exam in December, 1992. When a special five-member Honor Review Board scheduled hearings for more than one hundred students accused of cheating on the exam, the midshipmen joined as plaintiffs in a single lawsuit in the District of Columbia. Alleging violations of the applicable statute and the Fifth Amendment, the plaintiffs sought a preliminary injunction to enjoin the honor hearings. On February 22, 1993, following oral argument, the U.S. District Court Judge denied the motion and dismissed the complaint, and the case-by-case review was allowed to proceed. This litigation, described as the biggest cheating scandal in the 148-year history of the U.S. Naval Academy, presented sensitive issues of honor and accountability in the context of ensuring due process and fundamental fairness to all concerned. Admiral Grant stated that the U.S. Navy would have been hard pressed to achieve such satisfactory results without the expertise of Assistant United States Attorneys Bates, Ryan, and Lawrence.

[NOTE: On April 28, 1994, Secretary of the Navy John H. Dalton ordered 24 midshipmen expelled. Two other midshipmen who had been recommended for expulsion were allowed to remain at the Academy. Before Secretary Dalton's review, 62 of the 134 midshipmen were found guilty of honor violations but were not expelled. Thirty-eight midshipmen were exonerated, and the rest left the Academy for other reasons.]

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SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF VIRGINIA

David T. Maguire, Assistant United States Attorney for the Eastern District of Virginia, was commended by James E. Childs, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense, Arlington, for his successful prosecution of a government prime contractor after several years of intense and complex investigative effort. In this case, the contractor received $2.5 million on four different contracts, each valued in excess of $10 million. Rather than pay his subcontractors, the contractor misappropriated approximately $900,000. This action drove two subcontractors into bankruptcy, cost a federally insured bank a loss of $110,000, and the Department of Defense a loss of $250,000. Mr. Maguire's hard work and determination enabled the U.S. Government to obtain a guilty plea and avert a costly and time consuming trial. His outstanding efforts also helped protect the integrity of the Department of Defense procurement system.

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DEPARTMENT OF JUSTICE LEADERSHIP

Associate Attorney General

On May 12, 1994, Attorney General Janet Reno announced that President Clinton intends to nominate ***John R. Schmidt*** to serve as Associate Attorney General. Mr. Schmidt is the chief U.S. negotiator for the Uruguay Round of Trade Negotiations and also holds the rank of ambassador. He spent twenty-six years in private practice in Chicago championing civic causes and legal reform.

Executive Office For United States Attorneys

Wayne A. Rich, Jr., Principal Deputy Director, Executive Office for United States Attorneys, has joined the United States Attorney's office for the Eastern District of North Carolina where he will serve as First Assistant United States Attorney.

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Donna A. Bucella will serve as Principal Deputy Director of the Executive Office for United States Attorneys. Ms. Bucella, Assistant United States Attorney for the Southern District of Florida, has been the Director of the Office of Legal Education for the past several months.

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United States Attorneys

On May 9, 1994, ***Sheldon Whitehouse*** was appointed by the President to serve as United States Attorney for the District of Rhode Island.

On May 1, 1994, ***Faith S. Hochberg*** was appointed by the Attorney General to serve as United States Attorney for the District of New Jersey.

On May 2, 1994, ***W. Ronald Jennings*** was appointed by the court to serve as Interim United States Attorney for the District of the Virgin Islands.

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ATTORNEY GENERAL HIGHLIGHTS

Crime Victims Fund Awards

On April 22, 1994, at a ceremony marking the beginning of National Crime Victims Rights Week, Attorney General Janet Reno honored ten federal employees for their efforts to ensure that fines and debts owed to the federal government are paid as fully and promptly as possible, and to provide funds to aid victims of crime. The money, which is paid into the Crime Victims Fund, aids state and local programs that provide services for crime victims, including counseling, emergency shelter and transportation to court. The Fund, which collected nearly $145 million in 1993, is administered by the Office for Victims of Crime of the Department of Justice. The Attorney General stated, "These ten employees exemplify the high levels of dedication and service among federal workers in the Department of Justice and the Administrative Office of the U.S. Courts. Through their efforts, funds are available to help innocent victims of crime recover -- physically, emotionally, and financially -- from the devastating effects of crime. At the same time, they are ensuring that convicted offenders pay, in full, the fines and penalties assessed by the court." Ms. Reno presented plaques to the following individuals:

Northern District Of Iowa
Kristin I. Tolvstad
Assistant United States Attorney

District Of Connecticut
John B. Hughes
Assistant United States Attorney
Chief, Civil Division

Eastern District Of Wisconsin
Mary Kay McSherry
Coreen W. Johnson
Terrie D. Marker
Jean R. A. Steele
Financial Litigation Unit

District Of New Mexico
Juanita L. Bardtrief
Financial Litigation Unit

Central District Of Illinois
Charlene Garner
Asset Forfeiture Unit

Eastern District Of North Carolina
James M. Johnston, Jr.
Probation Officer, Wilmington Office

Federal Correctional Institution
Cynthia Ashman
Tucson, Arizona

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DEPARTMENT OF JUSTICE HIGHLIGHTS

The Crime Bill

President Clinton and Attorney General Janet Reno are continuing their intensive efforts toward enactment of a crime bill. The House of Representatives and the U.S. Senate have both passed comprehensive bills that will put more police on the street, tougher penalties on the books, and better prevention in our communities. On April 26, 1994, the House Judiciary Subcommittee on Crime and Criminal Justice voted 20 - 15 in favor of the assault weapons ban -- the final issue to be resolved in the House of Representatives. On May 5, 1994, the legislation was passed by the narrow margin of 214 - 216. This action now clears the way for a House-Senate conference on the omnibus crime legislation, which Congressional leaders hope to send to the President by Memorial Day.

Attorney General Janet Reno was extremely gratified by the outcome of the vote to ban assault weapons. She said, "This is a victory for the American people who have spoken out loud and clear in support of this reasonable measure. I wish to commend the many men and women in law enforcement all over this country who worked so hard for this crime-fighting measure. I also want to thank the 216 Members of the House of Representatives who cast this courageous vote to put public safety first."

Crime Prevention Programs

On April 26, 1994, the Attorney General testified before the Senate Judiciary Committee on crime prevention programs -- an essential component of a comprehensive balanced program to fight crime in America. Ms. Reno reviewed some of the programs included in the crime bills by the Senate and House which take advantage of the opportunity presented by the growing consensus that we must seek to prevent crime:

- The President's Youth Employment Skills program (Y.E.S.) contained in the House bill which will give young people something to say yes to by providing job training and opportunities to those in hard-hit, high crime areas.

- The Ounce of Prevention programs included in both the Senate and House bills which provide a mechanism for coordinating the efforts of the federal government to provide educational and recreational alternatives to drugs and crime, such as keeping schools open after hours to serve as community centers and expanding after-school activities, such as Boys and Girls Clubs, that keep kids safely off the streets.

- The Police Partnerships for Children program in both the Senate and House bills that encourages police officers to become involved with children and family services agencies to divert at risk children.

- Drug Court programs which will support intensive court supervision of drug dependent defendants to provide the "carrot and stick" approach that can help them beat their addiction.

- The Gang Resistance Education and Training program (G.R.E.A.T.), which helps kids fight the allure of gang membership.

- The PACT (Pulling America's Communities Together) Project, initiated by the Departments of Justice, Education, Health and Human Services, Housing and Urban Development, Labor, and the Office of National Drug Control Policy in four jurisdictions.

The PACT Project is designed to facilitate communities in the process of building comprehensive jurisdiction wide strategies aimed at reducing violence. The federal role in PACT is a supportive one. Federal agency representatives provide information about programs that offer hope of success to the jurisdiction as their strategies and program ideas are being developed. This includes information about program operation and evaluation. The federal agencies also coordinate the delivery of existing program assistance to these communities. Conversely, input to the Administration through this planning and implementation process has a positive impact on federal program development. The PACT Project calls for a more interactive relationship between the federal agencies and local communities -- in the process of policy and program development, in providing technical assistance and information on the best practices known to the federal government, and in making communities aware of every possible funding opportunity available to them to help implement their ideas.

Attorney General Reno concluded, "These coordination needs and functions will be increasingly important as we work to implement the crime bill and other major prevention-related initiatives. While coordination requires hard work, the preliminary results with PACT convince me that it's well worth the effort. I trust that through the Ounce of Prevention Council and other means we can achieve similar success in cooperation and coordination."

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

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Cryptographic Technology In U.S. Senate

On May 3, 1994, in testimony before the Subcommittee on Technology and the Law of the Senate Judiciary Committee, Assistant Attorney General Jo Ann Harris urged Congress to support steps being taken to maintain the capability of law enforcement officials to successfully continue court-authorized monitoring of phone conversations of suspected terrorists, drug dealers and other criminals. Ms. Harris described the development of new cryptographic technologies which threaten to hinder police and federal agents from moving quickly to prevent crimes, and stated that rapid or "real time" wiretaps were essential in recent years in permitting law enforcement agents to prevent a gang from using a surface-to-air missile to shoot down an airliner, and in making it possible for police to act quickly to stop the planned murder of a kidnapped boy.

The subject of the hearing was the Administration's program for Key Escrow Encryption, sometimes called "Clipper chip." The term "key escrow" refers to an electronic key implanted in an encryption chip which gives strong privacy protection but would permit government agencies to decode conversations under appropriate safeguards. The key is split in two parts and "escrowed" or held by two entities that are not involved in law enforcement -- the National Institute of Standards and Technology, Department of Commerce, and the Automated Systems Division of the Department of the Treasury. Both would have to be shown that law enforcement agents were lawfully authorized to conduct wiretaps of communications using a specific chip before they would release the key components needed to decode those communications.

Over 1,000 cryptographic devices equipped with the Clipper chip have already been sold commercially since they became available late last year. About 9,000 have been purchased by the government for protection of sensitive information because of the chip's mathematical complexity, or algorithm, which is sixteen million times stronger than methods otherwise available. The equipment, first developed by the government to meet its own security ends, is marketed by AT&T. A unit is approximately the size of a paperback book and sells for about $1,200.00.

Ms. Harris believes key escrow encryption will become the accepted standard because of its overwhelming technical superiority, the fact that it is already obtainable and in use, and because most users will want equipment that is widely compatible. She emphasized that the government is not seeking to expand its electronic surveillance authority, nor to change the privacy protection of telecommunications. The issue concerns decoding intercepts already authorized by law. Ms. Harris concluded, "In a criminal case, the government must show probable cause to believe that the telephone targeted is being used in furtherance of a specific serious federal criminal offense. We have worked to develop procedures that strike the right balance between the rigorous protection of the privacy of communications and the need, in critical moments, to be able to decrypt such communications in order to protect lives and preserve the public safety."

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

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Crime Technology Demonstrations

On April 20, 1994, Vice President Gore joined Attorney General Janet Reno and Secretary of the Treasury Lloyd Bentsen at the Drug Enforcement Administration in Arlington, Virginia, for a demonstration of wireless and dual-use technologies that can be used for law enforcement purposes. Also attending were John Deutch, Deputy Secretary of Defense, and Lee Brown, Director, National Drug Control Policy. The demonstration included an automated booking system to electronically record fingerprints and mug shots, laser-assisted computer imaging equipment for examining ballistics, and a portable/hand-held/single-step device to retrieve more readable fingerprints at crime scenes. The Administration officials also viewed technology that provides police cars with mainframe database information, such as criminal records and traffic violations, and allows them to file reports from their cars. Several non-lethal weapons for use in pursuit of a suspect or while a suspect is in custody also were on display.

In addition, the Vice President announced two inter-agency Memorandums of Understanding (MOUs). One MOU establishes an agreement between the Departments of Justice and Treasury to develop a wireless telecommunications network for use by federal, state, and local law enforcement officials. This agreement implements one of the recommendations of the Vice President's National Performance Review to make the federal government work better and cost less. Another MOU between the Departments of Defense and Justice is a five-year agreement to jointly develop and share technologies that are necessary for both law enforcement and military operations other than war.

The Attorney General stated, "New technologies increase the effectiveness of law enforcement, offer police officers greater options for apprehension, and improve the safety of the public. Today's agreements will unite the efforts of the Justice Department with those of Defense and Treasury to help make these technologies available to our Nation's law enforcement community."

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War On Crime In Public Housing Projects

On April 16, 1994, President Clinton directed Attorney General Janet Reno and Secretary of Housing and Urban Development Henry Cisneros to devise a constitutional effective way to protect the residents of America's public housing communities. This directive was prompted by a search and sweep policy that was put into effect in Chicago to clean out the public housing communities, to find weapons, to get people out of housing projects who don't belong, and to find drugs. A federal judge declared the search and sweep policy unconstitutional.

In a Radio Address to the Nation on April 16, 1994, the President announced a new policy to help public housing residents take back their homes. That policy has essentially five elements which was explained by Secretary Cisneros at a press briefing at the White House, with Acting Associate Attorney General Bill Bryson in attendance.

• The policy assumes that it is essential to get control of the lobbies of buildings. So substantial effort and resources are focused on access, entryways, metal detectors, guards, and control of lobbies.

• Sweeps can occur in the common areas of buildings. The Secretary explained that post boxes and mail boxes are used as hiding places for guns and drugs, as well as stairwells, air vents and electrical outlets.

• Sweeps can occur in vacant units, because gangs tend to locate their caches of weapons in vacant units.

• Sweeps can occur where consent has been given. It may be consent that is given in advance as an element of a lease where people in the agreement to sign a lease for a building sign a consent that would allow searches for weapons just as they allow consent for searches for maintenance problems or inspections that are now a standard part of a lease. Or it may be consent that is signed when the police team arrives at a unit.

• Another element is warrantless searches in exigent circumstances. The Secretary explained that the key word is "exigent," It has to do with what has occurred -- whether or not there has been shooting, for example, from the upper stories of the building, and how massive it might be, how frequent it might be, and how timely the response is. All are subjective judgments, but the judge's order indicated that under circumstances of exigency, these sweeps can occur.

Secretary Cisneros stated that the bottom line in the above elements of searches is that they be allowed to continue within certain circumstances, and they are an instrument available to all housing authorities that want to use that instrument. A copy of the press briefing is attached at the Appendix of this Bulletin as Exhibit A.

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Final Report On The Rocky Flats Nuclear Weapons Plant

On April 21, 1994, a Justice Department internal review was made public which concluded that "no basis existed" for Congressional charges that prosecutions in connection with environmental violations at the Rocky Flats nuclear weapons plant near Denver, Colorado, were mishandled. The review also concluded that the decision to bar the grand jury from issuing a public report condemning the conduct of certain plant employees was made appropriately and in good faith by career supervisors in the Justice Department applying traditional grand jury standards. The 88-page report was supervised by Mark Dubester, Acting Chief of the Public Corruption and Government Fraud Section of the United States Attorney's office for the District of Columbia. It was requested by then-Associate Attorney General Webster L. Hubbell on July 21, 1993, after the House Subcommittee on Investigations and Oversight of the Committee on Science, Space and Technology criticized the prosecutors for "extreme conservatism and lack of aggressiveness" in not obtaining a larger fine, in not prosecuting individual workers, and in preventing the grand jurors from publicly accusing individuals, who were not indicted, of misconduct.

In 1992, the Rockwell International Corporation pleaded guilty to ten hazardous waste and clean water violations, and paid an $18.5 million criminal penalty -- the largest hazardous waste fine in history. Rockwell pleaded guilty to improper storage of hazardous waste sludge, transfer of salt brine concentrate without a permit, storage of vacuum filter sludge without a permit, improper discharge of hazardous and

toxic wastes to a sewage treatment plant, exceeding permit limits for biological oxygen demand and fecal coliform, spilling chromic acid, failing to use good engineering practices, and other violations of the anti-pollution laws in 1987 and 1988. The Rocky Flats plant is owned by the United States, through the Department of Energy. For decades, it produced nuclear weapons components. The plant occupies 6,550 acres, and consists of more than 100 buildings outside Denver, near Boulder. All production facilities have now been shut down and a clean-up program is underway. Other conclusions in the report are:

• The plea agreement was the product of extensive negotiation between the parties, and was reviewed and approved by a wide range of experienced and senior officials not only within the Department of Justice and the United States Attorney's office, but also at the Environmental Protection Agency (EPA) and the Colorado Department of Health.

• Because of evidentiary and other problems, the decision not to prosecute was a sound exercise of prosecutorial discretion.

• The decision not to let grand jurors criticize workers who would have had no trial in which to defend their actions was a "by the book" decision influenced solely by a good faith reading of the law. Substantial portions of the grand jury's proposed report were subsequently made public by a judge.

• Rockwell had proposed only to plead no contest to a series of misdemeanors and pay a $1 million fine.

• The report praised the work of trial attorneys Kenneth Fimberg and Peter Murtha who were "highly committed," and whose efforts were primarily responsible for achieving "substantial benefits for the government" despite "numerous challenging and complicated legal, factual, tactical and organizational difficulties."

• Charges were considered against one Department of Energy official who in 1985 filled out a report to the EPA stating the groundwater monitoring system was in full compliance with all regulatory requirements. But the decision was made not to do so because EPA placed no reliance on the document and was well aware of the actual status -- and problems -- with groundwater monitoring at Rocky Flats.

• Specifically noted the prosecutors' success in obtaining Rockwell's agreement not to seek reimbursement from the Department of Energy, for whom it operated the plant, and whose contract with Rockwell provided for indemnification. It said, "the possibility that the government might successfully obtain convictions of Rockwell at trial only to have the criminal fine reimbursed by the U.S. taxpayer was a major -- perhaps the primary -- factor motivating the government to try to reach settlement of the case."

• The plea was obtained despite the absence of "smoking gun" documents. The government lacked evidence of subjectively bad intent -- no conspiratorial meetings, no document destruction, no evidence of personal financial motive. Individuals who might have been charged were relatively low-level workers, whom a jury might have regarded as scapegoats for the faults of the Department of Energy and higher-level Rockwell management, and who may not specifically have intended to violate environmental laws. The plant manager died in 1990.

The report concluded that this case was not handled perfectly in the sense that any case of this nature with complicated investigatory and institutional issues is likely to have difficulties. The personnel mix at the line level was not ideal, the FBI and EPA could have devoted more highly-motivated investigators, there could have been better coordination with civil attorneys, and the plea agreement could have been drafted with more precision. But ". . in contrast with the wide range of tasks that were handled skillfully and professionally, these problems, on balance, were relatively minor."

Evaluating the impact of the Congressional inquiry, the report said the Rocky Flats case "dramatically illustrated" the ease with which internal deliberations of Justice Department attorneys "can be misunderstood and distorted in a political forum, especially where complex and subtle prosecutorial judgments are involved. . .The Department needs to impress forcefully on Congress the serious consequences of politicized attacks on individual line prosecutors. . .The congressional maligning of the line prosecutors in this case provides strong incentives for prosecutors to stay away from politically charged environmental cases in the future."

Attorney General Janet Reno issued the following statement: "I am extremely pleased that the internal report on the Rocky Flats case concluded that it was properly and professionally handled by the attorneys who conducted the lengthy investigation and obtained a 10-count guilty plea and record penalty. In light of the detailed analysis and conclusions in the report, there should be no remaining doubt that the prosecutors acted energetically and consistently with the highest professional standards. Despite the complexity and difficulty of the investigation, the attorneys and agents who handled the case were able to obtain an $18.5 million fine, the largest fine for a hazardous waste violation in U.S. history. I am hopeful that the release of this report will put this matter to rest and allow our prosecutors to move on to further pursuit of those who violate the laws protecting our environment."

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Major Espionage Case In The Eastern District Of Virginia

On April 28, 1994, Helen F. Fahey, United States Attorney for the Eastern District of Virginia, and Anthony Daniel, Assistant Director, FBI, announced that former CIA Operations officer Aldrich H. Ames and his wife, Maria Del Rosario Casas Ames, entered pleas of guilty to charges of conspiracy to commit espionage and tax fraud. After accepting the pleas, the Federal District Judge sentenced Aldrich Ames to life in prison without parole in accordance with the plea agreement. Sentencing for Rosario Ames is scheduled for August 26, 1994. Attorney General Reno stated, "Today's pleas are the result of an extraordinary effort by investigators and prosecutors in the CIA, FBI, the Eastern District of Virginia and the Criminal Division of the Department of Justice. The pleas were appropriate to the facts, and assure the government of the information it needs to take whatever additional steps are necessary."

Aldrich Ames pled guilty to an extensive indictment which outlined his activities as a KGB spy since 1985. The indictment describes how Ames repeatedly passed valuable "secret" and "top secret" information to the KGB and its successor agency in the Russian Republic, both in personal meetings around the world and through signal sites and dead drops around the Washington, D.C. area. Ames' position in the CIA gave him unique access to information pertaining to U.S. intelligence operations against the Soviet Union and the KGB. Ames passed this information to his Russian handlers in exchange for large sums of cash totalling approximately $2.5 million. Ames passed to the KGB the identity of numerous Russian military and intelligence officers cooperating with western intelligence services, many of whom were later executed, imprisoned or just disappeared. In addition to the sentence of life in the penitentiary, Aldrich Ames also agreed to cooperate fully with the United States, and undergo extensive debriefings about his espionage activities; to forfeit all of his espionage proceeds, including all monies in foreign and domestic bank accounts, his Arlington, Virginia home, his Jaguar and Honda automobiles, CIA pension, and all other significant assets. The plea required Ames to assign to the United States the proceeds of any book, movie or interview deal he might sign, thus assuring that he will not profit in the future from his crimes and the resulting notoriety. Finally, Aldrich Ames pled guilty to a tax conspiracy charge, admitting that he did not report over $2.5 million in espionage income between 1985 and 1993.

Rosario Ames entered a guilty plea to a criminal information charging her with an espionage conspiracy charge and tax fraud. The information charges Mrs. Ames with aiding, advising and encouraging her husband's espionage activities after she learned of them in 1992. The information details how, for example, Ms. Ames advised her husband of the best way to transport large sums of cash obtained from the Russians in foreign countries, encouraged him to communicate with his Russian handlers, and deposited large sums of cash espionage proceeds into banks.

In her plea, both the government and Mrs. Ames' attorney agreed to recommend to the court that she be sentenced to between sixty-three months and seventy-two months in prison without parole. Like her husband, Mrs. Ames agreed to cooperate fully with the United States and be debriefed regarding her activities. She also agreed to forfeit the couple's assets, and assigned her profits from any potential book, movie or interview deal to the United States. Finally, she admitted that since 1985 she knowingly signed tax returns that did not report all of the couple's income, and pled guilty to tax fraud as well.

United States Attorney Fahey stated, "The United States achieved all of its objectives with these pleas. These dispositions not only guaranteed that Aldrich Ames would be incarcerated for the rest of his life, but they also stripped him and his wife of all their assets and assured that they would not profit in the future from their crimes." Further, by ending the matter quickly and securing the Ames' cooperation, Ms. Fahey noted that the United States could now proceed with the important task of evaluating the extensive damage that Ames has done to national security.

The prosecution was handled by Assistant United States Attorneys Mark Mulkower and Robert Chesnut. If you would like a copy of the Indictment, Criminal Information, Statements of Facts, and Plea Agreement, please call the United States Attorney's Bulletin staff, at (202) 514-4633.

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CIVIL DIVISION

Frank W. Hunger, Assistant Attorney General for the Civil Division, has announced the following major settlements in a number of Districts:

Western District Of Washington

In the largest defense procurement fraud case in the Northwest, and the fourth largest in national history, the Boeing Company paid the United States $75 million to settle allegations it charged unallowable costs to government military contracts. Assistant Attorney General Frank W. Hunger of the Civil Division, and Katrina C. Pflaumer, United States Attorney for the Western District of Washington, Seattle, stated that the settlement resolves three separate issues dating to September, 1988. Two of the three issues involved suspected violations of the False Claims Act.

The resolved issues included the mischarging of research and development costs to government contracts, improperly charging the government costs associated with Boeing's effort to sell planes to foreign governments, and over-allocation to the government of costs Boeing incurred in disposing of hazardous waste. The most significant issue concerned allegations that between 1980 and 1988 Boeing improperly charged millions of dollars in excessive independent research and development costs to government contracts. During that period, Boeing mischarged costs as "internal methods and process development," the company's term for manufacturing and production engineering overhead costs, that properly should have been classified as independent research and development. The independent research and development costs, according to Mr. Hunger, were subject to Department of Defense ceilings. Any costs above the ceilings should have been borne entirely by the contractor. Costs associated with internal methods and process development, on the other hand, were not subject to any ceilings and could be charged and allocated in their entirety to government contracts. By misclassifying and charging to the government over-ceiling independent research and development costs, Boeing improperly charged the government with costs it should have absorbed. The settlement also resolves claims Boeing improperly charged to government contracts additional millions of dollars in unallowable costs in connection with the potential sale of Boeing aircraft to foreign governments. Similarly, the company, between 1984 and 1991, over-allocated several million dollars in hazardous waste disposal costs to government contracts.

Assistant Attorney General Hunger praised the cooperation between the Civil Division and the United States Attorney's office in Seattle, both of which collaborated extensively in achieving the settlement. He said, "This settlement demonstrates that no matter how complex and deeply rooted contractor mischarging may be, the Department of Justice is capable of and committed to painstakingly investigating and pursuing such overcharges in order to protect the treasury."

The Assistant United States Attorney handling this case: ***Kurt Hermanns.***

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District Of Maryland

On April 26, 1994, Frank W. Hunger, Assistant Attorney General for the Civil Division, and Lynn A. Battaglia, United States Attorney for the District of Maryland, announced that Computer Sciences Corporation (CSC) has agreed to pay the United States $3,283,845 to settle government claims that CSC submitted false claims on billings for computer services submitted to the Federal Emergency Management Agency (FEMA). The settlement followed an investigation by the FEMA Office of the Inspector General, the United States Attorney's office for the District of Maryland, and the Civil Division of the Department of Justice. The investigation revealed that CSC, through its Health and Administrative Services Division, Eastern Region, billed FEMA excessively for computer services between October, 1988 and September, 1992. The investigation also disclosed that under the terms of the contract, CSC agreed to bill FEMA at a fixed rate for actual utilization of central processing units (CPUs) for processing business associated with the National Flood Insurance Program. Instead, CSC billed FEMA for more CPU hours than were actually used in violation of the terms of the contract. Under the False Claims Act, it is unlawful to knowingly present false claims for payment to a government agency, and if the United States prevails in a civil action, it may recover treble damages, plus civil penalties of between $5,000 and $10,000 for each false claim submitted to the United States.

United States Attorney Battaglia noted that CSC's misbillings were difficult to trace, and she praised the sustained effort of FEMA's technical staff, and the FEMA Office of the Inspector General. Ms. Battaglia further stated that this case demonstrates that the government will pursue contract fraud, no matter how technically complex.

The Assistant United States Attorneys handling this case: ***Roann Nichols*** and ***Joseph L. Evens.***

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Northern District Of Ohio

On April 15, 1994, Frank W. Hunger, Assistant Attorney General for the Civil Division, and Emily M. Sweeney, United States Attorney for the Northern District of Ohio, announced that TRW Inc. will pay the United States $29 million to settle claims that employees in two of its divisions mischarged the government on military subcontracts. The settlement resolves a complaint filed under the qui tam provisions of the False Claims Act in April 1986 by three former TRW employees. The three employees filed their complaint after TRW told the government about the mischarges but a federal court dismissed their claim. Two of the employees were convicted of federal crimes in connection with this case. The Department took the case in June, 1986 and negotiated the settlement.

The suit followed TRW's disclosures to the Department of Defense and Department of Justice in November, 1984 and February, 1985 that employees in its former Compressor Components Division and Power Accessories Division mischarged the government on numerous military subcontracts from at least 1978 through mid-1984. Assistant Attorney General Hunger said the employees engaged in a wide variety

of misconduct, including the alteration or "padding" of labor hour estimates to support inflated cost proposals, the charging of time spent working on commercial contracts to military subcontracts, and the misstatement of costs for raw materials. The Compressor Components Division manufactured blades and vanes used in jet engines sold to the Army, Navy and Air Force and the Power Accessories Division manufactured components used in nuclear reactors on Navy vessels.

Under the qui tam provisions of the False Claims Act, private citizens, known as relators, can file suits on behalf of the United States against companies or individuals who allegedly have defrauded the government and to share in the proceeds of any recovery. In this case, however, U.S. District Judge Alvin Krenzler of Cleveland ruled in 1991 that the relators were not entitled to a share of the recovery because their complaint was based on information already known to the government. This case was decided on the statutory standard in place before the 1986 amendments to the False Claims Act which liberalized the standard for relator participation. The Sixth Circuit Court of Appeals affirmed Judge Krenzler's decision last August. The U.S. Supreme Court recently declined to review that determination.

Assistant United States Attorney Emily Sweeney stated, "This agreement, along with the guilty pleas of TRW and five high-ranking employees brings to a conclusion the government's ten-year effort to make TRW accountable for its fraudulent activities. It sends a strong message to those who do business with the government that schemes to defraud the government will not be tolerated and that offenders will be prosecuted and penalized to the full extent of the law."

[NOTE: TRW pleaded guilty in 1988 to three counts of conspiracy to defraud the government and was fined $3 million. That fine was separate from this $29 million settlement.]

The Assistant United States Attorney handling this case: ***Arthur Harris.***

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DRUG ISSUES

Major Settlement In The Eastern District Of Louisiana

On May 4, 1994, United States Attorney Robert J. Boitmann and Special Agent in Charge Johnny Phelps announced the largest civil settlement in the history of the Drug Enforcement Administration. Health Corporation of the South, Ltd., doing business as Reality Drug Treatment Center, New Orleans General Hospital, and United Medical Center, agreed to tender a total of $1,850,000 to settle a civil matter concerning the requirement to secure a DEA registration to operate Narcotic Treatment Programs which operated at the two medical facilities. Under the terms of the settlement agreement, the hospitals and Health Corporation of the South, Ltd. did not admit to liability under the Controlled Substances Act for not securing a Narcotics Treatment Program Registration required under Title 21, U.S.C. §823(g). The government contended that a separate registration was required for the three organizations to dispense methadone, a Schedule II controlled substance in their substance abuse treatment units.

The case resulted from an administrative inspection of the pharmacies of both hospitals in July, 1993. DEA Diversion Investigators found that approximately 350 dosages of methadone had been dispensed in United Medical Center from January 1990 through July 1993. Diversion Investigators determined that approximately 1000 dosage units of methadone had been dispensed at New Orleans General Hospital during the same time period. Reality Drug Treatment Centers were operated at both hospitals. No methadone was dispensed at Reality located at United Medical Center; however, methadone

was dispensed at Reality located at New Orleans General Hospital. This Reality Clinic was closed in October, 1993, when the contract between Health Corporation of the South and New Orleans General Hospital expired. Reality at United Medical Center is still operating. While there was no evidence of diversion of methadone by any of the parties, United States Attorney Boitmann stated, "This office and the DEA are committed to enforcing the provisions of the Federal Controlled Substances Act. The proper registration of narcotics treatment programs is essential to the enforcement of the Controlled Substances Act."

This case was handled by ***Carter K. D. Guice, Jr., Thomas L. Watson,*** and ***Nancy A. Nungesser,*** all of the Civil Division, in cooperation in cooperation with the New Orleans Diversion Group of the DEA.

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IMMIGRATION ISSUES

Agreement Reached To Deport Incarcerated Criminal Aliens

On April 8, 1994, Doris Meissner, Commissioner, Immigration and Naturalization Service (INS) announced that INS has entered into an agreement with the State of Florida to expedite the deportation of certain criminal aliens who are serving time in the State's prisons. Commissioner Meissner and Florida Governor Lawton Chiles signed a Memorandum of Understanding to identify and remove such criminals as a demonstration project to help relieve overcrowding in Florida correctional institutions and to speed the removal of criminal aliens from the United States. Under this demonstration project, the State of Florida and the INS will identify several hundred alien inmates who can be excluded or deported before their criminal sentences are completed. The Governor will conditionally commute the remainder of these aliens' sentences, based upon the following conditions:

- that the aliens waive or withdraw any pending appeal or legal challenge to their criminal convictions;

- that they not contest exclusion or deportation;

- that they cooperate with the INS in obtaining travel documents to effect their removal from the United States; and

- that they agree to remain outside the United States and the State of Florida for specified periods of time.

If any alien fails to satisfy any of these conditions, the conditional commutation of the original criminal sentence may be revoked and the sentence reimposed. The INS can also pursue criminal prosecution of any alien who reenters the United States in violation of Federal immigration law.

The agreement supports the President's initiative for expediting criminal alien deportations as part of an overall plan to secure America's borders and control illegal immigration. Specifically, it augments the agency's Institutional Hearing Program to identify and remove incarcerated aliens in the five states with the largest immigrant population (Florida, California, Texas, New York, and Illinois). INS and the Florida Department of Corrections will coordinate efforts to identify deportable criminal aliens currently in the state prison system. The number to be deported initially is estimated in the range of 500 inmates.

Commissioner Meissner said, "This project demonstrates ways State and Federal Governments can cooperate to identify criminal aliens in our prisons and jails and to deport them so they do not get back on the street. It will free up needed prison space in Florida and enable the Immigration Service to carry out its deportation responsibilities in a timely, efficient manner."

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Special Counsel For Immigration Related Unfair Employment Practices

On March 14, 1994, the Department of Justice announced a 24-hour, toll-free "Employer Hotline" at the Office of Special Counsel (OSC) for immigration-Related Unfair Employment Practices. (See, United States Attorneys' Bulletin, Vol. 42, No. 4, April 15, 1994, at p. 145.)

Special Counsel William Ho-Gonzalez advised that a preliminary monitoring report indicates that during its first month of operation, a total of 808 calls were received. One hundred four callers selected the prompt that allows the person to speak to an OSC staff member, and 160 selected the fax-back option that automatically sends information on the antidiscrimination provisions by facsimile. The "Employer Hotline" number is: 1-800-255-8155 or (TDD) 1-800-362-2735.

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ANTITRUST DIVISION

Antitrust Division Accomplishments

In a speech before the American Bar Association's Antitrust Spring Meeting in Washington, D.C. on April 8, 1994, Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, outlined some of the Division's proposed initiatives for antitrust enforcement in the area of intellectual property, as well as some of the Division's accomplishments for the last ten months. She descirbed the proposed initiatives as a framework to solicit comments from interested parties who want to offer their comments or suggestions. The Division will consider the comments and proposed initiatives as part of its process for formulating a statement expected to be released this summer. The following are some of the Antitrust Division accomplishments:

• Merger enforcement over the last ten months hit a 13-year high. Fourteen transactions were either challenged, restructured, or abandoned as a result of Division initiatives during the first six months of FY 1994. This record compares with annual challenges of ten to twelve for previous years.

• The Division's litigation sections were realigned for efficiency. Litigation sections are now divided by types of enforcement, civil non-merger, merger and criminal. These changes will produce increased expertise in litigating complex cases and improve management of the Division's resources and priorities.

• The Division has obtained significant additional resources to hire attorneys and support staff -- thirty-five attorneys, sixty paralegals, fifteen honors law school graduates, and six economists will be added to the antitrust staff.

• The Division has created a Civil Task Force of eighteen lawyers to identify and investigate civil conduct cases. More than fifty new civil conduct investigations have been opened in the last six months. Only four such investigations were opened in FY 1992.

• In 1993, the Division filed eighty-four criminal cases against seventy-one corporations and fifty-one individuals. Fines of more than $41 million were imposed.

• The Division issued joint Department of Justice/Federal Trade Commission Statements of Antitrust Enforcement Policy in the Health Care Industry. The statements respond to industry concern over antitrust uncertainty in the health care industry, and in conjunction with the expedited business review process, allows providers to engage in cost-cutting and efficiency-enhancing measures.

• The Division has participated on the Department of Defense Task Force to determine the best manner to evaluate mergers of firms in the defense industry. A report will be issued soon.

• The Division is participating as a member of the Administration's working group on legislation to modernize the telecommunications laws. The goal of the Division is to encourage free entry in all areas of telecommunications, including local exchange services, information services, long distance, and manufacturing, when regulatory and technological barriers are removed.

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

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First Joint Antitrust Prosecution Involving Department Of Justice And A State

In the first joint antitrust prosecution involving the Department of Justice and a State, on May 5, 1994, the Department of Justice and the Attorney General for the State of Florida filed a lawsuit challenging a proposed merger between two central Florida hospitals that is likely to lead to higher prices and poorer services for consumers in North Pinellas County. If the proposed acquisition were to occur, the combined hospitals would dominate fast growing North Pinellas County with a market share of nearly 60 percent. The civil antitrust suit was filed against Morton Plant Health System Inc. and Trustees of Mease Hospital, the two largest general acute care hospitals firms in North Pinellas County. Morton Plant Health System Inc. operates Morton Plant Hospital in Clearwater, Florida. Mease operates two hospitals, in Dunedin and Safety Harbor, Florida.

Pinellas is the most densely-populated county in Florida. It is a long, narrow peninsula, surrounded on three sides by two large bodies of water, the Gulf of Mexico and Tampa Bay. Automobile traffic in Pinellas County is frequently congested, especially during winter months, when the county's population swells with a seasonal influx of tourists and winter residents. Because few major highways connect communities in the northern and southern ends of Pinellas, travel between North and South Pinellas County is especially difficult and time-consuming. According to the complaint, because of their quality, convenience and accessibility, general acute care hospitals in North Pinellas are uniquely situated to serve local physicians. Very few physicians who practice at hospitals in North Pinellas admit patients to general acute care hospitals in other areas. For these reasons, health care purchasers, such as managed care plans, strongly prefer to contract with general acute care hospitals in North Pinellas to service the needs of their area enrollees, and they do not consider hospitals in other areas to be acceptable substitutes. General acute care hospitals in North Pinellas County could profitably increase the price of acute inpatient hospital services without losing a significant number of enrollees of health care purchasers to hospitals in other areas.

Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, explained, "The proposed merger will likely result in decreased competition so that the residents and other health care consumers in the North Pinellas County area would suffer higher prices and reduced services if the acquisition were to occur. The merger would create a dominant provider of general acute care hospital services, reducing competition for managed care providers that have been instrumental in fighting the war on escalating hospital costs. Competition is the best way to ensure that we contain spiraling health care costs. Otherwise, we can't be sure savings are in fact passed on to consumers."

The Department's opposition to the proposed merger was announced jointly by Assistant Attorney General Bingeman, Larry H. Colleton, United States Attorney for the Middle District of Florida, and Robert A. Butterworth, Attorney General for the State of Florida.

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Antitrust Suit Filed Against The Largest Regional ATM Network In The United States

On April 21, 1994, the operator of the largest regional automated teller machine network in the United States agreed to open its ATM network to competition after the Antitrust Division alleged that its monopolistic and exclusionary practices caused more than a thousand banks to pay higher, non-competitive prices for ATM processing. Consumers in Pennsylvania, New Jersey, Delaware, West Virginia, New Hampshire and portions of Ohio -- a region in which one-seventh of the nation's population lives -- were affected by the anticompetitive practices. The Department filed an antitrust monopolization and restraint of trade case against Electronic Payment Services Inc., the operator of the MAC ATM network. The suit alleges that in order to be a member of MAC ATM network, Electronic Payment Services compelled banks to purchase data processing services. This is the first "tying" case brought by the United States in more then ten years. Electronic Payment Services also used its control over ATM processing to prevent its ATM network member banks from connecting to competing ATM networks. This is the first monopolization case brought by the Administration. At the same time, the Department filed a consent decree that, if approved by the court, would settle the suit.

The consent decree would open the MAC ATM network to competition. MAC, the dominant ATM network in Pennsylvania, New Jersey, Delaware, West Virginia, New Hampshire, and in large portions of Ohio, handles 92 million transactions a month for 27 million depositors of more than 1,400 banks at thirteen thousand ATMs. ATM networks have become an increasingly important means by which banks, savings and loan associations and credit unions offer their depositors convenient access to deposits. Absent competition, a dominant ATM network, such as MAC, can extract high prices from those banks dependent on it. As a result of Electronic Payment Service's exclusionary practices, many banks, particularly small banks, thrifts, and credit unions, paid higher, noncompetitive prices for ATM processing. In addition, by preventing many banks from participating in competing ATM networks, Electronic Payment Services excluded ATM competitors from its market and maintained its monopoly over ATM network access. The proposed consent decree, to which both the United States and Electronic Payment Services have stipulated, provides Electronic Payment Services will open its MAC ATM network to independent ATM processors on a nondiscriminatory basis. It also provides that Electronic Payment Services will sell its ATM network services at prices that will not vary with the process selected, and will not discriminate in the provision of ATM network access to qualified third party processors. Furthermore, Electronic Payments Services is limited in its right to prohibit banks from displaying multiple network marks on ATMs and ATM cards. As required by the Tunney Act, the proposed consent decree will be published in the Federal Register, together with the Department's competitive impact statement, and any person may comment on the proposed decree by submitting their comments to the Department. After a 60-day comment period, the United States will reply to any public comments and seek entry of the decree by the court. The decree will expire ten years after entry.

Assistant Attorney General Anne K. Bingaman stated, "The Department is committed to insuring that this important industry is open to competition, and we believe that competition will result in more choices for depositors and lower costs for depository institutions -- particularly small banks, thrifts and credit unions."

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POINTS TO REMEMBER

International Parental Kidnapping Crime Act Of 1993

On February 10, 1994, Jo Ann Harris, Assistant Attorney General of the Criminal Division, issued a memorandum concerning the International Parental Kidnapping Crime Act of 1993. On April 6, 1994, Assistant Attorney General Harris issued an updated version of the memorandum, which includes a sunset provision with regard to the requirement for prior Criminal Division approval. The new policy is being prepared in bluesheet form for inclusion in the United States Attorneys' Manual. A copy of the updated version is attached at the Appendix of this Bulletin as Exhibit B.

If you have any questions, or require further information, please contact the General Litigation and Legal Advice Section of the Criminal Division, at (202) 514-1026.

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Judicial Nominations And Vacancies

The following is a comparative analysis of judicial nominations and vacancies prepared by the Office of Policy Development as of May 6, 1994:

Judicial Nominations

	Clinton	*Bush*	*Reagan*	*Carter*
Number of Nominations	89	56	64	40
Male	59	52	60	38
Female	30	4	4	2
White	55	54	62	34
Black	24	1	1	6
Hispanic/Other	10	1	1	0
Rated by ABA Well Qualified	63%	52%	53%	57%

Judicial Vacancies

Vacancies	*Total Vacancies As Of May 6, 1994*		*Vacancies As Of Jan. 20, 1993*
District Court	130	(35 since 1/20/93)	95
Court of Appeals	26	(8 since 1/20/93)	18
Supreme Court	1	(1 since 1/20/93)	0
	157		113
Confirmed	60	(51 District; 8 Court of	55
	97	Appeals; 1 Supreme Court)	58
Nominations Pending	29	(24 District; 5 Court of Appeals)	22
	68	(55 District: 13 Court of Appeals)	36

Notes: All data are as of May 6, 1994 (and the corresponding date in the terms of President Clinton's predecessors). The ABA data reflect all appointees of Presidents Carter, Reagan, and Bush, not only nominations through May 5 in the second year of their terms.]

The figures under "1/20/93 Vacancies" refer to vacancies in existence when President Clinton took office and the judges appointed and nominated to fill those vacancies.]

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PROJECT TRIGGERLOCK

Summary Report

(In Cases Indicted Since April 10, 1991)
Significant Activity - April 10, 1991 through March 31, 1994

Project Triggerlock focuses law enforcement atention at local, state and federal levels on those serious offenders who violate the nation's gun laws. The following is a summary report of significant activity from April 10, 1991 through March 31, 1994:

Description	Count	Description	Count
Defendants Charged.....	17,855	Prison Sentences.....	77,161 years
Defendants Convicted.....	11,508	Sentenced to Prison.....	9,438
Defendants Acquitted.....	631	Sentenced w/o prison or suspended.....	732
Defendants Dismissed.....	1,830	Average Prison Sentence..	98 months
Defendants Sentenced.....	10,170		

Defendants Charged Under 922(g) w/o enhanced penalty.....	2,992
Defendants Charged Under 922(g) with enhanced penalty under 924(e).....	839
Defendants Charged Under 924(c).....	5,674
Defendants Charged Under Both 922(g) and 924(c).....	820
Defendants Charged Under 922(g) and 924(c) and (e).....	167
Subtotal Charged Under 922(g), 924(c) +(e).....	10,492
Defendants Charged With Other Firearms Violations (Includes 279 "carjacking" - 18 U.S.C. §2119 defendants)....	7,363
Grand Total (With Firearms).....	17,855

NOTE: Section 924(e) is a sentence enhancement applied to a defendant, prosecuted under 922(g), and has three or more prior state or federal felony convictions for violent offenses or serious drug offenses. It carries a 15-year mandatory minimum sentence. (These figures do not reflect D.C. Superior Court prosecutions.)

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 6, No. 11, dated April 14, 1994, is attached as Exhibit C at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Commission.

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LEGISLATION

Indian Gaming

On April 20, 1994, Kevin V. Di Gregory, Deputy Assistant Attorney General, Criminal Division, testified before the Senate Committee on Indian Affairs concerning oversight of Indian gaming. Mr. Di Gregory was accompanied by John W. Raley, United States Attorney for the Eastern District of Oklahoma, and Chairman of the Attorney General's Advisory Committee's Subcommittee on Native American Issues.

Mr. Di Gregory discussed the role and interest of the Department of Justice, and stated that although neither the Department nor the United States Attorneys participate directly in the day-to-day regulation or oversight of tribal gaming operations, the Department is intensely interested that they be properly and adequately overseen and regulated. The Department has repeatedly stated to this and other congressional committees that, in the absence of adequate supervision, large scale gaming, with its huge cash flow, may be targeted by the organized crime families or other criminal entrepreneurs, may have its proceeds skimmed by corrupt managers, may be victimized by dishonest employees and outside cheats, and may be used to launder the proceeds of illegal enterprises. Mr. Di Gregory added that while it is true that to date there have been few attempts of organized crime associates to infiltrate Indian gaming, and relatively few instances of the other evils, the Department remains very concerned. Some of these offenses are now under investigation, while others may be going undetected because of the lack of regulation and oversight.

Mr. Di Gregory discussed the Indian Gaming Regulatory Act (IGRA) and the need for greater regulation, state and federal regulatory authority, minimum standards for regulation of classes of gaming, and crime and illegal tribal gaming.

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

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SUPREME COURT WATCH

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

Selected Cases Recently Decided

Civil Cases

J.E.B. v. Alabama, No. 92-1239 (decided April 19)

In this case, the Court extended the rule of Batson v. Kentucky, 476 U.S. 79 (1986)--which held that the Equal Protection Clause bars peremptory strike of prospective jurors on the basis of race--to gender-based peremptory strikes.

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., No. 92-854 (decided April 19)

In this case, the Court held that Section 10(b) of the Securities Exchange Act of 1934 does not provide a private cause of action for aiding and abetting securities fraud.

McDermott, Inc. v. AmClyde, No. 92-1479 (decided April 20)

In this case, the Court held that, in an admiralty case where certain defendants have settled before trial, the liability of the nonsettling defendants should be determined by the jury's allocation of proportional responsibility, rather than by reducing the nonsettling defendant's liability by the dollar amount of the settlement.

Landgraf v. USI Film Products, No. 92-757 & Rivers v. Roadway Express, No. 92-938 (decided April 26)

In these companion cases, the Court held that the Civil Rights of 1991 does not apply to cases pending at the time of its passage, or to cases that arose before its passage.

Criminal Cases

United States v. Alvarez-Sanchez, No. 92-1812 (decided May 2)

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

Selected Cases Recently Argued

Civil Cases

Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co., No. 93-609 (argued April 26)

The government, as amicus curiae, argues in this case that Section 27A(b) of the Securities Exchange Act, which reinstated private actions under 10(b) dismissed as untimely under Lampf, Pleva, Likpind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), does not violate the separation-of-powers doctrine or the Due Process Clause.

Criminal Cases

Williamson v. United States, No. 93-5256 (argued April 25)

The government argues in this case that the admission of a post-arrest confession by an accomplice implicating the defendant, offered as a statement against penal interest under Fed. R. Evid. 804(b)(3), does not violate the Confrontation Clause.

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

Civil Cases

United States v. National Treasury Employees Union, No. 93-1170 (granted April 18)

Whether the 1989 Ethics Reform Act ban on government employees' acceptance of honoraria for speeches, articles, and appearances is facially invalid under the Free Speech Clause of the First Amendment.

Whether statements made in the course of plea discussions can be admitted to impeach defendant's contrary statements at trial, when defendant expressly agreed before making the statements that they could be used in that manner.

United States v. Lopez, No. 93-1260 (granted April 18)

Whether the Gun Free School Zones Act of 1990, 18 U.S.C. 922(q), is unconstitutional for lack of a nexus to interstate commerce.

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CASE NOTES

CIVIL RIGHTS DIVISION AND CIVIL DIVISION

Supreme Court Holds That Sections 101 and 102 Of The Civil Rights Act Of 1991 Do Not Apply Retroactively

On April 26, 1994, the Supreme Court issued its decisions in Landgraf v. USI Film Products, Inc., No. 92-757, and Rivers v. Roadway Express, Inc., No. 92-938, two cases involving the application of the Civil Rights Act of 1991 to cases arising before its enactment. The Solicitor General had filed a brief as amicus curiae and appeared at oral argument on behalf of petitioners in both cases. In Landgraf, the Fifth Circuit had held that petitioner, whose appeal was pending at the time of enactment, was not entitled to the damages provided by Section 102 of the new Act, even though the district court had found the employer liable for sexual harassment under Title VII. In Rivers, the Sixth Circuit had held that Section 101 of the new Act, extending Section 1981 to cover claims of racial discrimination in the enforcement and termination of contracts, did not apply to petitioners' discrimination claims that were pending on appeal. The district court had dismissed petitioners' 1981 claims after the Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), and the Sixth Circuit held that Patterson continued to bar petitioners' claims. The Solicitor General argued that Sections 101 and 102 of the Act applied to petitioners' claims, relying on the text of the Act and the presumption that new procedural and remedial statutory provisions apply to pending cases, in accord with Bradley v. Richmond School Board, 416 U.S. 696 (1974).

Justice Stevens delivered the opinion of the Court in both cases, in which Chief Justice Rehnquist and Justices O'Connor, Souter, and Ginsburg joined. In Landgraf, the Court held that Section 102 does not apply to cases that arose before it was enacted; in Rivers, the Court similarly held that Section 101 does not apply to preenactment conduct. In both cases, the Court rejected petitioners' arguments that the text of the statute dictates that Sections 101 and 102 be applied retroactively. Rather, the Court found that the text indicates Congress' inability to resolve how each section of the new Act applied to pending claims. The Court in Landgraf then resolved what lower courts had perceived as a conflict between the principles of statutory construction articulated in Bradley v. Richmond School Board, supra, and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). The Court ruled that Bradley did not conflict with the historic presumption "against applying substantive rights, liabilities, or duties to conduct arising before their enactment." In so ruling, the Court stated that a new statute would have retroactive effect only if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."

Applying these principles in Landgraf, the Court held that punitive damages could not be applied retroactively without raising a "serious constitutional question," and that while compensatory damages did not raise the same issue of unfairness to the defendant, they would still impose a "new disability" for past events. In Rivers, the Court, in addition to rejecting petitioners' textual arguments, found that there was no presumption in favor of the retroactive application of "restorative" statutes.

Justice Scalia filed an opinion concurring in the judgments in both cases, in which Justices Kennedy and Thomas joined. The concurring Justices agreed that there is a presumption against retroactivity absent a clear statement to the contrary, but disagreed with the majority that the clear statement could be supplied by the legislative history, rather than the statutory text.

Justice Blackmun dissented in both cases. In his view, the statutory text indicates retroactivity. He also read the Court's precedents as supporting the retroactivity of remedial statutes.

Landgraf v. USI Film Products, Inc., No. 92-757 (April 26, 1994). DJ 170-57-177

Rivers v. Roadway Express Inc., No. 92-938 (April 26, 1994). DJ 170-73-124

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CIVIL DIVISION

Seventh Circuit Accepts Our Waiver Of Exhaustion Requirement In Age Discrimination Case

When Jaime Espinueva, a federal employee, did not receive a job for which he applied, he complained to the Equal Employment Opportunity Commission (EEOC) of discrimination based on national origin and age. Prior to administrative resolution of his claims, he filed a civil action under 42 U.S.C. §1981 and the Age Discrimination in Employment Act. His national origin claim was dismissed on the ground that Title VII is the exclusive remedy for such claims by federal employees, and his age claim was dismissed for failure to exhaust administrative remedies. On appeal, the Navy initially defended both dismissals.

The court of appeals sua sponte asked the EEOC to appear as amicus curiae. The EEOC consulted with the Department of Justice, and we then filed a joint brief on behalf of EEOC and the Navy, in which we supported the dismissal of the national origin claim for the reasons stated by the district court, but, in accordance with our position in the Supreme Court in Stevens v. Department of the Treasury, 500 U.S. (1991), argued that exhaustion is not required in Age Act cases. We also stated that we waived any exhaustion requirement that might exist. The court of appeals (Cummings, Kanne, Rovner), in an unsigned order, accepted our waiver even though in prior cases it had suggested that the exhaustion requirement was jurisdictional. The dismissal of the national origin claim was affirmed, but the age claim was remanded for further proceedings.

Espinueva v. Dalton, No. 93-1582 (Mar. 30, 1994) [7th Cir.; N.D. Ill.].
DJ # 35-23-632

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Jonathan R. Siegel - (202) 514-4821

* * * * *

Eighth Circuit Accepts Our Argument Regarding The Required Records Exception To The Fifth Amendment Privilege Against Self-Incrimination And Overrules A District Court Order Quashing A Grand Jury Subpoena

This case involves a grand jury subpoena issued to a sole proprietorship automobile dealer as part of a criminal investigation of suspected title washing and odometer tampering. The district court granted a motion to quash the subpoena, which sought various business records of the dealership. The court ruled that enforcing the subpoena would violate the Fifth Amendment privilege against self-incrimination, as applied by the act of production doctrine. That doctrine protects against incrimination that would result from the act of producing documents.

We appealed, arguing that the records here are covered by the required records exception to the Fifth Amendment. This exception overrides the privilege against self-incrimination when records that are part of a legitimate regulatory scheme are required to be kept and produced. The Supreme Court has applied both doctrines, but has never explained how they interrelate. The Eighth Circuit has accepted our argument that the act of production doctrine is merely one way in which the Fifth Amendment applies, and the required records exception overrides that doctrine in appropriate circumstances. Those circumstances were present here. In so ruling, the Eighth Circuit joined several others that have reached this result. This decision should be helpful to us in enforcing the criminal laws that protect consumers.

In re Grand Jury Subpoena, Robert Spano, No. 93-1538 (Apr. 6, 1994)
[8th Cir.; D. Minn.]. DJ # 183-39-5

Attorney: Douglas Letter - (202) 514-3619

* * * * *

Ninth Circuit Upholds The Public Health Service's Regulation Regarding Waiver Of Obligations Under The National Health Service Corps Program

Plaintiff, the recipient of a National Health Service Corps scholarship, claimed that he had the right to fulfill his service obligation in an area of his choosing (a clinic for the homeless in Portland, Oregon) rather than as assigned by NHSC. After NHSC declared him in default, he brought this action seeking relief on a number of theories, including estoppel and breach of contract. Although the district court initially granted him relief, the Ninth Circuit reversed in our initial appeal. That 1988 ruling resolved a number of important issues in our favor, including the statutory nature of rights and obligations under the NHSC program and the broad authority to NHSC to assign scholarship recipients. In remanding for further proceedings, the court of appeals noted the availability of a statutory "waiver" provision, which plaintiff had not invoked.

Plaintiff applied for a waiver, which NHSC denied, applying criteria set out in a published regulation. The district court, however, subsequently accepted plaintiff's contentions that NHSC had construed the statutory terms "hardship" and "unconscionability" too narrowly by insisting on a showing of personal hardship as opposed to general reliance on the beneficial nature of plaintiff's present work and possible hardship to his patients if he had to relocate. Because that ruling effectively invalidated the Secretary's waiver regulation, we brought a second appeal.

The Ninth Circuit has now reversed again, in a highly favorable opinion. The court upheld the waiver regulation as consistent with the statute, noting, among other things, that the decision not to consider unassigned service as a factor furthers the policy of ensuring NHSC's ability to assign scholarship recipients where they are most needed. The court also rejected plaintiff's further claims that NHSC had improperly applied the regulation in his case. The agency believes that this decision should prove useful in future challenges to waiver denials.

Rendleman v. Shalala, No. 91-35596 (Apr. 14, 1994) [9th Cir.; D. Or.].
DJ # 145-16-2626

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* * * * *

False Claims Act Cases

Eleventh Circuit Holds That (1) There Is No "Public Disclosure" Under §3730(e)(4) Until There Are Public Allegations Specific To The Named Defendant,(2) "Based Upon" Under Section 3730 (e)(4)(A) Means Based In Any Part, (3) "Original Source" Need Only Have Some Information In Advance of Public Disclosure, And Need Not Be The Source Of The Information To The Entity That Publicly Disclosed It, And (4) Rule 9(b), Fed.R.Civ.P., Governs False Claims Act Complaints

Relator filed a qui tam suit following public allegations of widespread fraud in an industry. The Eleventh Circuit held that there was no "public disclosure" within the meaning of 31 U.S.C. §3730(e)(4) unless and until the public allegations include a specific reference to the defendant named in the qui tam suit. The appellate court also held that in considering whether the suit was "based upon" the information disclosed, the court must determine whether the suit was "based in any part on publicly disclosed information." The court concluded that relator was the "original source" because he had at least some direct information which was obtained independently of the allegations made public at a hearing. The court also held that an original source need not prove that he was the source of the information to the entity that first publicly disclosed it. Finally, the appellate court held that False Claims Act complaints must be pled with sufficient particularity to satisfy Rule 9(b), Fed.R.Civ.P.

Cooper v. Blue Cross and Blue Shield of Florida, Inc., No. 92-4875 (April 21, 1994) [11th Cir.; S.D.Fla.]

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* * * * *

Fourth Circuit Holds That Deadlines For Seeking Extensions of Qui Tam Intervention Period Are Not Jurisdictional

The District Court for the District of Maryland dismissed the Government as a party plaintiff in a qui tam suit, holding that the Government's failure to comply with court ordered extensions of the timely intervention provision in 31 U.S.C. §3730(b)(4) barred the Government from proceeding. Reversing the trial court, the Fourth Circuit held that section 3730(b)(4) is a non-jurisdictional statutory deadline.

The District Court also dismissed relator's action, holding that his suit was "based upon" publicly disclosed allegations and thus barred under 31 U.S.C. §3730(e)(4)(A). Expressly rejecting the broader definitions of "based upon" enunciated in cases such as John Doe Corp., 960 F.2d ---, 324 (2nd Cir. 19---), and Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2nd Cir. 1990), the Fourth Circuit vacated the dismissal as to the relator and remanded the case, holding that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based." The Fourth Circuit also affirmed the District Court's holding that allegations in a civil complaint constitute a public disclosure in a civil "hearing" for purposes of section 3730(e)(4)(A). Finally, the Fourth Circuit rejected the definition of "original source" adopted in Long Island Lighting and Wang v. FMC Corp., 975 F.2d 1412, 1418 ((9th Cir. 1992), and held that section 3730(e)(4) does not require that an "original source" be a source to the original disclosing entity.

United States ex rel. Siller v. Becton Dickinson & Co., Nos. 93-1275, 93-1459 (April 18, 1994) [4th Cir.; D. Md.]

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* * * * *

District Of Columbia Circuit Defines "Based Upon" And "Original Source" For Purposes Of 31 U.S.C. §3730(e)(4)

Relator in a qui tam suit alleged that defendant, who had served as the arbitrator in a labor dispute in which relator had been involved, had fraudulently billed the Government for days on which defendant had not actually worked on the arbitration. Through its personal knowledge of the arbitration process, relator became suspicious after certain records were produced during discovery in the labor dispute. Relator then conducted additional investigation. The lower court held that the qui tam suit was jurisdictionally barred because the complaint had been "based upon" a public disclosure in a "civil hearing." Agreeing that discovery material, when filed with the court and not subject to a protective order, is "publicly disclosed" in a "civil hearing" for purposes of section 3730(e)(4), the appellate court held that relator's suit was not barred because the information in the public domain was insufficient to expose the vital ingredients of a fraudulent transaction or the specific allegation of fraud. The appellate court further held that relator qualified as an "original source" because it had "direct and independent knowledge of [an] essential element of the underlying fraud transaction."

United States ex rel. Springfield Terminal Railway Co. v Quinn, No. 92-7157 (February 8, 1994) [D.C. Cir.; D.D.C.]

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* * * * *

District Court For The District Of Columbia Broadly Defines Claims, Holds That Rule 9(b) Governs False Claims Act Complaints

In a qui tam action in which the Government had declined to intervene, relator argued that actionable "claims" under the False Claims Act include an invoice and payment for a certain product, requested equitable adjustments for costs related to the product, and oral demands for payment for the product. The District Court for the District of Columbia accepted the broad definition of "claim" advanced by the Government in an amicus brief, holding that the first two items were claims and that the oral demands merely echoed other claims which already had been or eventually were submitted. In addition,

the court dismissed relator's complaint as to several items on the grounds that the complaint was insufficiently specific to comply with Rule 9(b), Fed.R.Civ.P. Finally, the court granted summary judgment as to the remaining items for failure to establish a causal relationship between the false statement and the Government's loss; prompted, at least in part, by the unusual nature of the underlying contract, the court reasoned that the Government only accepted and paid for those items which it actually tested and that this testing and acceptance was, in effect, an intervening cause that makes any prior representations immaterial.

United States ex rel. Schwedt v. Planning Research Corp., No. 92-1951-LFO (D.D.C. March 31, 1994)

Attorney: Judith Rabinowitz - (202) 307-0386

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Northern District Of Illinois Holds That Guilty Plea To Mail Fraud Has Collateral Estoppel Effect In False Claims Act Case, Holds Restitution In Criminal Case Is Not A Judicial Determination Of Damages, And Broadly Interprets Halper To Limit Government's Damages To Net Losses

Citing the collateral estoppel effect of a guilty plea to mail fraud, the Northern District of Illinois granted the Government's motion for summary judgment with respect to False Claims Act liability relating to HUD fraud. The court further ruled that the amount of restitution ordered in the prior criminal case does not constitute a finding as to the amount of damages suffered by the Government. While noting that, unlike in United States v. Halper, 490 U.S. 435 (1989), the defendant was not a "small gauge offender" and that the ratio between the Government's initial loss and the amount sought is 2.3 to one, the court was nonetheless "troubled" by the fact that the ratio between 1) the single damages less the criminal restitution and a prior recovery from a sale of property, and 2) the amount sought was 17.7 to one. Reasoning that the Government's law enforcement expenditures might "tip the scale back towards an acceptable ratio," the court ordered the Government to make an accounting of its detection and investigation costs. The Government is moving for reconsideration on whether the court correctly interpreted Halper.

United States v. Kanelos, No. 93-C-2251 (April 20, 1994) [N.D. Ill.]

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TAX DIVISION

Supreme Court Of Hong Kong Issues Favorable Ruling Pursuant To Letter Request Of The District Court For The Northern District Of Alabama

On March 25, 1994, the Supreme Court of Hong Kong issued an order requiring the production of bank records pursuant to a letter request of the District Court for the Northern District of Alabama. The Tax Division had earlier sought to obtain these same records in summons enforcement proceedings brought in the Southern District of New York. The Tax Division stayed these proceedings pending the outcome of the letter request, issued by the Alabama District Court where a grand jury is investigating the taxpayer whose records are at issue.

In September, 1993, the Hong Kong Supreme Court issued an order requiring the production of the summoned information, but shortly thereafter the targets of the United States investigation intervened and filed a motion to quash the order. On February 17 and 18, 1994, the Hong Kong Supreme Court conducted a final hearing on this matter. The Tax Division worked with the Hong Kong Crown Solicitor's office to obtain this favorable ruling.

* * * * *

Federal Circuit Affirms Favorable Judgment Of Court Of Federal Claims In Case Involving Question Of Use Of Rule Of 78's To Account For Interest On Long-Term Indebtedness

On March 18, 1994, the Federal Circuit affirmed the favorable judgment of the Court of Federal Claims in Mulholland v. United States, and the sixty-seven related cases that were consolidated with Mulholland. These cases, involving in the aggregate in excess of $10 million, present the question whether the Commissioner of Internal Revenue abused her discretion in determining that certain partnerships could not use the Rule of 78's to account for interest on long-term indebtedness. The Rule of 78's is an accounting convention that allocates substantially all interest payable on long-term debts to the first few years' payments. The Commissioner determined that this method of allocation, principally employed in tax shelters, does not clearly reflect income. The Court of Federal Claims held in the Government's favor and this taxpayer appeal followed. In 1989, the Government prevailed in a similar case in the Third Circuit.

* * * * *

Second Circuit Holds That Late-Filed Priority Claims Could Not Be Subordinated To Timely-Filed Claims Solely Because The Priority Claim Was Untimely Filed

On April 5, 1994, the Second Circuit reversed the order of the district court in Edward G. Vecchio, et al. v. United States. The Second Circuit held that late-filed priority claims could not be subordinated to timely-filed claims solely because the priority claim was untimely filed. Rather, the court held, the Bankruptcy Code requires that priority claims be paid first regardless of when filed. The court also held that untimely filing is not a valid ground for disallowing a claim, and invalidated a Bankruptcy Rule to the extent that it sugggests the contrary. The court of appeals acknowledged that its reading of the Bankruptcy Code could lead to the conclusion that priority claims must be paid ahead of other claims, even when they are filed after an estate's assets have been distributed. The Second Circuit expressed confidence, however, that the discretionary nature of the bankruptcy court's authority to order disgorgement of prior distributions would allow the court to reach a just result in such instances. The court of appeals also stated that late-filed priority claims could be subordinated under principles of equitable subordination. It remanded the case to the bankruptcy court to consider whether disgorgement was necessary and whether principles of equitable subordination should be applied.

* * * * *

Fourth Circuit Overturns Injunction Against Withholding Taxes On A $27 Million Lottery Jackpot

On March 31, 1994, the Fourth Circuit issued an opinion reversing the unfavorable order of the district court in International Lotto Fund v. Virginia State Lottery Department and United States. The International Lotto Fund is a self-described Australian trust engaged in "the business of participating in lotteries and other games of chance." In February 1992, the Fund won the $27 million jackpot in the Virginia lottery. The Virginia State Lottery Department, however, refused to pay the winnings to the Fund without first withholding state and federal taxes. The Fund responded by filing suit for an injunction compelling the Lottery Department to accept from the Fund an Internal Revenue Service Form 1001, which would, in effect, exempt the Fund from federal taxation. The district court granted the injunctive relief sought by the Fund and the United States and the Lottery Department appealed.

The Fourth Circuit has now reversed that adverse order, holding that the district court lacked jurisdiction to enjoin withholding of federal taxes from the Fund's lottery winnings under the Anti-Injunction Act of the Internal Revenue Code. The court of appeals also ruled that the district court was precluded from enjoining the withholding of state taxes from the lottery winnings.

* * * * *

Seventh Circuit Upholds A $15 Million Illinois Real Property Tax Assessment Against The United States

On April 5, 1994, the Seventh Circuit, en banc, issued an opinion in United States v. Thoams C. Hynes, et al., upholding the right of Cook County, Illinois, to impose over $15 million in property taxes on property the United States was purchasing under a lease-to-ownership plan. The taxes were assessed on buildings constructed and used by the United States. In its appeal, the Government sought a declaration that the state and local ad valorem real property taxes assessed at issue were unconstitutional because the state taxing statute discriminated against the United States in favor of buildings owned by state and local governments. The court of appeals held that the United States had consented to local taxation and that its consent was operative, even though similarly situated property owned by the state and local governments was immune from local taxation. The Seventh Circuit reasoned that the Illinois statute permitting taxation of the federal properties was not discriminatory because it merely allowed for governmental bodies to consent to taxation, which the United States did, and the state and local governments did not.

* * * * *

Ninth Circuit Grants Government's Petition For Rehearing In Case Centered On Claiming Current Deductions For "Interest" On Its Obligation To Pay Deferred Compensation To Top Executives And Directors

On March 31, 1994, the Ninth Circuit granted the Government's petition for rehearing in Albertson's Inc. v. Commissioner, which presents one important issue for review. This issue centers upon Albertson's position that it was entitled to claim current deductions for "interest" on its obligation to pay deferred compensation to a number of its top executives and directors. This additional "interest" amount would be paid to the recipient when the deferred compensation payments begin at a point that may be many years in the future. The Ninth Circuit, in an earlier decision, had "reluctantly" reversed the Tax Court's holding that the amounts treated as "interest" were in substance additional compensation, and that as compensation they were not deductible until disbursements were made to the employees. Rather, the Ninth Circuit found that the "interest" components of the deferred compensation payments "were a fair measure of the time value of monies loaned to Albertson's by the participants." While "sympathizing" with the policy argument we advanced that Congress had intended that no employer deduction should be allowed prior to the employee's receipt of the deferred compensation, the appellate court held that it was for the Congress to correct the "glitch" in the tax laws.

The Tax Division petitioned for rehearing, arguing that the panel decision was incorrect and could result in the potential revenue loss of billions of dollars. The Ninth Circuit has directed the parties to file new briefs, and will hear a reargument on the issue on June 15, 1994. The Government previously prevailed on other issues in this case, and those issues are not to be reheard.

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OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Donna A. Bucella, Director of the Office of Legal Education (OLE), and the members of the OLE staff, thank the following Assistant United States Attorneys (AUSAs), Department of Justice officials and personnel, and federal agency personnel for their outstanding teaching assistance and support during courses conducted from March 14 - April 15, 1994. Persons listed below are AUSAs unless otherwise indicated:

Complex Prosecutions And Advanced Grand Jury Seminar (Clearwater, Florida)

Amendment to COMMENDATIONS appearing in the April issue: ***Tom Wales,*** Western District of Washington, substituted as an instructor for Robert Westinghouse.

Evidence (Washington, D.C.)

Robert S. Berman, Trial Attorney, Housing and Civil Enforcement Section, Civil Rights Division. ***Douglas Coleman*** and ***Steven B. Snyder,*** Trial Attorneys, Torts Branch, Civil Division. ***Scott Glick,*** Trial Attorney, Terrorism and Violent Crimes Section, Criminal Division. ***Richard Parker,*** Deputy Chief, Civil Division, Eastern District of Virginia; ***Richard Roberts,*** District of Columbia; and ***Eleanor Darden Thompson,*** Deputy Civil Chief, Western District of Oklahoma.

In-House Criminal Asset Forfeiture Training (Boston, Massachusetts)

Karen P. Tandy, Acting Deputy Director for Litigation, Asset Forfeiture Office, Criminal Division. ***Bart Van de Weghe,*** Southern District of New York.

Fourth Circuit Asset Forfeiture Component Seminar (Columbia, South Carolina)

Nancy Wicker, First Assistant United States Attorney, District of South Carolina; ***Steven Hess*** and ***Richard C. Kay,*** District of Maryland; ***Beverly Hartley,*** Eastern District of North Carolina; ***Gill Beck,*** Middle District of North Carolina; ***Rebecca Milner*** and ***B. Frederick Williams,*** Western District of North Carolina; ***Sylvia Amaker*** and ***Doug Barnett,*** District of South Carolina; ***Winfield Grant, Maria Grote, Gordon Kromberg,*** and ***Ruth Wilson,*** Eastern District of Virginia; ***Lisa McGuire*** and ***Ken Sorenson,*** Western District of Virginia; ***David Bayha, Lisa Quaranta,*** and ***Sharon Potter,*** Northern District of West Virginia; ***Dorothy Hess*** and ***Betty Pullin,*** Southern District of West Virginia. ***Robert Sharp,*** Acting Director, ***Harry Harbin,*** Assistant Director, ***Alice Dery,*** Special Counsel, and ***Stefan D. Cassella,*** Acting Deputy Director, Asset Forfeiture Office, Criminal Division. ***Cary Copeland,*** Director, and ***Neill Roe,*** CATS Deputy Project Supervisor, Executive Office for Asset Forfeiture. ***Paul V. King,*** Forfeiture and Seized Property Unit Chief, ***Peter J. Krusing,*** Special Agent, ***William Schroeder,*** Legal Forfeiture Unit Chief, and ***Charles Sheppard,*** Special Agent, Federal Bureau of Investigation. ***Sue Bronston,*** Training Administrator, ***Carol Gainey,*** Seizure and Forfeiture Specialist, and ***Carroll Spillar,*** Deputy Chief, Seized Asset Division, United States Marshals Service. ***Cedric Bullock,*** Attorney Advisor, ***William Dodge,*** Resident Agent in Charge, ***Peter Niessing,*** Program Manager, ***William Snider,*** Forfeiture Counsel, and ***Hal Stillings,*** Asset Forfeiture Section Group Supervisor, Drug Enforcement Administration. ***Joseph Travis,*** Field Management Branch Chief, and ***Karen Wolford,*** Property Management Specialist, Immigration and Naturalization Service.

Criminal Trial Advocacy (Washington, D.C.)

James Hurd and ***Azekiah Jennings,*** District of Virgin Islands; ***Rhonda Fields,*** Chief, Economic Crimes Section, District of Columbia; ***Loretta Lynch,*** Chief of Long Island Offices, Eastern District of New York; ***David Fein,*** Deputy Chief, Criminal Division, Southern District of New York; ***David Allred,*** Middle District of Alabama; ***Michael Whisonant,*** Northern District of Alabama; ***Donna Barrow,*** Southern District of Alabama; ***Crandon Randell,*** District of Alaska; ***Rory Little,*** Northern District of California; ***Noel Brennan,*** District of Columbia; ***Eileen O'Connor,*** Southern District of Florida; ***Hillary Frooman,*** Central District of Illinois; ***Dan Gillogly,*** Northern District of Illinois; ***Patricia Brown Holmes,*** Northern District of Illinois; ***Barbara Brook,*** Northern District of Indiana; ***William Redkey,*** Western District of Washington. ***Ken Bresler,*** Trial Attorney, New England Bank Fraud Task Force. From the Criminal Division: ***Laurie Barsella,*** Senior Legal Advisor, Office of International Affairs, and ***Bruce Pagel,*** Deputy Chief of Litigation, Narcotic and Dangerous Drug Section.

Employment Discrimination Seminar (Albuquerque, New Mexico)

Rachel Ballow, Eastern District of Virginia; ***Peter A. Caplan,*** Eastern District of Michigan; ***Janet Craig,*** Deputy Chief, Civil Division, Southern District of Texas; ***Joan Garner,*** Deputy Chief, Civil Division, Eastern District of Pennsylvania; ***Judith D. Kobbervig,*** Chief, Civil Division, District of Oregon; ***Beth McGarry,*** Northern District of California; ***Albert W. Schollaert,*** Western District of Pennsylvania; ***Glenn K. Schreiber,*** Eastern District of Louisiana; ***Judith A. Whetsine,*** Northern District of Iowa. From the Civil Division: ***Susan K. Rudy*** and ***Anne Gulyassy,*** Assistant Directors, ***Richard R. Brown, Lisa Olson, Christopher Tuite, Robert A. Van Kirk,*** and ***Sarah Wilson,*** Trial Attorneys, Federal Programs Branch; ***Salvatore D'Alessio,*** Trial Attorney, Torts Branch; ***Marleigh D. Dover,*** Special Counsel, Appellate Staff; ***Kirsten D. Levingston,*** Special Assistant to the Assistant Attorney General. ***M. Faith Burton,*** Senior Counsel, Office of Legislative Affairs. ***Stuart Frisch,*** Acting General Counsel, Justice Management Division. ***Stuart Gibson,*** Senior Trial Attorney, Tax Division. ***Rebecca K. Troth,*** Staff Attorney, Appellate Section, Civil Rights Division.

Examination Techniques (Washington, D.C.)

Richard Parker, Deputy Chief, Civil Division, ***Brian Miller, Margaret Smith, Winfield Grant,*** and ***Stephen Miller,*** Eastern District of Virginia; ***Rhonda Fields*** and ***Tom Zeno,*** District of Columbia; ***Samuel Langoria,*** Southern District of Texas; ***Mike Hardy,*** Western District of Texas; ***Bruce Brandler,*** Middle District of Pennsylvania; ***Jill Martindell, Steve Handler, Steve Talson, Kathlynn Fadely,*** Attorneys, Torts Branch, Civil Division.

Attorney Supervisors Seminar (Annapolis, Maryland)

From the Executive Office for United States Attorneys: ***Anthony C. Moscato,*** Director; ***Wayne A. Rich, Jr.,*** Principal Deputy Director; ***Brian Jackson,*** Assistant Director, Evaluation and Review Staff; ***Michael McDonough,*** Assistant Director, Financial Management Staff; ***Eileen Menton,*** Assistant Director, Case Management Staff; ***Paula Nasca,*** Director, Security Programs Staff; ***Rick Sponseller,*** Associate Director, Financial Litigation Staff; ***Gail Williamson,*** Assistant Director, Personnel Staff; ***Deborah Westbrook,*** Legal Counsel.

Alternative Dispute Resolution (Washington, D.C.)

Donald Greenstein, Volunteer Mediator, Tax Division. ***Lawrence A. Klinger,*** Assistant to the Director, Torts Branch, Civil Division. ***James Layton,*** District of Columbia.

Criminal Asset Forfeiture Seminar (New Orleans, Louisiana)

Robert J. Boitmann, United States Attorney, Eastern District of Louisiana; ***Robert Mydans,*** District of Colorado; ***James R. Alsup,*** District of Maryland; ***Kathleen Brinkman,*** Southern District of Ohio; ***Leslie J. Westphal,*** District of Oregon; ***Sonia Jaipaul,*** Eastern District of Pennsylvania; ***Claude Hippard*** and ***Susan Kempner,*** Southern District of Texas. ***Cary Copeland,*** Director and Chief Counsel, Executive Office for Asset Forfeiture. ***Lee Radek,*** Chief, Public Integrity Section, Criminal Division. ***Karen Tandy,*** Acting Deputy Director for Litigation, and ***Stefan D. Cassella,*** Acting Deputy Director for Program Management, Asset Forfeiture Office, Criminal Division. ***Kevin Matthews,*** Trial Attorney, and ***Patrick Brady,*** Trial Attorney, Fraud Section, Criminal Division.

Introduction To The Freedom of Information Act (Washington, D.C.)

Thomas J. McIntyre, Senior Attorney, ***Carol S. Hebert*** and ***Kirsten J. Moncada,*** Attorney-Advisors, Office of Information and Privacy.

Health Care Fraud Seminar (San Diego, California)

Gerald Stern, Special Counsel for Health Care Fraud, and ***Debra Cohn,*** Deputy Special Counsel for Health Care Fraud, Office of the Deputy Attorney General; ***David Bosley,*** Southern District of Ohio; ***Bruce Carter,*** Western District of Washington; ***Jeanne Damirgian,*** Senior Litigation Counsel, Southern District of Florida; ***Phillip Halpern*** and ***Carol Lam,*** Southern District of California; ***Michael Loucks,*** District of Massachusetts; ***Lee Michaelson,*** Central District of California; ***Janet Newberg,*** District of Minnesota; ***Andrew Quinn,*** Middle District of Pennsylvania; ***James Sheehan,*** Chief, Civil Division, ***Catherine L. Votaw,*** Deputy Chief, Civil Division, and ***Judy Goldstein Smith,*** Eastern District of Pennsylvania. ***Karen Morrissette,*** Deputy Chief, Fraud Section, Criminal Division. ***William Esposito,*** Special Agent in Charge (San Diego), and ***Everett Cook,*** Special Agent (Philadelphia), Federal Bureau of Investigation.

Freedom of Information Act for Attorneys and Access Professionals (Washington, D.C.)

Richard L. Huff, Co-Director, ***Daniel J. Metcalfe,*** Co-Director, ***Melanie Ann Pustay,*** Senior Counsel, ***Thomas J. McIntyre,*** Senior Attorney, ***Gerald B. Roemer, Scott A. Hodes, Michael H. Hughes, Paul-Noel Chretien, Janice Galli McLeod,*** Attorney-Advisors, ***Carmen L. Mallon,*** Paralegal Specialist, all from the Office of Information and Privacy. ***Elizabeth A. Pugh,*** Assistant Director, Federal Programs Branch, ***John F. Daly,*** Attorney, ***John P. Schnitker,*** Attorney, Civil Division; ***Lee J. Ross, Jr.,*** Deputy Chief, Money Laundering Section, Criminal Division. ***William E. Bordley,*** Attorney-Advisor, Drug Enforcement Adminstration.

COURSE OFFERINGS

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

AGAI Courses

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

June 1994

Date	*Course*	*Participants*
1-3	First Assistants	FAUSAs (Small and Medium Offices)
6-10	Criminal Federal Practice	AUSAs, DOJ Attorneys
7-10	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
7-10	Asset Forfeiture Financial Investigations	AUSAs, DOJ Attorneys
7-10	Asset Forfeiture Multi-Level Staff Training	USAO Support Staff
13-17	Complex Prosecutions/ Advanced Grand Jury	AUSAs, DOJ Attorneys
14-16	Affirmative Civil Litigation	AUSAs, IG Counsel
28-30	Attorney Supervisors	AUSAs

July 1994

6-8	Civil Chiefs	Civil Chiefs (Small/Medium Offices)
12-14	Environmental Law (Civil)	AUSAs, DOJ Attorneys
12-15	Asset Forfeiture Multi-Level Staff Training	AUSAs, Paralegals
13-15	Environmental Crimes	AUSAs, DOJ Attorneys
26-28	Affirmative Civil Litigation	AUSAs, IG Counsel
26-28	Money Laundering/ Financial Issues/Asset Forfeiture	AUSAs, DOJ Attorneys
26-29	Basic Narcotics	AUSAs, DOJ Attorneys
26-29	Basic White Collar/ Financial Crimes	AUSAs, DOJ Attorneys

August 1994

Date	***Course***	***Participants***
1-5	Advanced Criminal Trial Advocacy	AUSAs, DOJ Attorneys
2-5	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
16-18	Criminal Tax Institute	AUSAs, DOJ Attorneys
17-19	Attorney Supervisors	AUSAs
23-25	Alternative Dispute Resolution	AUSAs, DOJ Attorneys
29-Sept. 2	Criminal Federal Practice	AUSAs, DOJ Attorneys

LEI Courses

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

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

June 1994

Date	***Course***	***Participants***
9	Advanced FOIA	Attorneys
13-14	Federal Acquisition	Attorneys
15	Fraud, Debarment, and Suspension	Attorneys
16	FOIA Forum	Attorneys
20	Statutes and Legislative Histories	Attorneys
20-22	Negotiation Skills	Attorneys

June 1994 (Cont'd.)

Date	Course	Participants
21-23	Advanced Bankruptcy	Attorneys
24	Legal Writing	Attorneys, Paralegals
	July 1994	
6-7	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals
8	Privacy Act	Attorneys, Paralegals
11-15*	Basic Paralegal	USAO Paralegals
19-21	Discovery	Attorneys
25	Ethics and Professional Conduct	Attorneys
	August 1994	
25-27	Attorney Supervisors	Attorneys
1-5*	Support Staff Training	USAO Paralegals
15	Ethics for Litigators	Attorneys
18-19	Evidence	Attorneys
22-31*	Financial Litigation for Paralegals	USAO Paralegals
23	Introduction to FOIA	Attorneys, Paralegals

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

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(LEI-Paralegal & Support)	Donna Kennedy

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

Legal Counsel's Office
Executive Office For United States Attorneys

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Executive Office for United States Attorneys, Legal Counsel's Office, in Washington, D.C. Incumbent will function as the Attorney-In-Charge for the Labor and Employee Relations Branch. Incumbent must have primary legal expertise in the areas of Employment and Administrative Law and Equal Employment Opportunity. In addition, familiarity with the workings of the Department of Justice is desired. Previous supervisory experience along with work experience in a Chief Counsel's/General Counsel's office is preferred.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least five years post-J.D. experience. Applicants must submit an SF-171 (Application for Federal Employment), writing sample, and current performance appraisal to: Executive Office for United States Attorneys, Administrative and Personnel Services Staff, Bicentennial Building, Room 8104, 600 E Street, N.W., Washington, D.C. 20530 - Attn: Marie Blackmon, Personnel Management Specialist.

The position is a GS-15 with a salary range of $69,427 to $90,252. This advertisement will remain open until the position is filled. No telephone calls, please.

* * * * *

Voting Section, Civil Rights Division

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced attorneys to work in the Voting Section of the Civil Rights Division in Washington, D.C. The Voting Section enforces laws designed to safeguard the right to vote of racial and language minorities and members of other specially affected groups. In enforcing the Voting Rights Act, the Section brings lawsuits against state and local jurisdictions to challenge unfair election systems. The Section also administratively reviews, under Section 5 of the Act, voting changes, including such highly sensitive matters as redistricting plans to determine whether they are discriminatory in purpose or effect, and it monitors election day activities through the assignment and oversight of federal observers.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Applicants must submit a current SF-171 (Application for Federal Employment) or resume, writing sample, and current performance appraisal to: Civil Rights Division, Voting Section, Department of Justice, P.O. Box 66128, Washington, D.C. 20035-6128.

Current salary and years of experience will determine the appropriate salary level. The possible range is GS-12 ($42,003 - $54,601) to GS-15 ($69,427 - $90,252). These positions are advertised in anticipation of future vacancies, and are open until filled. No telephone calls, please.

* * * * *

[NOTE: The Department of Justice is an Equal Opportunity employer. It is the policy of the Department to achieve a drug-free workplace and persons selected may therefore be required to pass a urinalysis test to screen for illegal drug use prior to final appointment.]

* * * * *

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%	04-06-90	8.32%	09-20-91	5.57%	03-05-93	3.21%
11-18-88	8.55%	05-04-90	8.70%	10-18-91	5.42%	04-07-93	3.37%
12-16-88	9.20%	06-01-90	8.24%	11-15-91	4.98%	04-30-93	3.25%
01-13-89	9.16%	06-29-90	8.09%	12-13-91	4.41%	05-28-93	3.54%
02-15-89	9.32%	07-27-90	7.88%	01-10-92	4.02%	06-25-93	3.54%
03-10-89	9.43%	08-24-90	7.95%	02-07-92	4.21%	07-23-93	3.58%
04-07-89	9.51%	09-21-90	7.78%	03-06-92	4.58%	08-19-93	3.43%
05-05-89	9.15%	10-27-90	7.51%	04-03-92	4.55%	09-17-93	3.40%
06-02-89	8.85%	11-16-90	7.28%	05-01-92	4.40%	10-15-93	3.38%
06-30-89	8.16%	12-14-90	7.02%	05-29-92	4.26%	11-17-93	3.57%
07-28-89	7.75%	01-11-91	6.62%	06-26-92	4.11%	12-10-93	3.61%
08-25-89	8.27%	02-13-91	6.21%	07-24-92	3.51%	01-07-94	3.67%
09-22-89	8.19%	03-08-91	6.46%	08-21-92	3.41%	02-04-94	3.74%
10-20-89	7.90%	04-05-91	6.26%	09-18-92	3.13%	03-04-94	4.22%
11-17-89	7.69%	05-03-91	6.07%	10-16-92	3.24%	04-01-94	4.51%
12-15-89	7.66%	05-31-91	6.09%	11-18-92	3.76%	04-29-94	5.02%
01-12-90	7.74%	06-28-91	6.39%	12-11-92	3.72%		
02-14-90	7.97%	07-26-91	6.26%	01-08-93	3.67%		
03-09-90	8.36%	08-23-91	5.68%	02-05-93	3.45%		

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.

* * * * *

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THE WHITE HOUSE

Office of the Press Secretary

EXHIBIT A

For Immediate Release

April 16, 1994

PRESS BRIEFING
BY
SECRETARY OF HOUSING AND URBAN DEVELOPMENT HENRY CISNEROS
AND ACTING ASSOCIATE ATTORNEY GENERAL BILL BRYSON

The Briefing Room

10:38 A.M. EDT

MS. MYERS: A huge crowd today, the Saturday gang. (Laughter.) You're all so quiet.

Secretary of Housing and Urban Development Henry Cisneros, and the Acting Associate Attorney General Bill Bryson are going to brief you on their report to the President on fighting violent crime in the public housing projects. So, without further ado, Secretary Cisneros.

SECRETARY CISNEROS: Thank you, Dee Dee.

The last weeks have seen an eruption of violence in Chicago's public housing, of which has been unprecedented. Last weekend alone, some 15 shootings and five deaths in the public housing developments along the State Street Court, or principally at Robert Taylor Homes and Stateway Homes.

It prompted the President to direct the attentions of the Attorney General and the Department of Housing and Urban Development to several elements of this crisis. First, to devise a policy on the sweeps, and secondly, to look at the other elements of security and community development that need to occur to stop the violence.

Unfortunately, the violence we see in Chicago is not limited to Chicago public housing. While it may not be on as intense a scale in other places at this time, it exists in many communities across the country, and Washington, D.C. as well, as many of us know.

The President directed the Attorney General and the Secretary of Housing and Urban Development to devise a policy that could be used nationally so that other housing authorities across the country would be able to act upon it; a policy that would look at the nature of sweeps that might be necessary and do it within constitutional limits.

As you know, a judge, Judge Anderson in Chicago last week ruled that the sweeps as they were being conducted exceeded constitutional limits. And so work has been done over the course of the last week to devise a national policy. That policy has essentially five elements. You heard the President describe it in general terms in his radio address. I'd like to be a little more specific on the elements of the policy.

First, the policy assumes that it is essential to get control of the lobbies of buildings. So substantial effort is placed, and resources, to focus on access, entryways, metal detectors, guards, and control of lobbies.

The precise policy on sweeps includes the following four elements. Sweeps can occur in the common areas of buildings. This is important, because of what we have seen in recent weeks in Chicago includes the use of post boxes, mail boxes, as hiding places for guns, as well as stairwells, air vents and electrical outlets used as hiding places for weapons as well as drugs. So it is not insignificant to be able to sweep the common areas. That was allowed before and it continues to be.

Secondly, obviously, sweeps can occur in vacant units. I was along with a sweep team last Sunday evening in Chicago that netted something on the order of 25 weapons just Sunday night -- heavy weapons, rifles, 30-06 weapons with scopes, automatic weapons and revolvers -- just on Sunday night. The stock room at the police substation of the Chicago Housing Authority is full; literally 1,000 weapons that have been secured principally in vacant units.

And I'll say more about the issue of vacancies in a moment. But sweeps through vacant units can be very productive because the gangs tend to put the weapons -- locate these caches of weapons in vacant units.

Fourthly, sweeps can occur where consent has been given. That consent can take several forms. It may be consent that is given in advance as an element of a lease where people in the agreement to sign a lease for a building sign a consent that would allow searches for weapons just as they allow consent for searches -- for maintenance problems, inspections that are now a standard part of a lease. And we expect that this will be decided on a local basis, sometimes as local as the residence voting themselves in a building whether or not they want that as a precondition on the lease. We believe that would be important in a court test on this subject, that the residents voted that kind of element in a lease in advance.

But another approach to consent is what I witnessed myself on Sunday, and that is leases that are signed on the spot as a police team arrives at a unit. What you find -- you say, well, that's surprising that a resident would allow a search if they know there is contraband in their apartment. Frequently, they don't know that there's contraband there. It may be a mother who has small children, but a relative, a boyfriend, an older member of the family who has hidden guns there that the family doesn't know. What I witnessed on Sunday was the discovery of heroine in bags hidden in a mother's chest of drawers -- bureau -- by a son who was in the room and when it was discovered, readily admitted it was his. The mother did not know that it was there. She had consented to the search. So it is not insignificant to search when consent has been given. And that, obviously, meets the test of the law.

Finally, the fourth element of searches are warrantless searches in exigent circumstances. The key word there, of course, is exigent. It has to do with what has occurred -- whether or not there has been shooting, for example, from the upper stories of the building, and how massive it might be, how frequent it might be, and how timely the response is. All of those are subjective judgments, but the judge's order indicated that under circumstances of exigency, those sweeps can occur.

So those are the elements, then, of clarification on the sweeps policy. The bottom line is they allow for the continuation, the use of that particular vehicle, sweeps, within certain circumstances. And they are an instrument available not only to the city of Chicago, but to other housing authorities that want to use that instrument.

Acting Associate Attorney General Bill Bryson is here in the event you have some questions. But I'd like to follow up on the second aspect of this beyond sweeps to what is essentially a strategy of providing a down payment on the crime bill.

Yesterday in Chicago, the mayor and Vince Lane, the chairman of the Housing Authority, and myself announced a series of initiatives that represent cooperation between the federal government and the city of Chicago.

You have in front of you a handout that I'd like to call to your attention because it speaks to the other elements of what have to occur. The first page is called enforcement measures. The second is called prevention measures. Roughly speaking, they group into those two categories. The first one are measures associated with security and safety and taking control of buildings and their surrounding areas. And the second revolve around recreation, youth programs, antigang strategies, drug control and other elements that are preventative in character.

Let me just quickly give you the highlights of this, because I think it underscores what the President has said all along in his fight against crime and, particularly, in his pressing for the crime bill that while we focus on security measures, we must also focus on the balancing of some preventative measures.

On the security side, HUD is putting in new funds as well as advancing some CHA unobligated funds, totaling $10 million for the creation of 10 additional BITE teams which will augment two BITE teams -- that stands for Building Interdiction Team Effort -- already in existence.

Now, let me just say quickly what those are. They're 18-member teams: eight members of the Chicago Police Department with a sergeant or nine Chicago police; eight members of the Chicago Housing Authority Police and a sergeant or nine CHA police team up together and literally arrive at a building, take control of the lower floors of the building, and then proceed on searches within the limits of what has been described.

I went with one of those teams on a raid on Sunday night. This was one where consent was required, but the emphasis was on controlling the common spaces and vacant spaces, and, as I say, 25 weapons were secured by BITE teams that evening.

This is a very substantial commitment of 180 additional police personnel, 18 times 10, for a year with a capacity to extend it beyond a year with additional HUD funds, as well as with funds that are in the crime bill. So this is a substantial addition of police capability that can be on the scene immediately. It does not require hiring of police personnel. These are off-duty personnel who, through overtime, can be in place as quickly as the funds are available. We're talking about the next week to 10 days on this. It's a very effective mechanism. They arrive en masse, without notice where buildings are in particular difficulty, and it's made a great deal of difference.

You see also under the next item, the third one down, $5-million advance to fund replacements of private security guards so that sworn police officers can be in charge of the lobby and entrance areas. Today, these are so-called rent-a-cops, private security guards at the entrances, generally regarded to be ineffective. They're not trained, they're underpaid; the gangs intimidate them, go around them, even when they have a metal detector and it goes off. The rent-a-cops stay in there plastic, glassed-in cages for fear of stepping out and confronting the gangs. We think the gang members will have a good deal more of a problem confronting a peace officer, a police officer, a trained policeman with back-up capability in the same way. So this is an effort to replace the security personnel with sworn officers.

You see a program that is part of -- the next one -- an element of our Operation Safe Home initiative which will bring FBI and Alcohol, Tobacco and Firearms resources together in order that we can trace weapons and prosecute appropriately, based on interstate movement of weapons, moving weapons through the mails and other possible things such as that.

The next one, I promised I'd say a word about vacancies. There's a $10-million advance to rehabilitate vacant apartments. This is literally an around-the-clock effort. Conditions are so bad in the housing authority that I saw, the housing developments that I saw, that when you make an effort at vacancy rehabilitation, if the workmen leave at 6:00 p.m. in the evening, by the time they return the next morning, the work they did the previous day's been vandalized an undone.

So in a mixture of fixing the buildings on a practical, round-the-clock basis, using the model that was used in the California earthquake to get the freeway built in a fourth of the time that was originally projected, as well as to have a physical presence in the buildings with workers and spotlights and guards moving equipment through the building 24 hours, that will be an element of getting control of some of these buildings and dealing with the vacancies.

You see, finally, on this page funding for tenant patrols -- very important American heroes who wake up in the middle of the night to patrol their own buildings, no matter the weather. And they need some support in the form of radio equipment and so forth.

Let me quickly go through the second page because it's important to balance the security steps against the prevention measures. You see there funds to rehabilitate playground facilities. Presently the ball fields around Robert Taylor Homes are covered with glass shards and fragments and drug paraphernalia; clearly, unavailable to the children who want to play there.

In addition, $200,000 to support recreational programs, particularly one called Midnight Basketball that takes and allows gangs members to be engaged in something other than gang activity by participating in basketball late into the night. Well orchestrated, coached, supervised basketball.

A very successful drug program at the Harold Ickes Homes called CADRE will be extended to the rest of the developments in the Chicago Housing Authority with the funds advanced from the Bureau of Justice Assistance. And then, very importantly, you see a $2 million new investment of family -- in what we call Family Investment Center funds to provide recreational programs, youth counseling, cultural activities, after-school programs, and do that on the ground floor of the buildings, which then take some units out of circulation and replaces them with adults to add to the control of the bottom floor of the lobbies.

In addition, what we find is that many of those ground floor units are being used for drug transactions because people can avoid coming to the [illegible] the windows for drug transactions at the ground levels. If we would transform those into active places where adults are providing youth services and counseling and so forth, they're unavailable for those purposes.

And finally, $150,000 to establish a Boys and Girls Club.

Let me just say two things in closing. The first is that this represents a down payment on the concepts the President has pushed in the crime bill; the same balancing of, on the one hand, prevention measures with those matters related to enforcement. And though this is particularly targeted to Chicago, because of the emergency circumstances of the moment -- the level of violence and gang war that is at its highest intensity -- this same approach will be available to other communities in the crime bill and through other programs that exist between the various federal departments. And we will work with other communities in the same way.

Finally, everything that we have proposed here is in consultation with the residents. Keep in mind, it is the residents who have requested that the policy of sweeps continue, and support them. And I can tell you this from firsthand, spending Sunday afternoon and Monday and yesterday with the residents. I didn't take one step in recommending to the President, consulting with the Attorney General, or allocating our resources -- HUD resources -- without consultation with the residents. It is an absolute imperative that we do that, and I can tell you from those discussions that they are nearly desperate with the conditions that they're forced to raise their children in today.

I could tell you anecdotal stories; I won't dwell on it now, but perhaps the most plaintive voice that I heard on Sunday was a lady who just said, "Please make it stop." Beyond ideology, beyond partisanship, beyond fine legal distinctions, she was just begging that the violence, the shooting, her children having to watch their classmates be taken to the hospital stop. And they're convinced that the sweeps have played an important role in slowing down the flow of weapons.

Without the sweeps, the weapons have come back into the buildings on a large scale. As a matter of fact, one lady told me yesterday -- she said, they're bringing the weapons back in in bagfuls. So some mechanism like the sweeps needs to be available to those who would try to provide safety and security. We've tried to provide those within constitutional limits.

The rest of the things we've talked about here -- the BITE teams, the vacancies, the drug programs, the recreational programs -- all -- I can show you my notes -- are specifically requested by the residents, because they know their circumstances better than anyone else.

I'll be happy to stop on that note and take questions. And Mr. Bryson may want to speak to some of the legal issues.

Q Is this problem only with the public housing? I mean, why particularly with public housing?

SECRETARY CISNEROS: Well, I'll tell you why particularly with public housing. Because the configuration of the public housing is a big part of the problem. First of all, we have created a legacy of concentration in Chicago -- not only in Chicago, but in Chicago, 67 high-rise buildings along State Street for four miles, literally -- no exaggeration -- you can check it on the odometer of your car -- four miles, 67 high-rise buildings without a break. A concentration of something like a third of the 144,000 people who are public housing residents in Chicago in this State Street corridor.

Point number one, concentration. Secondly, the federal government has been part of the problem in recent years in allowing income levels to drop so dramatically in public housing that the residents of public housing share all of the same problems. The median income in Chicago public housing is $5,400, as against something in excess of $40,000 in the metropolitan area as a whole. So an eighth or so, and no income mix. In many buildings, 85 percent single heads of households; no one working in regular jobs; no role models for the children at all.

Now, that's the base condition. Then it is exaggerated by -- rather it is complicated by the war for turf, and particularly for control of drug producing properties. There is a gang war in Chicago right now -- and particularly, I speak now of Robert Taylor Homes and Stateway -- by two gangs; one called the Gangster Disciples, the other called the Black Disciples. They literally control entire high-rise buildings, and frequently these buildings are adjacent to each other. I am told by the Chicago police that the drug take from those high-rise buildings is as high as $30,000 a week, or $1.5 million a year. Therefore, in the minds of 15- and 16-year-old gang members, it is worth fighting for, even dying for, control of the buildings.

What you end up with, then, is high-rise buildings adjacent to each other with young men spotting from the upper stories to see whether their rival gang members are moving around in the common space between the buildings, and shooting from building to building with heavy weapons. I mean, a 30-06 deer rifle with a scope is the kind of weapon that's in use and the kind of weapon that was confiscated the other night.

So, unfortunately, you find circumstances where, because children live there and families live there, they get caught in the cross-fire. Women will show you apartments with bullet holes over their children's beds; bullets that have finally ended up in the hallway in their homes not because they were the targets, but because anyone in the opposite building ends up being a target in the cross-fire.

Q Where are the Chicago police in all this?

SECRETARY CISNEROS: Chicago police are patrolling, and they have allocated a unit of 125 officers in addition to what the Chicago Housing Authority has. But it's not enough to patrol, when what is required is to actually take control of buildings and take them back from the gang members; and that's the circumstance. That's why Chicago, at this moment -- and that's why public housing.

Q What are you hearing from the civil liberties groups on this? What are your preliminary estimates of court tests? Are people telling you this will or will not pass constitutional muster?

SECRETARY CISNEROS: We believe that this will pass constitutional muster, and a lot of work went into drafting a policy that would pass a court test. The consent forms, the consents in the leases, the conditions under with warrantless searches can occur -- all of those were drafted with that in mind.

Now, if you were, this afternoon, to call a member of the ACLU and ask them a specific question, I can't tell you what their answer might be. My guess is that there are some who might continue to want to test these questions; and that's what the courts are for. But we believe that we have devised a policy here that can meet the test.

And let me, in the final analysis, say that the conditions in public housing in Chicago -- as well as other places right now -- are so severe that any abstract analysis of people's rights of the type that the ACLU might do is swamped in real life by people's rights being denied. Clearly, people ought to have a right to live safely, in peace, take their children to school, walk the sidewalks of their buildings, to be able to walk through the hallways of a building without all the lights having been knocked out and the elevators pitch dark because the gang members want to reduce the silhouette that they'll make to gunners in the next buildings -- those are rights that people have, as well; and those rights are being abridged by the present circumstances.

Q In announcing the program --

SECRETARY CISNEROS: I'll come back -- just let me take this lady and I'll come back.

Q What is the status of the overall issue of gun control in public housing?

SECRETARY CISNEROS: We are, internally now, assessing the proper course that we want to follow. Clearly we want to discourage -- obviously, illegal weapons are banned in public housing. The question has arisen of whether or not we ought to ban all guns in public housing by lease. Some public housing residents -- and there are some places in the country where people would feel this would be a substantial infringement on their rights, so we have not crossed that bridge at this point.

There is some legislation that suggests that developments may want to vote on whether all weapons can be banned in a building. And we think that has some plausibility and is worth looking at. But we've not issued regulations or taken a stand yet on the question of banning all weapons in public housing. It's an open question; it's now being discussed in the department and elsewhere.

Q In announcing this program, it sounds like housing authorities are admitting a failure on a rather extreme level -- that people are indeed living in circumstances where their children have bullet holes over their bed, or where they're always making --

SECRETARY CISNEROS: I'm not afraid to acknowledge that public housing, in the worst configurations, has failed. And therefore, we must go beyond security measures and even the kinds of community building measures, salvaging measures that I've described here today to profound and dramatic change in public housing.

We'll be introducing legislation this next week which will allow us to do things, for example, like change the rules and internal dynamics of public housing so that people can work, and families that have incomes and work can be included in the mix of families in public housing. That goes to one of the questions that I answered earlier about the income mix.

We want to go farther than that, and make it possible to capitalize future streams of public housing assistance to housing authorities so that large sums of money can be made available now -- not down the road, not just rehabilitate, modernize and put Band-Aids, but replace the worst of the high-rise public housing with more appropriately scaled, scattered, safer configurations across the metropolitan area. These are the kinds of dramatic, profound changes I think we need to make in public housing.

Let me just say, anytime that you're in Chicago -- and I know most of you are White House press so it may be restricted to a time when you're traveling there with the President -- but it is worth seeing this line up of 67 high-rise buildings and recognizing what was done there.

Q Can that be torn down?

SECRETARY CISNEROS: Much of it ought to be replaced because, as I said, the present configuration is a failed effort at housing people.

Q But, Mr. Secretary, may I ask you just a question about the allocation of resources understanding that you are going to accomplish nothing without a zone of safety.

SECRETARY CISNEROS: Right.

Q I still note that some $30-odd million are devoted to enforcement, and of the $2,950,000 that have been slated for prevention, my count is no more than $950,000 that might go for such things as counseling, drug prevention, violence prevention. What can you really hope to accomplish if you lay in a heavy dose of law enforcement short-term and you don't do anything to counsel kids who are seeing this violence, to help their parents find jobs who only have a median income, that you so eloquently put it, at $5,000 a year. I mean, what about the so-called soft services that really are going to be the building blocks of changing this thing? You've got to change the people.

SECRETARY CISNEROS: Good question, and I'd like to answer it in two ways. The first is that what you see here is an immediate infusion of federal resources to deal with the present circumstances. In part, it's law enforcement. It's also some of these community efforts.

Yesterday morning, I met with the mayor, with the head of the Parks District in Chicago, which controls the park system as well as recreational programs; met with foundation leaders from the Chicago area and began discussions with the business community of Chicago. There's one important element missing that was not present at the table, but the mayor committed to bring them to the table is the Board of Education. And what we're asking is that this down payment be matched by these other institutions in their areas of capability. And we received some tentative commitments yesterday, which the mayor will outline in the weeks ahead.

This is a partnership in which the federal government has started and we expect fully that we will see resources for summer recreation programs from the Parks District, for some educational initiatives from the Board of Education, some commitments from the foundation and business community to cultural programs, antidrug initiatives, and, very importantly, the city of Chicago with its own discretionary resources. So what you see here is a small percentage of what will be brought to bear on this circumstance.

Additionally, and the second part of the answer, we have many ongoing programs that are not represented in this -- our own HUD as well as the other federal departments. And I might also say that in instances where we concentrate effort, such as you know the decision this week to join in a partnership with the District of Columbia government to deal with the very troubled District of Columbia Housing Authority, it gives us the opportunity, gives HUD the opportunity to work on the housing component, but also to bring to bear the efforts of other federal resources.

So I fully expect you'll see the Department of Education and Labor and Justice and Health and Human Services joining us, using public housing, the base as the focal point for effort.

Q Considering the magnitude of the money you're discussing here for these two projects, doesn't that really limit the likelihood of this truly being a nationwide approach?

SECRETARY CISNEROS: Let me make clear, the announcement yesterday in Chicago was not solely for these two projects. If you look at many of these things, for example, the BITE teams, which is $10 million of this $29 million package; the vacancy reduction, which is another $10 million of the $29 million -- so now we're up to $20 million of the $29 million -- are intended to be used throughout the CHA. So we're talking about one of the largest housing authorities in the country that has new resources to work with.

Now, as to the question of inadequacy of resources -- yes, we're always working with tight resources, always. It's the sort of going in assumption that we're going to be very, very tight. That's why it's important to leverage beyond what the federal government can do and get others to the table. That was the first thing I did on arrival yesterday morning in Chicago, is to meet with the group that I described. And I think we can create partnerships that leverage money dramatically.

We're looking now at some changes in rules that would allow us to bring private sector partners that can bring resources, like our pension fund relationship where we put $100 million of housing vouchers, and with pension money, extend that to $1.2 billion worth of housing product. We'll have to do a good deal more of that. And I think that's going to be one of the watchwords, one of the hallmarks of our efforts the next few years.

Q Mr. Secretary, are these search consent clauses now going to be a part of everybody's lease in the Chicago Housing Authority?

SECRETARY CISNEROS: The preconsent given in leases will be a local decision. That is to say, we believe it is an element of policy that will enhance the ability of housing authorities to conduct searches. The decision will have to be made as local as each housing authority, and potentially, each development where residents may want to vote. That would further enhance the constitutionality of these preconsent devises.

Q Are sweeps being used in other housing authorities?

SECRETARY CISNEROS: Yes, they are. Yes, they are, but in different configurations. For example, in Baltimore, they give 48 hours notice that a sweep is going to occur and have not been tested with that approach.

Bruce, do you know other cities that are using sweeps now?

MR. KATZ: I think Philadelphia and Puerto Rico are using sweeps similar to the ones they use in Baltimore.

SECRETARY CISNEROS: In Baltimore -- with advance notice.

Q Is that successful?

SECRETARY CISNEROS: You'd be surprised at how successful they are because, as I said earlier, frequently residents don't know what another family member has put in the unit. So it's more successful than you might imagine, but clearly, not as successful as a surprise sweep might be.

Q But there are dangers, too. I mean, recently, in Boston, a 71-year-old man who also happened to be a preacher had a heart attack and --

SECRETARY CISNEROS: I don't think that was a sweep, though. That was a -- my recollection is it wasn't public housing, it was a private apartment and -- it may have been assisted housing, but it was a private apartment and it was a police action. That was not a sweep, but it was an anticrime raid. It was a different circumstance. They arrived in force, rammed down the door, were looking for fugitives and had the wrong person. It's exceedingly unfortunate. The mayor and the police chief apologized; obviously, apologies aren't enough in such a circumstance, but that was the circumstances of that case.

Q Could you just clarify -- when you were talking about the warrantless searches in exigent circumstances, does that mean that -- let's say, there's a shooting, a shoot-out, and the police come into the building, that they are able without a warrant to go into an entire floor, searching?

SECRETARY CISNEROS: It does. It does --

Q -- kind of leave open the possibility that whenever there might be any type of incident whatsoever, the police could use that in order to --

SECRETARY CISNEROS: No, and let me tell you some practical reasons why it doesn't. First of all, the sweeps involved a lot of police personnel. You can't just assemble large numbers of people anytime there's an incident. The sweeps, as they were being run in Chicago, involved over 100 personnel. So the likelihood that you could say, oh, there's been some shooting; we need the excuse; let's put 100 people together and go -- it doesn't work that way as a practical matter.

Legally, what we interpret the -- and Bill may want to expand on this -- what we interpret the exigent condition to be an appropriate response in a timely fashion. It can't be three days later. It's got to be in some rough approximation to when the incident occurred and targeted to the circumstances of the incident.

Bill?

ASSOCIATE ATTORNEY GENERAL BRYSON: With respect to exigent circumstances, there's a lot of case law on this, and the theme of what we're saying here is that we think we can have an effective crime prevention and apprehension program without departing from standard Fourth Amendment law. We're not trying to create new law here. What we're really trying to do is to avoid having everything tested in court, avoid having long delays while programs get precleared, in effect, by federal and state courts. We think there is the capacity through existing Fourth Amendment law to take care of the problem.

Now, with respect to exigent circumstances, the standard formula -- and of course, it's very fact specific; you just can't say in any more than the most general terms how exigent circumstances will apply in a particular case until you know the facts -- but by and large, the way the courts would articulate it is to say that you need some kind of emergency situation where the need to act without a warrant is pressing. And the police, under those circumstances, can engage in an appropriate response.

If a gang is running into a building and the police are following, they can run into the building. They can pursue the gang. That doesn't mean that they can go through the entire building, to the top floor, and look through everybody's chest of drawers in their apartments. That would be well beyond what the courts would characterize as exigency. But it really is a fact-specific kind of inquiry that has to be done and yet, it gives flexibility to police to deal with emergency situations.

Q How throughout the chain of command would a determination need to be made in order to declare a circumstance exigent? Are we talking about a sergeant, a captain? What are we talking about?

ASSOCIATE ATTORNEY GENERAL BRYSON: Well, typically, when -- real exigency is typically something that has to be decided on the spot, because if it has to go up to the captain, by that time, your need for immediate action very often has ended. Not necessarily, but very often. So this is the kind of thing -- if there is a medical emergency; somebody has been shot, somebody is shooting from the windows of an apartment, you can identify the apartment. You go in and you try to apprehend them then. You don't need, under those circumstances, to get a warrant because you have no capacity to get a warrant. You don't have the time. And you also, of course, don't have the time to call the chief of police.

That's the way exigent circumstances typically works. Now, there may be circumstances in particular cases in which you do have to go up the chain. But the normal exigent circumstances case will not involve the opportunity for that.

Q So it could be a cop on the beat?

ASSOCIATE ATTORNEY GENERAL BRYSON: It typically has been. In exigent circumstances law, it's the cop on the beat who is trained to understand what the limits are of exigent circumstances, but it's the cop on the beat that has to make that decision in many exigent circumstances cases.

Q On another part of this, you say that it will be helpful for a tenant to show their support for searches in advance. Is this basically a majorit·· rule can overrule the Fourth Amendment?

ASSOCIATE ATTORNEY GENERAL BRYSON: No. What we think is very important here, and the theme of that element and really a lot of this is, one, local circumstances really control what is reasonable in a particular case. The whole Fourth Amendment is premised on the concept of reasonableness. And reasonableness is a balancing of need against the intrusion.

Now, in particular cases, the need may be very great. And that's true of these two units. We need desperately to get control of these units -- to get control from the gangs. Therefore, the need element is extremely high. The intrusion of searches into one's home obviously is high, too. But what's important, I think, about allowing the voice of the tenants to be heard through tenant organizations or otherwise is that you have evidence in the clearest form that you can have of what the people who are affected by both the emergency need and also by the intrusions that are involved -- how they feel about it.

Now, this is not to say that the Fourth Amendment is somehow subject to majority rule; of course, it's not. It is, however, to say that in assessing a particular case what the level of need versus intrusion is, that it's very important to consider how the people who are there view it. And for that reason, I think a lot about this policy is really local specific. This is not to say that the same policy were to be applied in say a senior citizens' public housing home in Sarasota which hasn't had a serious crime problem in years -- of course not. This is a policy which, in its various applications, has to be made specific to, as the Secretary said, a particular housing authority and even perhaps a particular building.

Q Are you suggesting that the consent to be searched be a condition of the lease? And what circumstances would that consent be able to be withdrawn?

ASSOCIATE ATTORNEY GENERAL BRYSON: Well, again, that's going to have to depend on how these particular authorities work that out. I think that there certainly are circumstances in which it is legitimate to have in the lease a provision similar to the maintenance and emergency clause provision which would allow for administrative inspections for firearms, let's say. In fact, there is already a provision in the consent decree in the Chicago case that allows inspections of that character.

Now, this is in the leases. It is a provision that everybody who is in the unit is bound by. Whether there would be, in a particular case, provisions that would allow somebody to opt out at particular time; or whether somebody could say, no -- just at the outset -- I don't want to sign that; and whether that person would then be able to do that would depend very much on the local conditions. And that's the gist of, I think, the whole constitutional analysis here, is that it really is not something on which you can make any across-the-board pronouncements that X policy applies regardless of where and regardless of the circumstances.

I point out that when you have a clause like this in a lease, what it really gives you is flexibility. That means you don't, then, necessarily have to conduct any of these procedures. You can say, we've got this capacity and, therefore, when the time comes, if we need to use it, we can invoke it. That gives you the flexibility that the current typical lease clauses do not. They do contain emergency entry provisions. But they typically -- the word emergency in that sense usually means the place is on fire, or there is water flowing out from the place and down into the lower units.

We think that, in effect, that in some of these units there is a fire -- there is a problem that ought to be addressed in the same sort of a way; this is a form of emergency. Now, obviously, it's different from the emergency or maintenance inspections. But it is of the same general nature, and can be dealt with in the same kind of way. It is something that has to be explored, I think, by, again, the local agencies.

And one of the things in our discussion with the people at HUD -- which has been very profitable on this, and I expect to continue -- will be to try to provide guidance to local housing authorities to the extent that they seek it as to what kinds of innovative mechanisms can be used to try to address the problem without infringing Fourth Amendment rights.

Q Do you think in some circumstances it ought to be a condition of the lease?

ASSOCIATE ATTORNEY GENERAL BRYSON: I think in some circumstances it can be a condition of the lease, that's right. Now, the basic theme of consent law in the Fourth Amendment is that you can't coerce somebody to consent to something. So if the conclusion is that, under those circumstances, you would be effectively coercing consent because the person has no other choice, then you would have to reassess that. If the person had other choices -- if there were a provision, let's say, in a particular development that conditions were so bad that you felt you had to go to some mandatory lease provision, then if the person had choices -- was offered public housing under the circumstances, it might well take the coercive element away. But in any even, that's the basic theme.

What we're saying is, we can square this with the Fourth Amendment. We are not engaged in an effort to try to undermine the principles of the Fourth Amendment; and we would welcome, as a matter of fact, the constructive suggestions of any civil liberties groups as to how we can go about doing this while minimizing the intrusiveness of these procedures. But I think they, as we, recognize that what we're dealing with here is an emergency situation in which some kind of innovative action is required. And we're prepared to embark on it without, in any way, trampling on the rights of people under the Fourth Amendment. And we think it can be done. We think there is enough room under the doctrines that the courts have devised to do that.

Q I have one more question for Secretary Cisneros. You had said that people in public housing had supported these measures and you had worked in consultation with them.

SECRETARY CISNEROS: Correct.

Q But some of the other tenants that I've talked to have said that housing officials have, in effect, set up a second-class citizenship, forcing people to endure things like metal detectors and frisking and home searches -- the kinds of things that would be viewed as indignities if they were applied to more middle-class neighborhoods.

SECRETARY CISNEROS: Interesting question -- let me take it in two parts. The first piece is, I've talked with the public housing residents, talked with their elected leaders -- the people that I meet with when I go to Chicago are the leaders of the buildings, the people who are duly elected. They are quite clear that they want security measures. Unequivocal, strongly worded -- in fact, if anything, our package didn't go far enough for them when I described it yesterday. They wanted more money, more resources, more programs and want to make sure that we carry out on these, which we will; but, very clear speaking the voice of their members.

As a matter of fact, we had a meeting at a church on Monday morning in Chicago with residents and other persons in the community, and several discordant voices were raised on these points; and the residents literally took back the meeting and said, "You don't live in public housing; you don't know what you're talking about. We live here, and we want these protections."

Q Excuse me, this is to say that older women, elderly women and elderly men are saying that they don't mind going through metal detectors?

SECRETARY CISNEROS: Well, that was the second part that I wanted to answer. If you -- many developments in America today have protections. The most elite developments in America today have a guard at the door; a security person that you walk by at a desk; closed-circuit television from the downstairs desk to the upstairs hallways, from the parking garage. Frequently they are fenced in, in some way.

And article in last Saturday's Washington Post talked about the number of people who live in some 20 enclosed communities throughout the Washington area. Now, I'm not proposing that that's the preferable way to live, but it is not correct to say that people are stigmatized somehow by living with security when the most elite communities in America have it. Indeed, what we're doing is offering some of the same protections to the poorest of our population that those who can pay hundreds of thousands of dollars for shelter pay.

One of the interesting things, for example, is the issue of fencing of public housing. For years, I had a kind of personal sense that fencing might be regarded as fencing people in, instead of keeping trouble out. And so I resisted it until I talked to residents who said that when fencing had been put in place and it had restricted people driving through their developments without going through some kind of a entry way, sometimes even a guard shack with a guard there, but that when it was done, drive-by shootings stopped, drug trafficking stopped, people wandering across the development from outside to come and do drug purchases had stopped. In Houston, 44 percent reduction in crime the first year after fences -- simple step -- fences around a development.

Again, if we go up Connecticut Avenue, Massachusetts Avenue in Washington, D.C., we'll find the most elite condominiums have those same basic security measures. So I don't think it's a fair attack on the concept of providing security.

THE PRESS: Thank you.

END 11:25 A.M. EDT

EXHIBIT
B

International Parental Kidnapping Crime Act of 1993

On December 2, 1993, the International Parental Kidnapping Act of 1993 (Public Law 103-173, 107 Stat. 1998) was enacted into law. This legislation adds a new 18 U.S.C. § 1204 which makes it an offense to remove a child from the United States or retain a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights. Such an offense is punishable by a fine under title 18, imprisonment for not more than three years, or both.

The term "child" is defined as a person who has not attained the age of 16 years. The term "parental rights" with respect to a child means the right to physical custody of the child whether joint or sole, and includes visitation rights. Such parental rights may arise by operation of law, court order, or by legally binding agreement of the parties.

The statute expressly provides for the following affirmative defenses: (1) the defendant acted within the provisions of a valid court order granting legal custody or visitation rights and such order was obtained pursuant to the Uniform Child Custody Jurisdiction Act, (2) the defendant was fleeing an incidence or pattern of domestic violence, (3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child due to circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts the other parent or lawful custodial within 24 hours after the visitation expired and returned the child as soon as possible.

The statute also contains a Sense of the Congress that inasmuch as the procedures set forth in the 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction has resulted in the return of many children, those procedures, in circumstances where they are applicable, should be the option of first choice for a parent who seeks the return who has been removed from the parent.

The 1980 Hague Convention on the Civil Aspects of International Child Abduction provides a left-behind parent with certain civil remedies to effect the return of the child to the country of habitual residence. Our obligations under the Convention are handled by the Department of State.

Currently, the following 31 countries are parties to the Convention: Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, United Kingdom, United States, Austria, Norway, Sweden, Belize, Netherlands, Germany, Argentina, Denmark, New Zealand, Mexico, Ireland, Israel, Croatia, Ecuador, Poland, Burkina Faso, Greece, Monaco, Romania, Mauritius, and the Bahamas.

It is the view of the State Department that the existence of pending criminal charges based on an abduction or wrongful retention may adversely affect the willingness of courts of the country where the child is located to order the return of the child, pursuant to the Hague Convention, to the country where the criminal charges are pending. In view of these concerns and in view of the Sense of the Congress set forth in the statute, prosecutions for violations of the new 18 U.S.C. § 1204 should not be initiated unless the left-behind parent has exhausted all remedies, if applicable, under the Hague Convention.

Even in situations in which the child is taken to a non-Hague Convention country, the State Department's Child Custody Division may be able to initiate efforts to locate the abducted child, inquire as to the welfare of the child, and possibly open communications between the parents with a view toward a resolution of the custody dispute.

More detailed information about procedures under the Hague Convention can be obtained from Linda L. Donahue, Chief, Child Custody Division, Office of Citizens Consular Services, Room 4817, U.S. Department of State, Washington, D.C. 20520, phone: (202) 647-2569, fax: (202) 647-2835.

Based on the unanimous recommendation of the Attorney General's Advisory Committee of United States Attorneys, prior approval of the Criminal Division must be obtained before taking any prosecutive action to enforce the International Parental Kidnapping Crime Act of 1993. This prior approval requirement will remain in effect for two years from the date of enactment.

Requests for approval to prosecute and other inquiries concerning the International Parental Kidnapping Crime Act of 1993 should be directed to the General Litigation and Legal Advice Section, Criminal Division (202) 514-1026.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT C

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

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

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Violation of Probation

REVOCATION FOR DRUG POSSESSION

Supreme Court resolves circuit split, holds that the minimum sentence after revocation of probation for drug possession is one-third of the original guideline maximum. Defendant was originally subject to a guideline range of 0–6 months' imprisonment, and was sentenced to a 60-month term of probation. He violated probation by possessing cocaine and was subject to 18 U.S.C. § 3565(a), which states that for "possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence defendant to not less than one-third of the original sentence." The district court interpreted "original sentence" to mean one-third of the probation term, and sentenced defendant to prison for 20 months. The appellate court reversed, holding that "one-third of the original sentence" should be read to mean the maximum sentence available under the original guideline range; thus, defendant should have been sentenced to "not less than" 2 months, with a maximum sentence of 6 months. *See U.S. v. Granderson*, 969 F.2d 980 (11th Cir. 1992). [See *Outline* at VII.A.2 for other circuit holdings.]

The Supreme Court affirmed the appellate court. "According the statute a sensible construction, we recognize, in common with all courts that have grappled with the 'original sentence' conundrum, that Congress prescribed imprisonment as the *type* of punishment for drug-possessing probationers. As to the *duration* of that punishment, we rest on the principle that '"the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended."' . . . The minimum revocation sentence, we hold, is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum."

Two justices concurred in the judgment only, and two justices dissented.

U.S. v. Granderson, No. 92-1662 (U.S. Mar. 22, 1994) (Ginsburg, J.).

Outline at VII.A.2.

Violation of Supervised Release

SENTENCING

U.S. v. Anderson, 15 F.3d 278 (2d Cir. 1994) (Affirmed: After revocation of supervised release, defendant was subject to a statutory maximum of 24 months' imprisonment and a range of 6–12 months under Guidelines Chapter 7. The district court sentenced her to 17 months, stating that it departed from the Guidelines because defendant needed "intensive substance abuse and psychological treatment in a structured environment." The appellate court held that the prohibition in 18 U.S.C. § 3582(a), "that imprisonment is not an appropriate means of promoting correction and rehabilitation" (see also 28 U.S.C. § 994(k)), does not apply to sentencing after revocation of supervised release under 18 U.S.C. § 3583(e). "In determining the length of a period of supervised release, . . . a district court may consider such factors as the medical and correctional needs of the offender. . . . Because [of that], and because a district court may require a person to serve in prison the period of supervised release, the statute contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation . . . . We conclude, therefore, that a court may consider an offender's medical and correctional needs when requiring that offender to serve time in prison upon the revocation of supervised release." (Kearse, J., dissented.)

The court also "declined to extend *Williams [v. U.S.*, 112 S. Ct. 1112 (1992),] to Chapter 7 policy statements," and reaffirmed its pre-*Williams* holding that "Chapter 7 policy statements are advisory, rather than binding. . . . Accordingly, the district court need not 'make the explicit, detailed findings required when it departs from a binding guideline,' . . . [and] we will affirm the district court's sentence provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable." The court found those conditions were met and affirmed the sentence.).

Outline at VII and VII.B.1.

Criminal History

OTHER SENTENCES OR CONVICTIONS

U.S. v. Thomas, No. 92-2112 (8th Cir. Mar. 10, 1994) (en banc) (Hansen, J.) (four judges dissenting) (Affirmed: District court may consider constitutionally valid but uncounseled prior misdemeanor conviction in determining Guidelines sentence. Under *Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam), "one cannot be sent to jail because of a prior uncounseled misdemeanor conviction, either upon the initial conviction or because of the conviction's later use in a subsequent sentencing, but if the subsequent sentence to imprisonment is already required as a consequence of the subsequent crime, the prior conviction may be used as a factor to determine its length.").

Outline at IV.A.5.

CAREER OFFENDER PROVISION

U.S. v. Heim, 15 F.3d 830 (9th Cir. 1994) (Affirmed: Disagreeing with *U.S. v. Price*, 990 F.2d 1367 (D.C. Cir. 1993) [5 *GSU* #12], and holding that "the Sentencing Commission did not exceed its statutory authority in including conspiracy within the meaning of 'controlled substance offense' in §§ 4B1.1 and 4B1.2.").

Outline at IV.B.2.

U.S. v. Baker, 16 F.3d 854 (8th Cir. 1994) (Remanded: District court erred in holding that defendant's 21 U.S.C. § 856 conviction for managing or controlling a "crack house" was a "controlled substance offense" for career offender purposes under § 4B1.2(2). Although managing a residence for the purpose of *distributing* a controlled substance would

qualify, managing a residence for the purpose of *using* drugs does not, and the jury's verdict was ambiguous—"it does not clarify whether Baker was convicted of a possession § 856 offense or a distribution § 856 offense. When a defendant is convicted by an ambiguous verdict that is susceptible of two interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range.").
Outline at IV.B.2.

Challenges to Prior Convictions

U.S. v. Mitchell, No. 92-3903 (7th Cir. Feb. 23, 1994) (Flaum, J.) (Affirmed: "[W]e agree with the result reached by the First, Fourth, Sixth, Eighth, and Eleventh Circuits, and hold that a defendant may not collaterally attack his prior state conviction at sentencing unless that conviction is presumptively void, . . . that is a conviction lacking constitutionally guaranteed procedures plainly detectable from a facial examination of the record." The court also determined that, although it and other circuits had found that early versions of Application Note 6 to § 4A1.2 indicated such challenges should be allowed, amendments to the commentary in Nov. 1990 and later have made it clear that the Sentencing Commission did not intend to enlarge a defendant's right to collaterally attack a prior conviction "beyond any right otherwise recognized by law.").
Outline at IV.A.3.

Departures

Criminal History

U.S. v. Fletcher, 15 F.3d 553 (6th Cir. 1994) (Affirmed: Downward departure for career offender—to his offense level before career offender designation and criminal history category V instead of VI—was appropriate. "Fletcher argued that his case was ripe for a downward departure because of his extraordinary family responsibilities, the age of the convictions on his record (1976 and 1985), the time intervening between the convictions, and his attempts to deal with his drug and alcohol problems. Moreover, Fletcher specifically requested the court to compare him 'to other defendants who would typically be career offender material.' Fletcher also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court held "that these circumstances present a satisfactory basis for a downward departure. Fletcher's unrelated past convictions, . . . the type of convictions, his attempts to deal with his alcohol problems, . . . the age of the convictions, and Fletcher's responsibilities to his parents are circumstances that indicate that the seriousness of Fletcher's record and his likelihood of recidivism were over-stated by an offense level of 32 and a criminal history category of VI. . . . While we note that the age of Fletcher's convictions, standing alone, does not warrant a downward departure, a district court may take the age of prior convictions into account when considering a defendant's likelihood of recidivism.").
Outline at VI.A.2.

Mitigating Circumstances

U.S. v. Monk, 15 F.3d 25 (2d Cir. 1994) (Remanded: Defendant, convicted of simple possession of crack but acquitted of possession with intent to distribute, was sentenced to 135 months. The district court concluded that it had no power to depart, although it wanted to because "the interests of justice require it, given the rather harsh result on the facts of this case" due to the inclusion of relevant conduct in setting the offense level. The appellate court concluded that "the sentencing judge failed to appreciate his authority to depart under [18 U.S.C.] § 3553(b). *See U.S. v. Concepcion*, 983 F.2d 369, 385–89 (2d Cir. 1992) (where relevant conduct guideline would require extraordinary increase in sentence by reason of conduct for which defendant was acquitted by jury, district court has power to depart downward) . . . . We repeat that when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered.").
Outline generally at VI.C.4.

U.S. v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (Remanded: District court could not grant downward departure "because of its concern that incarceration of the appellee would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community. We hold that this departure is inconsistent with U.S.S.G. § 5H1.2, which provides that departures based on a defendant's 'vocational skills' are generally not permitted." The court added that "we see nothing extraordinary in the fact that the imprisonment of [the business's] principal for mail fraud and filing false corporate tax returns may cause harm to the business and its employees. The same is presumably true in a great many cases in which the principal of a small business is jailed for comparable offenses.").
Outline at VI.C.1.e.

Determining the Sentence

Supervised Release

U.S. v. Porat, No. 93-1095 (3d Cir. Mar. 3, 1994) (Roth, J.) (Remanded: Home detention was available as a condition of supervised release under § 5C1.1(d) and (e)(3), but the district court could not allow it to be served in Israel. "Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence. To do so, the probation office must closely monitor his actions. In order that the probation office effectively perform its responsibilities, we believe that Porat must serve his home detention in the United States. It is not clear that the probation office could properly insure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel.").
Outline generally at V.C.

Note to readers:

The latest revision of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*, which supersedes the August 1993 issue, has been printed and is being mailed to all recipients of *Guideline Sentencing Update*. Please note the following changes that should be made to your copy:

VII.F.1.b.ii - *U.S. v. Hernandez*, 996 F.2d 62 (5th Cir. 1993), was modified March 7, 1994, to be reprinted at 17 F.3d 78. Please delete the sentence and quote that immediately precedes the citation on p. 87 of the *Outline*. The holding of the case did not change. Also, the citation for *Hernandez* in VI.F.1.a on p. 85 should be changed to 17 F.3d 78.

IX.D.4 - At p. 100, *U.S. v. Tincher*, 8 F.3d 350 (8th Cir. 1993), was withdrawn and replaced by an unpublished per curiam opinion listed at 14 F.3d 603.

U. S. Department of Justice

Executive Office for United States Attorneys

Office of Legal Education

Nomination Form

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